## Simon mansell

**From:** Simon mansell [s.mansell@templebar.co.uk]
**Sent:** 06 December 2010 21:20
**To:** Michel Barnier
**Subject:** Is the UK FSA Retail Distribution Review in Breach of EU Law?

**Michel**

**To: Michel Barnier & Cabinet Members**

**Michel.Barnier@ec.europa.eu**

**http://ec.europa.eu/commission_2010-2014/barnier/about/team/index_en.htm#cabinet**

**As Commissioner and Cabinet Members for Internal Market and Services, I am writing to you as you responsible for giving momentum to the Single Market while driving the Commission's initiatives in the field of financial services, free movement of services and professional qualifications.**

**As you may be aware the UK Financial Services Authority (FSA) intends to implement Retail Distribution Review (RDR) in the UK. Mark Hoban MP Treasury Minister has accepted what has gone before him under the former Labour Government.**
**However it is my view that the European element has been largely ignored. I have believe the RDR will bring about a position of disharmony between UK and EEA investment firms and may also breach EU law. Further if and when RDR can be challenged in the EU courts it will be too late for many of the UK independent financial advisers (IFAs).**

**European Union law operates alongside the legal systems of the European Union's member states and where conflict occurs, takes precedence over national law.**
**Does such a conflict exist? I would like to submit to you that all 3 aspects of the RDR - prescribing the conditions for a firm being able to hold itself out as "independent"; prescribing methods of remuneration; prescribing criteria for competence - are super-equivalent to comparable provisions in the Markets in Financial Instruments Directive aka (MiFID).**

**As you will know under EU law super-equivalence is not permitted. It can be taken thatb the FSA know and have accepted this, which is why the FSA are unable to apply their proposed rules to inwardly passporting firms, as this would bring the FSA into direct contravention of Article 31 of the L1 Directive (2004/39/EC). NB: Firms passport into the UK from the EU just as UK firms can passport into EU states via the UK. This two way traffic is the corner stone of EU law and the principle of trading harmony.**
**We know the FSA have accepted this and we know the FSA can see a conflict with EU law because the FSA have confirmed they will not be applying the RDR rules to firm's exercising Article 31 rights in their draft notification to the EC (ref CP09/18 Ann B pars 26 and 51).**

**In short EEA investment advisers will be able to provide investment advice to UK customers under the more relaxed MiFID regime, but UK advisers will be restricted in providing the same MiFID service to their own UK customers. To illustrate just one aspect - a UK adviser would be required to charge the client a fee and invoice the client or provide a loan arrangement for the client to pay; there is no such restriction on (for example) a French adviser. If the French adviser's advice was unsuitable and the client complains, this is outside the FSA's jurisdiction as the Home State Regulator (France) is responsible.**

**If the FSA is allowed to proceed, not only will many IFAs be unable to continue to pursue their profession (which is also contravening EU rights for citizens), but the IFAs that remain will face heightened competition from other EEA states, and will be unable to respond because their hands are tied, again a breach of EU law. Because freedom to trade and cross boarder trading harmony is the foundation of EU law the non RDR model will survive intact but only in the hands of EU passported firms until such times that a successful challenge can be made by a UK adviser or advisers, which I believe will succeed but will be for many too late.**

**Most UK IFAs do not have the finances or know how to pursue this matter, especially when denied the ability to trade, the ability to retain their vested trail fees whilst at the same time being subjected to 400/500 hours of CII degree level exams with at best a 56% pass rate, again not a requirement of EU passported in firms.**

**There are also concerns about the FSA's justification for these super-equivalent provisions, as set out in their draft notification. The FSA are saying the specific risks in the UK market, caused by commission, can only be addressed by this radical scything through of the IFA sector and this may result in the removal of up to 20% of small IFA firms. The evidence though, does not support the assertion that small firms are the root cause of consumer detriment - small firms contribute to less that 2% of complaints (the FOS/FSA's own figures). The sad truth is that the vast majority of small IFA firms are professional and ethical with great relationships with their clients, and yet it is this type of firm that will be most severely affected.**

**Furthermore, the FSA presents no evidence to support the assertion that the RDR measures are conclusively the remedy; that is, no pilot or trials of different potential solutions have been conducted (other than asking consumers which label they prefer to call their investment adviser). We are just told that these are the only measures that will work and the FSA is bulldozing ahead. For example, what about just bringing in a commission accounting rule?! This would cost hardly a penny, the UK advisory landscape remains intact and the FSA would be able to target the scoundrels. European regulations already set in place the tenets that RDR hopes to have in place by 2012. The FSA is subject to EU Law and I wonder why they involve themselves in such expensive duplication, when in due course they may well need to fall in line with the higher authority of the EU.**

**If you look at the FECIF website www.fecif.org/library/FECIF173.pdf you will see the joint declaration adopted by the Accociation of International Life Offices (AILO) and FECIF http://www.fecif.org/html/home.html with its representation of over 300,000 IFAs across Europe.**

**CONCLUSION**
**1. Can you confirm that RDR is to be applied to UK advisers but not to EU advisers passported into the UK?**
**2. If so does this place the UK adviser at a disadvantage to his/her UK counterpart?**
**3. Will this bring about a position of disharmony between the UK and EEA financial service breaching EU law?**
**4. Are all 3 aspects of the RDR - prescribing the conditions for a firm being able to hold itself out as "independent"; prescribing methods of remuneration; prescribing criteria for competence - are super-equivalent to comparable provisions in the Markets in Financial Instruments Directive aka (MiFID). Can you confirm these views?**
**5. European Union law operates alongside the legal systems of the European Union's member states and where conflict occurs, takes precedence over national law. Does such a conflict exist?**

**Regards**

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