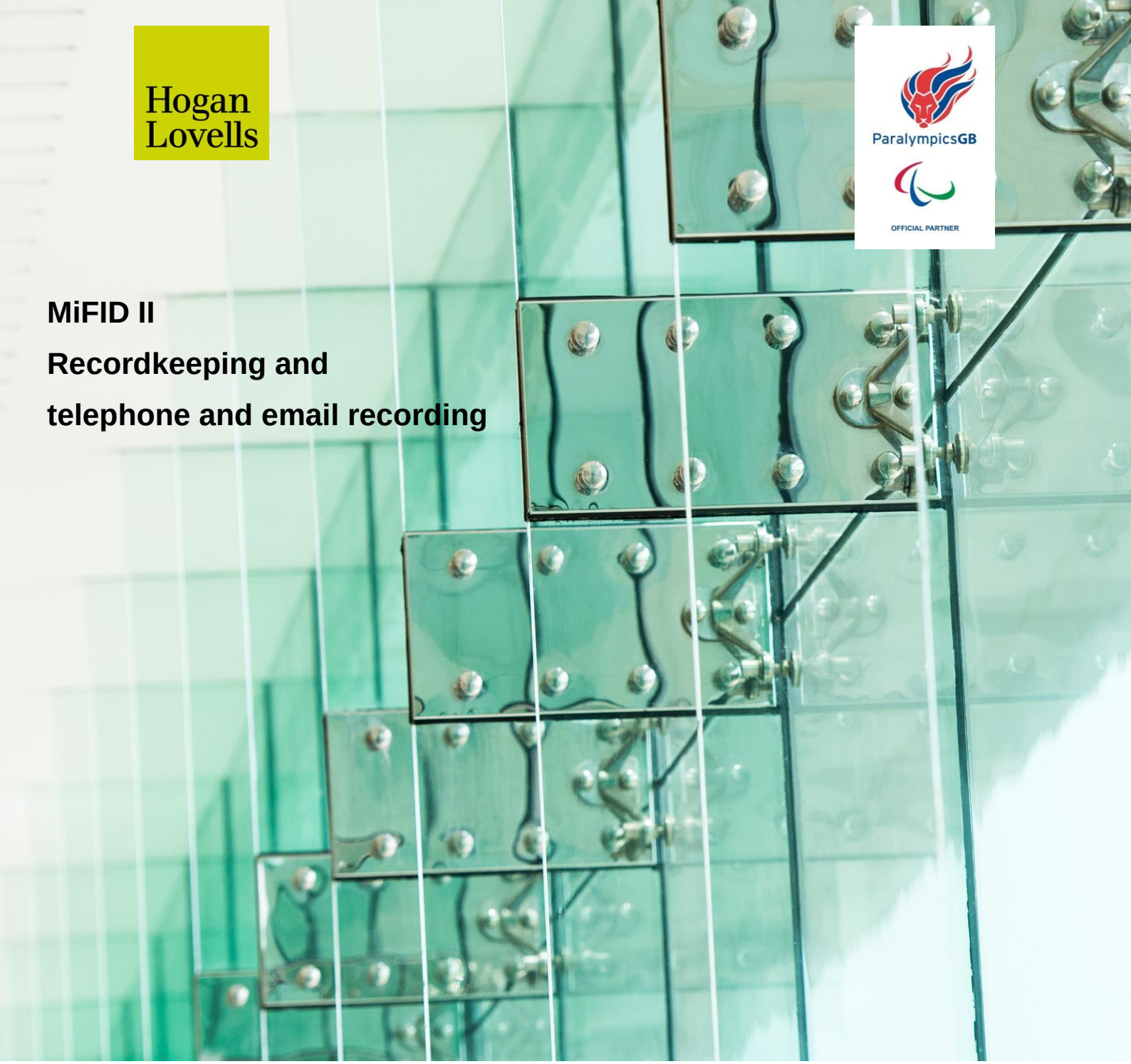

MiFID II
Recordkeeping and telephone and email recording

2016

Key Points

- Like MiFID I, MiFID II requires firms to keep records of transactions
- MiFID II will require firms to retain additional information on transactions, based on a list of the minimum records to be retained by firms
- MiFID I allowed member states discretion as to whether they required firms to record telephone calls and electronic communications that resulted or might result in transactions
- Under MiFID II, it will become a mandatory obligation for firms to record telephone calls and electronic communications of this kind

The MiFID II provisions on recordkeeping cover the retention of transaction information by investment firms. This is distinct from the recording of telephone conversations and electronic communications. However, for the sake of convenience, we have included both topics in this briefing note.

Recordkeeping

Recordkeeping under MiFID I

Under MiFID I, firms are subject to the following recordkeeping requirements:

- Firms must keep records of: (a) every client order and (b) every decision to deal taken in the course of providing the service of portfolio management.[1]
- Firms must keep records of transactions. A transaction should be recorded on the execution of a client order or, where a firm is transmitting an order, after receiving confirmation that an order has been executed.[2]
- Records required to be kept for the purposes of MiFID must be retained for at least five years. The terms of business agreed between a firm and its client must be kept for as long as the relationship lasts.[3]
- The records must be kept in a medium that can be accessed by the relevant national competent authority ("**NCA**"), and must be in a form and manner that the NCA can access readily, can use to reconstitute each key stage of the transaction process, and can identify any corrections or amendments. The records must not be capable of being manipulated or altered.[4]
- NCAs are required to draw up and maintain a list of the minimum records to be kept by investment firms for the purposes of MiFID.[5]

Recordkeeping under MiFID II

The MiFID II Directive provides a general obligation to keep records in the following terms:

"*An investment firm shall arrange for records to be kept of all services, activities and transactions undertaken by it which shall be sufficient to enable the competent authority to fulfil its supervisory tasks and to perform the enforcement actions under this Directive, Regulation (EU) No 600/2014, Directive 2014/57/EU and Regulation (EU) No 596/2014, and in particular to ascertain that the investment firm has complied with all obligations including those with respect to clients or potential clients and to the integrity of the market*."[6]

In practical terms, this provides two new features compared with MiFID I:

- First, it emphasises the need for the investment firm to provide sufficient information to its NCA for the purposes of the Directive on Criminal Sanctions for Market Abuse ("**CSMAD**") and the Market Abuse Regulation as well as MiFID II and MiFIR.[7]
- Secondly, it underlines that the NCA will use the records to confirm whether the firm has complied with its obligations with respect to the integrity of the market.

In its May 2014 consultation paper, ESMA recommended that the Level 2 implementing measures for MiFID II should carry over the existing MiFID I requirements.[8] In addition, it proposed that the Level 2 measures should also include a list of minimum records, based largely on an existing list contained in CESR Level 3 Recommendations.[9] ESMA believed that

[1] MiFID Implementing Regulation, article 7.

[2] MIFID Implementing Regulation, article 8.

[3] MiFID Implementing Directive, article 51(1).

[4] MiFID Implementing Directive, article 51(2).

[5] MiFID Implementing Directive, article 51(3).

[6] MiFID II Directive, article 16(6).

[7] Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse; Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC. The ESMA consultation paper refers to the "Market Abuse Directive"; however it is clear from the context that this is intended as a reference to CSMAD.

[8] ESMA Consultation Paper, 22 May 2014, chapter 2.5.

[9] CESR Level 3 Recommendations on the list of minimum records in article 51(3) of the MiFID Implementing Directive, CESR/06-552c.

this might benefit stakeholders and might also encourage convergence across the EU.

ESMA also suggested that the list of minimum records would be non-exhaustive, permitting NCAs the flexibility to add additional records required to be kept under MIFID II. Furthermore, ESMA stated that it might issue further guidelines on the content and timing of each record, and could also add other records to the list in the future.

In its final report of December 2014, ESMA proposed amendments to the existing MiFID I requirements by requiring that firms keep records in respect of initial client orders and initial decisions to deal.

In addition, ESMA has proposed that additional details should be recorded in respect of the orders and decisions compared with the requirements under MiFID I. The details required to be recorded are described in the ESMA Technical Advice.[10] This would include the transaction details that must be recorded and reported to NCAs under MiFIR, such as the Trader ID and Algo ID if appropriate (please see our briefing note on Market Data Reporting).[11]

The ESMA Technical Advice also confirmed that ESMA intends the list of minimum records to be non-exhaustive and that NCAs should be able to add their own requirements for records to be kept where there is a need under MiFID II. However, the records required to be kept for the purposes of MiFIR, CSMAD and MAR are not listed even though these form part of the recordkeeping obligation under MiFID II.

Telephone and email recording

MIFID I allows member states the discretion to choose whether or not to require firms to record telephone conversations and emails relating to client orders.[12] In contrast, this recording obligation will become mandatory on firms under MiFID II.

The rationale behind this change is based on CESR technical advice provided to the European Commission as part of the MiFID I review. This recommended that member states' discretion in relation to telephone and email recording should be removed. The reasons given by CESR for imposing these requirements were to:

- ensure there is evidence to resolve disputes between an investment firm and its clients over the terms of transactions;
- assist with supervisory work in relation to conduct of business rules; and
- help deter and detect market abuse and to facilitate enforcement in this area.[13]

On this basis, MiFID II will require firms to keep records of telephone calls and electronic communications. Specifically, article 16(7) of the MiFID II Directive requires that:

- Firms must keep records of telephone conversations or electronic communications relating to transactions when the firms:
  - deal on own account; or
  - receive and transmit and/or execute client orders.

This will include telephone calls and emails where a transaction is intended to take place, but never actually occurs.

- The obligation extends to calls and emails involving equipment provided to, or authorised for the use of, employees and contractors of the firm.
- Firms must inform new and existing clients that telephone calls which will (or may) result in transactions will be recorded. This notification may be made once, before investment services are provided to the client.
- MiFID II also allows for firms to record orders may through a variety of means, including telephone, mails, faxes, emails, and

[10] ESMA, Final Report: Technical Advice to the Commission on MiFID II and MiFIR, 19 December 2014 (ESMA/2014/1569) (the "**Technical Advice**"), chapter 2.5, pages 27-30.

[11] ESMA, Technical Advice, 19 December 2014, chapter 2.5. The relevant details are required to be recorded and reported under articles 25 and 26 of MiFIR.

[12] MiFID Implementing Directive, article 51(4).

[13] CESR Technical Advice to the European Commission in the context of the MiFID Review - Investor Protection and Intermediaries, CESR/10-859, pages 7-8.

documentation made at meetings. It can also include written minutes or notes of face-to-face meetings. These are considered to be equivalent to orders made over the telephone.

- Firms have to take all reasonable steps to prevent employees or contractors receiving client orders via their own personal equipment that is not being recorded by the firm.

- The records must be kept for five years but, if requested by an NCA, may be kept for up to seven years. They should be made available to clients on request.

ESMA's May 2014 consultation paper supplemented the Directive by proposing draft technical advice that would require:

- Firms should have effective organisational requirements to comply with the MiFID II rules in this area;

- The firm's management body should have effective oversight and control over the relevant policies and procedures;

- Firms should have a policy on the recording of telephone conversations and electronic communications, which should identify which conversations and communications are in scope;

- The firm should comply on a "technology-neutral" basis, so that its procedures can be updated to reflect the use of new technologies;

- Firms must give education and training to employees on this issue;

- Firms should periodically monitor their records to ensure compliance; and

- Firms should be able to demonstrate their policies, procedures and management oversight to the relevant NCA.

In relation to the records to be kept of face-to-face meetings from which a transaction will or may result, ESMA proposed that, as a minimum, the record should include the date and location of the meeting, the identity of the attendees, the initiator of the meeting, and other relevant information about the transaction(s).

ESMA also proposed that, in line with the other MiFID II requirements for recordkeeping, the records of telephone conversations and email communications should be kept in a durable medium allowing for replaying, but which prevents the record from being manipulated or altered. The records should be accessible and readily available to the relevant NCA on request.

ESMA has also clarified that in its view, the period for the retention of the record commences from when the record is created.[14]

In its Technical Advice in December 2014, ESMA discussed the obligation under MiFID II for firms to notify clients that their calls will be recorded. A respondent to the ESMA consultation queried which language should be used by firms with a large international client base. ESMA consequently amended its technical advice to confirm that this notification should be given in the language as that used to provide investment services for clients.[15]

ESMA's Technical Advice also confirmed that internal calls that result or may result in transactions must be recorded, and revised its technical advice to reflect this.

Timescales for Implementation

The MiFID II Directive and the Markets in Financial Instruments Regulation ("**MiFIR**") came into force on 3 July 2014, and most of their provisions will come into effect in member states from 3 January 2017. Member states have until July 2016 to transpose the MiFID II Directive into national law.

However, following discussions between ESMA and the European Commission, it is now expected that the implementation of MiFID II will be delayed until January 2018.

The European Commission is also drafting delegated acts on the basis of the Technical Advice received from ESMA in December 2014.

[14] ESMA, Technical Advice, 19 December 2014, chapter 2.6.

[15] ESMA, Technical Advice, 19 December 2014, chapter 2.6.

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