

In case of discrepancies between the French and the English text, the French text shall prevail.

Luxembourg, 28 December 2015

To all professionals of the financial sector
subject to the CSSF's prudential
supervision

CIRCULAR CSSF 15/631

Re: Dormant or inactive accounts

Ladies and Gentlemen,

Awaiting legislation in Luxembourg with respect to “dormant” or “inactive” accounts, the professionals of the financial sector have, until now, defined their own approach in this regard. Given the importance of the subject, it appears that a more uniform approach is both requested by the stakeholders and opportune for the image of the financial centre. In the interest of legal certainty, this circular aims to provide guidelines for defining and handling dormant accounts.

1. Scope

This circular primarily addresses banks, but it also concerns all the other professionals of the financial sector that hold or manage third-party assets, notably by depositing them with banks or other financial institutions, and that open accounts for the beneficiaries of these assets in their books.

Within the meaning of this circular, the term “account” extends to the business relationship between the professional and an account holder, irrespective of the nature of the account (cash account, securities account, electronic money account, safe-deposit box, etc.).

2. Obligations of a professional to prevent an account from becoming dormant

Every professional is required to maintain regular contact, preferably at least once a year, with its clients and to closely monitor the relations with its clients.

These obligations arise from MiFID/MiFIR and AML/CFT texts. More specifically, Article 3(2)(d) of the law of 12 November 2004 on the fight against money laundering and terrorist

financing requires “conducting ongoing monitoring of the business relationship including scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the professional’s knowledge of the customer, the business and risk profile, including, where necessary, the source of funds and ensuring that the documents, data or information held are kept up to date.”

Compliance with these obligations should reduce the risk of a relationship becoming inactive.

If, nevertheless, the professional loses contact with the client, there must be precise rules defining as of when a relationship will be considered as inactive or an account as dormant. From that point forward, the professional shall follow the guidelines below and be particularly vigilant should such an account become active again.

A professional shall consider its relationship with a client as inactive and thus the client's accounts as dormant if (i) the account holder or his authorised representative has not communicated with the professional in the past six years; and if (ii) the client or his authorised representative has not initiated any transaction (transfer instruction, withdrawal or deposit of cash, sell or buy orders, etc.) with regard to any of his accounts held with the professional within the past three years (cf. Standard for Automatic Exchange of Financial Account Information in Tax Matters, OECD, 2014, pages 111-112).

In this regard, the transactions that are not initiated by the client or his authorised representative, such as automatic renewal of deposits, fees or commissions, operations on securities (payments of coupons or interests), operations on accounts under discretionary management, payment by standing order or domiciliation, shall not be considered as movements on accounts for the purpose of this circular. Conversely, if the professional receives a visit from the client or his authorised representative, or any other sign of life (withdrawal of hold-mail, deposit or withdrawal of assets in a safe-deposit box, etc.) whilst one or all of the client's accounts are inactive, the relationship shall not be considered as inactive.

3. Obligations of the professional when an account becomes dormant

The professionals shall have in place detailed internal procedures to identify inactive relations and dormant accounts, particularly in order to trace outstanding amounts. Such identification will allow the professional depositary, among other things, to rapidly fulfil its obligation to return the funds, particularly in case of heirs searching for funds.

As from the moment a relationship has been identified as inactive and the client accounts concerned as dormant, the professional shall try to re-establish contact with the client, by all appropriate means of communication. Without prejudice to the specifications set out in the provisions governing the contractual relationship with the client, the professional shall inform the client on this occasion what will happen to the funds deposited on a dormant account if the client does not respond to an attempt to take up contact.

Any initiative generating costs in order to re-contact the client and search for potential heirs must be undertaken according to the principle of proportionality. In particular, the opportunity to engage in researches by using the services of specialised professionals shall be assessed in relation to the amount of the client's assets and the generated costs, the professional being authorised to debit from the account(s) concerned the costs resulting from these researches.

The professional shall monitor the dormant accounts. In particular, the fact that an account identified as being dormant becomes active again as a transaction has been initiated shall trigger an alert with the professional which shall then verify the non-suspicious nature of this renewed activity on the account.

4. Fate of the assets deposited on dormant accounts

Where the attempts to re-establish contact with the client are unsuccessful, the professional shall continue managing the client's assets. To this end, the professional shall apply the principles of loyalty, good faith, diligence and due care, in line with its contractual obligations. Applying these principles allows the professional to pass on accountable and transparent administrative charges, as long as they remain lower than the value of the deposit, failing which the account will be closed.

5. Imprescriptibility of the obligation of restitution

Under Article 2236 of the Civil Code, the professional has no right to appropriate assets deposited on dormant accounts by way of prescription. This article lays down that those who possess on behalf of another person can never benefit from prescription, however much time elapses. Thus, farmers, depositaries, usufructuaries and all other persons who hold property as a result of its owner's permission cannot acquire it by prescription.

This provision means that the professional shall not be allowed to appropriate assets of which it is the depositary (whatever the amount) or to use them for purposes (even for charitable purposes) other than restitution to the beneficiaries.

This circular is without prejudice to the specific regimes whose implementation, initiated at the discretion of each institution, could be justified by particular circumstances (litigation or criminal proceedings, collection, minority or age of the client, discretionary management contracts, legal or regulatory constraints, FATCA regime, etc.).

Yours faithfully,

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