

Vodafone customer briefing: MiFID II obligations in relation to recording communications

This MiFID II briefing (the **Briefing**) gives some background to the MiFID II legislation and its requirements in relation to recording communications.

The answers below set out the default position under MiFID II. We have also considered the answers from the perspective of the following jurisdictions:

- the UK;
- Germany;
- Italy;
- the Netherlands; and
- Spain;

together, the **Jurisdictions**, and have noted for each question if the answer for one of the Jurisdictions differs from the default.

This Briefing is provided for information only and does not constitute legal advice. It provides a simplified overview of the application of MiFID II and does not discuss the detail of any of the obligations that apply.

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1. What is MiFID II and when will it come into effect?

The existing European legal framework governing financial markets (being the Markets in Financial Instruments Directive¹ (**MiFID I**)), is being replaced by a revised Directive² (the **MiFID II**) and a new Regulation³ (**MiFIR**).

MiFID II is one part of the EU's response to the financial crisis and is intended to strengthen financial markets and address concerns regarding investor protection. The revised law builds on the existing framework to improve the efficiency, resilience and transparency of financial markets, to develop and strengthen rules regarding investor protection and also take into account developments in the trading environment since the introduction of MiFID I in 2007.

MiFID II will apply from 3 January 2018. However, some aspects of the new regulatory framework will commence at a later date.

2. Will the MiFID II requirements take direct effect or will they need to be transposed into national law?

The MiFID II requirements in relation to recording communications (the **Recording Communications Requirements**) can be found in MiFID II under Article 16(7), with accompanying provisions in the Delegated Regulation⁴.

As MiFID II is a directive, it requires transposition into national law in each member state. This means that each EU jurisdiction has to pass its own law implementing the requirements contained within the MiFID II directive into the national regime.

As a regulation, the Delegated Regulation takes direct effect and therefore will apply in all EU jurisdictions without transposition into national law.

¹ Directive 2004/39/EC.

² Directive 2014/65/EU.

³ Regulation (EU) No 600/2014.

⁴ Commission Delegated Regulation (EU) 2017/565.

3. To whom does MiFID II apply, specifically regarding the Recording Communications Requirements?

The Recording Communications Requirements apply to the following:

Investment firms: broadly speaking, these are entities and individuals whose business involves providing investment services to third parties and/or performing investment activities on a professional basis. Investment services include execution of client orders, receipt and transmission of orders, dealing on own account and providing investment advice (among other activities), in each case in respect of financial instruments.

Credit Institutions: these refer to undertakings that take deposits or other repayable funds from the public, and grant credits for its own account (e.g. banking institutions).

Note that some of the Jurisdictions have extended the scope of Article 16(7) MiFID II so that the Recording Communications Requirements apply to other non-MiFID II entities in their domestic law regimes, or have elected not to include those entities. We would be happy to provide further information in relation to national recording requirements for non-MiFID business activities if needed.

4. What exactly needs to be recorded?

MiFID II introduces the obligation on firms to record telephone conversations or electronic communications that relate to:

- the reception and transmission of orders;
- the execution of orders on behalf of clients; and
- transactions concluded when dealing on own account;

together, **Relevant Communications**.⁵ The requirements cover all telephone conversations and electronic communications that are intended to result in the conclusion of a transaction or the provision of client order services, even if they in fact do not. Relevant Communications must be recorded from start to finish. Moreover, face-to-face conversations must also be recorded (such as by written minutes or notes) where they relate to the transmission and execution of client orders, including such conversations that are intended to result in transactions.

Firms must take all reasonable steps to record Relevant Communications, where those communications are made with or received by equipment provided by firms to their employees, or equipment which the firm has permitted the employee to use (including personal devices).

'Electronic communications' encompasses a whole range of communications including video conferencing, fax, email, Bloomberg email, SMS, chat and instant messaging. Note that ESMA, the European securities and markets regulator, will not produce an exhaustive list of relevant technologies as it anticipates that such a list would become out of date very quickly.

Firms need to have policies and procedures in place to ensure that no Relevant Communications are done through communication systems which are not recorded.

5. Can I avoid this requirement by telling my employees to use their own personal mobiles?

No. Firms may permit employees to use mobile devices including devices owned by the firm which are expressly authorised for use and devices which are personally owned and used to make relevant conversations. In any case, firms are required to establish, implement and maintain an effective

⁵ Note that the UK and the Netherlands also extend the Recording Communications Requirements to certain portfolio management services where a firm undertakes transactions in financial instruments during the provision of those activities.

recording of telephone conversations and electronic communications policy. In ESMA's view, this should therefore cover the requirements relating to mobile devices.

6. Can the employer record an employee's personal mobile phone?

MiFID II requires firms to take all reasonable steps to prevent an employee or contractor from making, sending, or receiving Relevant Communications on privately-owned equipment which the firm is unable to record or copy.

Accordingly, if a firm has permitted an employee to use their personal phone for business, the firm would be required to record any Relevant Communications that are made or received by that device.

Moreover, firms seeking to record an employee's personal mobile phone would need to ensure that such recordings are compliant with relevant principles of employment, confidentiality and data protection law.

In Germany, telephone calls or electronic communication via private devices are only permitted if the investment firm obtains the consent of the relevant employee that such communications can be recorded.

7. Should employees be able to turn on and off the ability of their mobile phone to record conversations?

MiFID II does not explicitly address this. In light of the position set out at question 6 above, it does not appear that an employee should have the ability to determine whether or not a particular conversation is recorded.

The purpose of the obligation is to ensure that all Relevant Communications are recorded. In ESMA's view, firms must be able to record the entirety of Relevant Communications because it is impossible to understand upfront whether the conversation will lead to the conclusion of a transaction.

8. How long do the records need to be stored for?

All records must be stored for a minimum of five years, and a maximum of seven years if requested by the relevant jurisdiction's regulator. These records must be made available to clients upon request (including records of internal communications). ESMA has advised that it is at the firm's discretion whether to charge clients for access to these records (national law permitting), but that any charge must be 'reasonable' and should not deter clients from making such requests.

9. Will Brexit affect the implementation of MiFID II, specifically in relation to recording communications?

Until the UK formally withdraws from the EU, MiFID I will continue to apply, and MiFID II will still come into force on 3 January 2018. At this stage, the future trading relationship between the UK and the EU remains uncertain. Consequently, it is not possible to predict the extent to which the UK rules will continue to follow EU legislation once the UK has withdrawn from the EU. However, given that the FCA has had a telephone taping regime in place since 2009 it seems unlikely that Brexit would have a significant impact on firms' obligations to record communications.

10. Is there a requirement under MiFID II for the financial institution to have a particular type of technology to be compliant?

MiFID II makes no specifications as to the type of technology firms should use in order to fulfil their recording obligations.

In Spain, the Spanish implementing legislation, currently in draft form, grants the Spanish Securities Markets Commission (**CNMV**) the authority to develop rules to specify the "systems, procedures, technical requirements and scope of the recordings of the telephone conversations and electronic communications with clients that may result in the provision of order services to clients".