



## Guide

# A practical guide to preparing for MiFID II call recording

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# The evolution of MiFID

The original Markets in Financial Instruments Directive (MiFID) first came into force in 2008, replacing the Investment Services Directive (ISD). Forming the cornerstone of the EU's regulation of the financial markets, MiFID aims to improve the competitiveness of EU financial markets by creating a single market for investment services and activities, as well as ensuring robust protection for financial investors. Since its introduction, MiFID has brought greater competition across Europe in the provision of services to investors and between trading venues.

However, a number of concerning market developments in recent years have demonstrated areas of weakness in some of MiFID's underlying principles, highlighting key areas in need of revision or reform. For example, it has arguably led to the development of new trading platforms and activities which fall outside its scope and thus outside any regulations.

In order to achieve the original objectives of MiFID, these gaps and loopholes needed to be closed. Furthermore, the ever changing nature of the financial markets mean regulators are now faced with more diverse platforms and instruments for trading than ever before.

MiFID II represents an evolution of the original MiFID directive, aiming to establish a safer, more transparent and more responsible financial system that's protected from market abuse. Due to come into force on 3rd January, 2018, MiFID II will introduce a series of new legislation governing everything from where and how derivatives can be traded, to measures for reducing volatility and policing potential conflicts of interest among financial advisers.

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## Who does MiFID II apply to?

MiFID II regulates firms that provide services to clients linked to financial instruments, such as shares, bonds, units in collective investment schemes and derivatives, as well as the venues where those instruments are traded. These firms broadly fall into the following categories:

- **Investment banks**
- **Brokers**
- **Fund managers**
- **Investment managers**
- **Certain wealth managers**

However, there will be some firms that are exempt. These will include:

- **Insurers**
- **Group treasurers**
- **Professional firms**
- **Professional investors who invest only for themselves**
- **Pension schemes**
- **Real estate firms**
- **Private equity firms**
- **Loans providers**

MiFID II also applies to third country investment firms providing investment services or performing investment activities through the establishment of a branch in the EU or by way of direct access to clients in member states.

# The implications of MiFID II on call recording

One of the more contentious aspects of the new legislation is the change in requirements relating to the recording and archiving of telephone calls. The FCA currently mandates that only the telephone conversations of individuals directly involved in trading need to be recorded, but MiFID II broadens the scope considerably to include anyone involved in the advice chain that may result in a trade. Conversations between the likes of wealth managers or independent financial advisors and their clients will now all fall under this scope, where previously they did not. Furthermore, the legislation applies to both fixed line and mobile conversations, and all calls must be stored and accessible for a minimum of five years after taking place (seven in some instances).

## What will be required?

Within MiFID II are a number of key rules around call recording on both mobile and landline that must be adhered to. These include:

- **Obligation to record** A firm must take all reasonable steps to record telephone conversations and keep a copy of electronic communications in relation to in-scope activities.  
  
In-scope conversations include: Those that directly relate to the conclusion of a transaction, or; Those intended to result in a transaction. The conversation must occur on equipment provided by the firm to an employee or contractor, or on equipment the firm has accepted or permitted the employee or contractor to use.
- **Restrictions on non-approved equipment** A firm must take all reasonable steps to prevent an employee or contractor from making, sending, or receiving relevant telephone conversations and electronic communications on privately-owned equipment which the firm is unable to record or copy.
- **Record Keeping** A firm must keep a record of each conversation for five years from the date of the conversation or communication unless the FCA requests a period of seven years.

Access to these recordings must be readily available and must reconstitute each key stage of the processing of each transaction. If any amendments are made, there must be an 'audit trail' explaining the changes

Investment firms must also 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

Records must be stored in a durable medium, which allows them to be replayed or copied and must be retained in a format that does not allow the original record to be altered or deleted

Records must be stored in a medium so that they are readily accessible and available to clients on request

Firms must ensure the quality, accuracy and completeness of the records of all telephone recordings and electronic communications

- **Monitoring** A firm must periodically monitor the records of transactions and orders subject to these requirements, including relevant conversations. Such monitoring is risk based and proportionate.
- **Technology** Firms must ensure they comply with the recording requirements irrespective of the technology they are using.

# What to look for in compliance solution

There are numerous considerations that those affected by MiFID II should take into account when choosing a suitable call recording solution to meet compliance requirements.

## Coverage of all required telephone platforms

MiFID II mandates that calls must be recorded across both mobile and landline platforms, so it is critical to ensure any solution being looked at has the capability to do this, as many out there cannot. The best solutions are also capable of recording SMS channels as well, so be sure to check this during any consultation periods if it is required.

## Easy implementation and scalability

Will implementing the new solution result in business down time and therefore, loss of revenue? If so, this creates problems of its own. Many cloud-based recording and archiving solutions no longer require any on-site installation, eliminating disruption incurred as a result. Scalability is also a major factor. Can the solution scale both up to cover busy periods, whilst scaling down to save firms money during quieter periods? If not, they will likely end up overpaying for recording capacity they aren't using, or having to buy additional capacity at premium pricing on short notice.

## Access to call recording archives from anywhere

Cloud-based recording and archive solutions offer the ability to access call recordings and archives from anywhere, at any time via a secure online portal. This is particularly beneficial to firms spread over multiple sites or countries.

Vendors specialising in on-site recording and storage often cannot deliver this same level of flexibility in terms of recording accessibility, so be careful to ensure any solution being considered can match the needs of the organisation.

## Secure storage and encryption to protect recordings

As mentioned, MiFID II mandates that call recordings relating to a financial transaction must be stored for five years after the transaction was made. Not only does this impact heavily on storage resources, but it also presents security challenges, particularly if the recordings contain sensitive financial information. After all, five years is a long time to keep data safe. Only recording and archive solutions that offer the latest levels of data encryption and provide guarantees about who is able to access recordings should be considered. If a vendor is using outdated encryption or does not offer ongoing guarantees regarding upgrades to security as/when they become available, they should be avoided at all costs.

## Compliance with additional data standards

Whilst the primary driver for implementing a suitable call recording and archiving system is to achieve MiFID II compliance, many of the solutions available also offer additional layers of compliance such as the Payment Card Industry Data Security Standard (PCI DSS) and BS10008; governing whether recorded content is legally admissible in court if required. These data standards can bring additional return on any investment made and should be considered when choosing a suitable solution.

# Additional cloud partner considerations

Whilst some larger firms may prefer to implement a MiFID II compliant call recording solution in-house, the majority will likely find it more cost efficient to work with a cloud partner. When searching for a suitable partner, the primary consideration should always be the suitability of the solution itself. However, there are also a number of secondary considerations that will play a major part in the final purchasing decision. These include:

## Third party audits and accreditation

When searching for a cloud partner, a key consideration should be whether they have been audited and/or accredited by any significant industry third parties. Sources such as the VISA Global Registry of Service Providers can quickly help firms establish if the partners they are considering live up to the high data security and protection standards set by major card brands.

## Location and security of stored data

Another key consideration when choosing a cloud partner should be the location of stored call recording data and the security measures used to protect it. Will it be stored in a private, public or hybrid cloud environment? Will it be fully encrypted? Who will have access to it? These are all questions that should be considered closely before making a final decision.

## FAQs

### **‘My firm is exempt from current MiFID taping rules under Article 3. Does that still apply with MiFID II?’**

Under current MiFID rules, Article 3 firms – a category largely comprised of financial advisors and corporate finance boutiques – are exempt from taping requirements because they only conduct a limited range of MiFID activities.

The original draft of MiFID II legislation proposed removing this exemption. However, following consultation with the industry the FCA has relaxed its position, offering Article 3 firms a greater degree of flexibility in meeting their obligations. Revised FCA guidelines issued in March 2017 state that Article 3 firms ‘will be permitted to record relevant communications either through electronic taping or by taking “at least analogous” written notes’.

This means Article 3 firms can meet the new requirements by manually writing down and keeping records of details relating to any relevant interaction, rather than recording them electronically. At a minimum.

At a minimum, written notes must include:

- The date and time of the meeting
- The location of the meeting
- The identity of the attendees
- The initiator of the meeting

Relevant information about the client order, including the price, volume, type of order and when it will be transmitted or executed.

As well as these five criteria, advisers must also capture the main points of the conversation to provide a degree of consumer protection.

While this will require more diligence than currently required under existing MiFID rules, the “at least analogous” clause will spare many Article 3 firms from the more stringent aspects of MiFID II taping rules that larger ‘investment firms’ will be subject to.

## **‘I use Skype for client calls. How can I record these?’**

Skype is becoming an increasingly popular platform for business calls around the world. Skype for Business now offers a variety of solutions that will ensure MiFID II compliance across all of its channels, for those that need it.

## **‘I work anti-social hours and cannot always use a desk phone’**

MiFID II compliance is not limited to recording of landline calls and all pertinent conversations taking place on mobile must also be recorded. Fortunately many leading compliance vendors offer call recording packages that cover both landlines and mobile phones, as well as SMS channels.

## **‘Brokers/business contacts have my personal phone number, I don’t want a new phone’**

It is not uncommon for clients and investors to want to use personal phones for conversations with brokers and financial advisers. However, MiFID II places the responsibility for recording conversations on the advisers themselves and as long as call recording is taking place at the broker/financial advisors end then compliance is still being achieved, regardless of the device being used at the customer’s end.

## **‘Will this be expensive to implement?’**

There is a wide variety of compliance solutions available to fit every budget, ranging from large in-house options through to highly scalable cloud-based offerings.

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