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**EBA-2018-D-2045**

Mrs Tiina Astola  
Director General  
Directorate-General Justice and Consumers  
European Commission  
Rue Montoyer 59 (MO59 08/014)  
1049 Brussels  
Belgium

24 September 2018

**Subject: Recommendation to the Maltese FIAU on action necessary to comply with AMLD4**

Dear Mrs Astola,

On 11 July 2018 the EBA issued a breach of Union law recommendation to the Maltese Financial Intelligence Analysis Unit (FIAU) on action necessary to comply with Directive 2015/849/EU of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (AMLD4).

If the FIAU has not complied with Union law within one month of the EBA issuing its recommendation, Article 17(4) of Regulation (EU) No 1093/2010 enables the Commission to issue a formal opinion requiring the FIAU to take action necessary to comply with Union law.

In order to assist the Commission in assessing whether to a formal opinion is appropriate, we have carried out an assessment of the information provided to determine the extent to which it appears to fulfil the expectations set out in our recommendation. A copy of our assessment is enclosed, together with the full information provided by the FIAU.

As you will see from the summary, we have concerns that our recommendations are only partially met at present. A detailed action plan is, however, provided, setting out a timetable for actions that is intended to be completed progressively between now and June 2019. I would also note that our assessment is based only on a review of the documentation provided: a fuller assessment would require an on-site visit and discussions with key staff at the FIAU. We intend to carry out such an on-site visit as part of our programme of supervisory reviews and this is currently scheduled for mid-2019.

If, in the light of our assessment, the Commission were minded to issue an opinion, we would propose that the opinion focuses on those areas where we have noted a lack of current evidence of implementation, and the need to adhere to the action plan timetable provided by the FIAU.

Yours sincerely,

Andrea Enria

CC: Olivier Guersent, Director-General, DG FISMA

Encl: Letter from the FIAU dated 25 July 2018 and annexes

# Assessment of FIAU responses to EBA recommendation

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Recommendation	Summary of FIAU response	EBA assessment
<p>1. The FIAU should, in accordance with their duty under Article 4(3) of the Treaty on European Union, take all appropriate measures to ensure they fulfil their obligations under Articles 48 and 58 of AMLD4, including by interpreting national law, as far as possible, in line with those Union law obligations.</p>	<p>The FIAU posits that it has been instrumental in transposing the 4AMLD into MT national law. Because Malta has transposed the AMLD, and because the FIAU is in the process of drafting various implementing procedures, Recommendation 1 is met.</p> <p>Specifically, based on the FIAU’s covering letter:</p> <ul style="list-style-type: none"> <li>○ the FIAU ‘began developing a draft framework and guidance on the use of sanctions’ only in January 2018. This does not yet seem to be complete;</li> <li>○ the FIAU ‘will update’ implementing procedures and issue sector-specific guidance, but has not yet done so; and</li> <li>○ the FIAU ‘will enhance its sanctions policy’ to enhance the type and range of sanctions, among other issues, but has not yet done so.</li> </ul>	<p>The FIAU only provides a partial explanation of the steps it intends to take to comply with Articles 48 and 58 of the AMLD and, therefore, Recommendation 1. The documents submitted in support of its arguments only contain draft guidelines for the private sector, and excerpts from the Maltese law transposing the AMLD. The FIAU apparent failure to understand the very broad scope of those articles gives rise to concern.</p> <p>The AMLD was transposed only in January 2018 and the FIAU has yet to implement rules and guidance to comply with the new legal requirements. The FIAU, in its covering note, suggests a target deadline of February 2019 for implementation, more than 1.5 years after the AMLD transposition deadline.</p> <p>The FIAU is not responsible for transposing the AMLD into Maltese law and cannot be held responsible for Malta being seven months late in transposing the 4AMLD.</p>

**Recommendation**

**Summary of FIAU response**

**EBA assessment**

2. The FIAU should enhance its assessment of ML/TF risk associated with its financial sector to ensure it is comprehensive and relevant, and to enable it to (i) allow the identification of ML/TF risk factors both domestic and foreign affecting the Maltese financial sector; (ii) take a holistic view of the level of ML/TF risk to which each type of credit and financial

The FIAU has been developing a risk assessment tool since 2016 to increase the number of data sources it uses to risk assess firms. This tool will be operational from December 2018.

The FIAU 'intends, in the coming months, to benchmark the updated tool and its universe of data sources against the ESA guidelines'.

However, 'implementation' of the Directive's requirements is still underway and it is not, in all cases, dependent on a reform of national AML/CFT law. At the very least, the FIAU could have initiated the process of preparing for implementation in good time to ensure relevant provisions and tools were in place by the time the 4AMLD was transposed. This could have been expected, given the amount of international guidance (including ESA guidance) on sanctions and effective AML/CFT supervision.

As a result of the late transposition, and the late 'implementation', the FIAU is not meeting its obligations under Articles 48 and 58 of the AMLD.

Various actions in progress/not yet started, for completion September 2018-March 2019.

Recommendation 2 is met only in part. It is not clear that the FIAU is taking the steps necessary to comply, and it has not submitted any evidence of the steps it says it will take to redress current shortcomings.

In particular,

## Recommendation

institution is exposed, taking into account product, services, customer, geographic and distribution channel risks in line with the ESAs' Joint Guidelines on the characteristics of a risk-based approach to AML/CFT supervision ('the risk-based supervision guidelines', ESAs 2016 71).

In particular, when assessing the ML/TF risk associated with its financial sector, the FIAU should use a sufficiently broad range of sources of information, including those listed in paragraphs 17-19 of the risk-based supervision guidelines.

Concerning the tools currently used, the FIAU should:

- i. establish and maintain a clear process to ensure this ML/TF risk assessment remains up to date, and can be amended without undue delay where necessary;
- ii. review the FIAU's (existing) AML controls questionnaire in order to ensure that responses to this questionnaire enable the FIAU better to understand the level of risk to which institutions in its sector are exposed. The FIAU should ensure in particular that the questionnaire contains qualitative questions that will provide it with important information the level of ML/TF risk to which an institution

## Summary of FIAU response

It also 'intends' to complement this risk assessment tool with qualitative information, by March 2019, as it currently only captures 'hard data'.

Finally, the FIAU states that it is already in the process of updating its Annual Compliance Report to include a greater focus on risk.

## EBA assessment

- A document responding to a call for tender for a new risk assessment system dating back to 2016 is attached, but there is no evidence of progress, or which aspects of the proposal were being pursued. There is also no evidence of attempts to structure the capturing of emerging risks, or regular updates, other than a stated 'intention' to do so. It is of concern that the FIAU intends to compare this (apparently evolving) tool with the ESAs' guidelines only 'in the coming months', given its previous failure to identify, understand and assess the ML/TF risk associated with its sector.
- There is no mention, in the FIAU's cover note, of its data controls questionnaire template, or its intention to update this in line with Recommendation 2(ii). It remains a tick-box questionnaire that may serve as a starting point, but it is insufficient, on its own, to ensure effective, risk-based AML/CFT supervision in line with the ESAs' guidelines on risk-based supervision and on risk factors.
- the FIAU states its intention to 'enhance its compliance report', but

Recommendation	Summary of FIAU response	EBA assessment
<p>is exposed as a result of its business, and the adequacy and effectiveness of its AML/CFT policies and controls;</p> <p>iii. enhance its annual compliance report by including key information that will support the use of this report for supervisory purposes. For example, the report should distinguish between different types of credit institutions (e.g. by sub-sector or risk profile), and consider product/services/customer/distribution channel risk. It should also aligning the assessment of country risk with the ESAs' Risk Factors Guidelines and not limit the assessment to FATF blacklists, EU/UN sanctions, Transparency International CPI or being an 'international financial centre'.</p>		<p>does not set out in sufficient detail how it will enhance it to ensure it is fit for purpose. The attachment provided merely contains the 2017 version of the compliance report, which is extremely high level and unlikely to provide the FIAU with any meaningful insights into the level of compliance, or the level of risk associated with, a particular financial institution.</p> <p>Various actions not yet started, for completion by March 2019.</p>
<p>3. The FIAU should establish a clear supervisory strategy in line with Step 3 of the Risk-based Supervision Guidelines, whereby it allocates supervisory resources based on the categorisation of institutions by level of ML/TF risk and to each obliged entity in line with its ML/TF risk profile. In line with these Guidelines, the FIAU should ensure that institutions associated with higher ML/TF risk, such as institutions with a business model focused on international clients and PEPs, are</p>	<p>The FIAU has moved to risk-based supervision over the last two years. It currently bases its supervision on sector risk assessments.</p> <p>In November 2017, the FIAU adopted a more flexible and varied range of supervisory tools (e.g. thematic reviews, offsite monitoring) to better respond to institutions' risk profiles.</p> <p>It will now formalise its resource allocation and adjust its approach to take account of the guidelines on risk-based supervision by June 2019.</p>	<p>This recommendation has not yet been met and it is not clear, based on the documentation provided, that the FIAU is on track to make the necessary changes to implement this recommendation.</p> <p>While some of the FIAU's proposed actions outlined in the cover note appear to be a step in the right direction, they come very late, considering that this is already a legal requirement under Article 48(6) of the AMLD, and that competent authorities were</p>

**Recommendation**

**Summary of FIAU response**

**EBA assessment**

subject to more frequent and intrusive AML/CFT supervision.

expected to comply with the ESAs’ guidelines on risk-based supervision in April 2018.

The proposed actions are also not backed up by evidence: for example, there is no evidence that the FIAU allocates its resources based on institutions’ level of ML/TF list – a gap analysis against relevant provisions in the guidelines on risk-based supervision remains high-level and non-specific.

Various actions not yet started, for completion by March/June 2019.

4. Recommendations number 2 and 3 should be implemented applying the ESAs’ Joint Guidelines on the characteristics of a Risk-based approach to AML/CFT supervision (ESAs 2016 72, of 16 November 2016) and the ESA’s Joint Risk Factors Guidelines (JC 2017 37 of 26 June 2017).

The FIAU will take ESA guidelines into account.

Recommendation 4 is met only in part.

The FIAU states a high-level intention to carry out gap analyses against our guidelines in respect of some of its products, but appears to have done so only in respect of paragraphs 41-49 of the RBSGL (in spite of its stated intention to ‘intend to comply’ with the RBSGL and RFGL). It is clear from the documentation received that other aspects of both guidelines have not yet been considered.

See also above.

Recommendation	Summary of FIAU response	EBA assessment
<p>5. The FIAU should ensure that there are sufficient resources at its disposal in the light of its tasks, the size and complexity of its sector, and the ML/TF risk level of obliged entities. The FIAU should take steps to ensure that its supervisory staff is equipped to implement and carry out risk-based supervision in an effective and consistent manner, including by providing staff with adequate training in line with paragraphs 50-53 of the risk-based supervision Guidelines.</p>	<p>The FIAU refers to its the HR Development Plan for the period 2017-2022, that was adopted before the EBA opened its preliminary enquiries.</p> <p>Detailed set of actions planned for completion by March 2019</p>	<p>In relation to the Compliance Unit there is no information about the state of fulfilment of the objective of the HR Development Plan for 2018, because the document “FIAU HR Statistics” does not contain disaggregated data: an increase of 7 members of staff since 2017, but without specifying their positions.</p> <p>Resourcing needs assessment, updated training, development and recruitment programmes planned for completion by March 2019 but not yet started.</p>
<p>6. The FIAU should implement robust internal procedures to conduct AML/CFT supervision, including in particular:</p> <ul style="list-style-type: none"> <li>• a supervisory manual to guide its onsite visits and ensure a consistent approach to monitoring and ensuring institutions’ compliance with applicable AML/CFT obligations. This should set out both the procedures to be followed and the type of questions supervisors should consider when assessing the adequacy of institutions’ AML/CFT policies and procedures (relevant questions are listed in the ESAs’ Risk Factor Guidelines and could be used by the FIAU as a basis for its own assessments);</li> </ul>	<p>The FIAU has updated the Supervisory Procedures Manual (“Financial Sector–Joint Visits Procedure).</p> <p>The Manual includes the procedures to be followed and the questions to be assessed.</p> <p>A new Annex VII b) to the Manual has been submitted to the EBA in relation to Missing Documentation Request List and deals with “extensions to subject persons to present further due diligence documents (or any other relevant document) to the officials following an on-site examination”.</p> <p>The FIAU letter expresses an intention to “build on changes already made to introduce updated</p>	<p>However, the Manual and its Annex set out the type of questions to be consider by supervisors but in a manner that it is not fully in line with ESAs’ Risk Factor Guidelines. The Manual does not include a complete regulation of the record-keeping processes.</p> <p>In relation to robust record-keeping processes, the manual deals only with on-site inspections and to missing documents. It therefore does not appear to cover off-site requests, or provide for records of information requests that do not result in missing documentation.</p>

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<ul style="list-style-type: none"><li>• robust record-keeping processes, including:<ul style="list-style-type: none"><li>i. Records of the requests for information addressed to obliged entities;</li><li>ii. Records of obliged entities' responses to those requests, including records of incorrect or incomplete responses, or failure to respond;</li><li>iii. Records of both offsite and onsite inspections. These records should contain sufficient detail to enable the FIAU to substantiate its findings, including:<ul style="list-style-type: none"><li>a) which information supervisors reviewed, and records of this information, including records of any customer files;</li><li>b) who supervisors interviewed, and the relevant information obtained from those interviews;</li><li>c) supervisors' assessment of those findings.</li></ul></li></ul></li></ul>	<p>templates in a number of areas, including on record keeping, off-site inspections and findings”.</p>	<p>Commitments to make further improvements. Completion by March 2019.</p>

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<p>7. The FIAU should ensure that the composition of the CMC is designed to ensure the appropriate challenge to supervisory proposals decisions and that are properly documented. In particular, the minutes of the meetings of the CMC, or any other body with the same task, should provide information about the documents examined, the discussions held and the reasons behind the conclusion reached.</p>	<p>FIAU is working to strengthen deliberation, debate, challenge and minute-taking at the CMC with new templates introduced to improve audit trail of decisions. Additional improvements are needed, review of protocols, processes and culture is planned, and improving the quality and structure of decision-making and record-keeping</p>	<p>No new improvements from the composition and procedures existing before the adoption of the EBA’s recommendation.</p> <p>Commitments to further reviews. Completion by January 2019.</p> <p>No particular mention of the content of the minutes of the CMC’s meetings in the Terms of Reference.</p>
<p>8. The FIAU should ensure that where it concludes that it does not have evidence of an infringement or a clear-cut breach of applicable legislation, but maintains concerns regarding the adequacy of the an obliged entity’s approach to AML/CFT, it adopts within a reasonable period appropriate supervisory measures or a supervisory plan designed to address the risk identified.</p>	<p>The FIAU’s letter express the commitment to “develop a clear methodology to help articulate discomfort in the absence of evidence proving a clear cut infringement, and introduce new potential actions that the FIAU may take aside from applying sanctions. This methodology will include a process that links it to the risk assessment. Additionally, FIAU will introduce the capacity for additional checks to allow for 'drilling down' in case of further questions”.</p>	<p>No action taken yet, high-level commitment only. Completion by January 2019.</p>