

Advice to ESMA

On the SMSG's role in the Breach of EU Law (BUL) Procedure (art. 17 ESMA Regulation)

1 Background

1. Article 17 of the ESMA Regulation provides that where a competent authority has not applied certain EU rules, or has applied them in a way which appears to be a breach of Union law, in particular by failing to ensure that a financial market participant satisfies the requirements laid down in those rules, ESMA shall take action following the BUL procedure laid down in this article.
2. The SMSG is one of the five privileged requesters/complainants (with the NCAs, the European Commission, the Parliament and the Council) who can ask ESMA to initiate a BUL procedure. The SMSG never used the BUL procedure to date. However, the issue was discussed at least twice (lastly with regard to the SMSG's own initiative paper on the Wirecard case in 2020).
3. The BUL procedure has been very rarely used by ESMA. For example in 2021, it received 540 complaints, of which 18 were deemed admissible. Those cases in turn led to 3 Requests for Information (RFIs), but, ultimately, not to an investigation.
4. ESMA does not disclose the admissible cases nor the ones that would lead to RFIs or to investigations. It does provide a breakdown of admissible cases per EU Act, for example 9 (50%) of the 2021 admissible cases related to compliance with MiFID 2, but ESMA does not currently disclose more granular issues at stake.
5. At the SMSG's 8 July 2022 meeting, ESMA pointed out that requests/complaints are its primary source of information, notably from non-privileged requesters. It suggested that it "**could rely more on the SMSG**, in its capacity as a privileged complainant under Article 17(2) of ESMA regulation, to pass on the information in case you would identify potential breaches of EU law...
6. ESMA's **BUL powers** are an **important and useful tool** to ensure compliance with EU law and promote supervisory convergence...
7. In order to make greater use of ESMA's BUL powers, **SMSG members** are in a unique position to identify potentials breaches."
8. In order to follow-up on ESMA's analysis and recommendations, the SMSG decided at its 5 October meeting, to create a working group to propose:

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- recommendations to ESMA
- additions to the SMSG's own rules of procedure as regards BUL.

2 Recommendations to ESMA

9. In general, the SMSG recommends to ESMA to include in its annual report a specific BUL section:
 - detailing its purpose and provisions
 - giving generic information on why complaints were considered non admissible
 - providing statistics not only of the EU Acts involved, but also by type of issue (e.g. investor protection, and in which area of investor protection: information, conflicts of interests, etc.), and
 - providing any other information it considers useful.
10. Article 17a(3) of the ESMA Regulation provides that ESMA shall ensure that all information can be submitted anonymously or confidentially, and safely. In order not to deter EU citizens from filing complaints, the SMSG recommends that ESMA should publish on its website and enforce (including with regard to the national competent authority involved) strict confidentiality rules on the identity of individual authors of BUL-related complaints in accordance with article 17a(3). The SMSG recommends that ESMA clarifies that such confidentiality applies, unless the authors of the complaints give express consent to disclose their identity and other specified personal data, and that strict confidentiality applies also vis-a-vis the members of ESMA's own Supervisory Board (i.e. representatives of the NCAs), as NCAs are the targets of potential BUL procedures.
11. The SMSG recommends that ESMA should inform the SMSG every year about the most critical issues or concerns it identified with possible BUL or non-compliance with EU Law and should then have a structured discussion with the SMSG.
12. The SMSG recommends that ESMA, where appropriate, should explicitly link some of its requests for advice to the SMSG to these issues or concerns identified regarding BUL.

3 Proposed addition to the SMSG Rules of Procedure

3.1 SMSG's involvement in the BUL procedure

13. As stated in ESMA Regulation article 17.2, the SMSG is one of the five privileged complainants on a possible breach of – or non-compliance with EU Law by an NCA.
14. It is not within the SMSG's remit/responsibility to receive and/or process BUL complaints from other parties, and a fortiori to deal with those. If the SMSG does receive such complaints, it may forward them to ESMA.
15. Every member of the SMSG is encouraged to identify potential breaches and report them to the SMSG for discussion. If/when the SMSG discusses a potential BUL case, it could on a case-by-case basis – when deemed appropriate by the SMSG – publicly disclose this (in the summary of conclusions of its meetings, or a recommendation to ESMA, published by ESMA on its website). In such case, the SMSG will take due care of the wording of the published text, ensuring that clear caveats are made on the SMSG's role in the process (clarifying, for instance, that the SMSG's position is only about a “potential” BUL issue without prejudice to ESMA's assessment, etc).
16. Any decision of the SMSG regarding BUL cases shall follow articles 6.2.b.; 6.3 and 7 of its Rules of Procedure.
17. The SMSG has a structured discussion with ESMA once a year, based on a report from ESMA to the SMSG on its previous year's experience with the BUL procedure. This discussion can be extended to the use of other ESMA tools for supervisory convergence and compliance of NCAs to EU Law.

This advice will be published on the Securities and Markets Stakeholder Group section of ESMA's website.

Adopted on 10 January 2023.

[signed]

Veerle Colaert
Chair
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[signed]

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