CHAPTER IX

CUSTOMER COMPLAINTS

1. Complaints in 2003
2. Analysis of complaints handled in 2003
3. FIN-NET network: the cross-border out-of-court complaints network for financial services

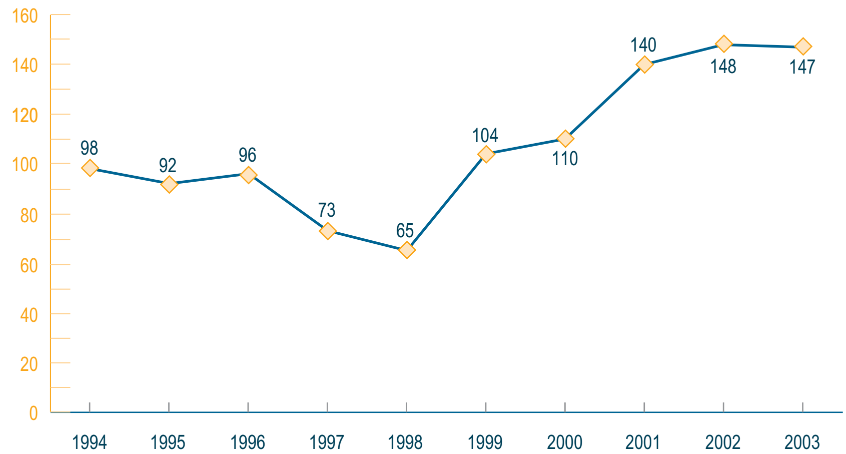
1. Complaints in 2003

The law of 5 April 1993 on the financial sector as amended confers on the CSSF the task of mediating between the customers and the institutions it supervises. Under the terms of article 58, the CSSF is competent to receive complaints from clients of the persons subject to its supervision and to take action vis-à-vis these persons with a view to reaching an amicable settlement of the disputes.

Within the CSSF these disputes are handled by the General Secretariat.

The analysis of the new complaints handled by the CSSF in 2003 reveal for the first time a certain stabilisation.

Number of complaints received



Among the 147 complaints received in 2003 by the CSSF, 137 were lodged by natural persons and 10 by legal persons. 24 plaintiffs contacted the CSSF through a lawyer or a representative. The majority of complaints concerned banks (136), while 11 complaints concerned PFS. Furthermore, the department for the supervision of UCIs handled 19 complaints against UCIs; these complaints are not included in the statistics of the General Secretariat.

Number of complaints handled in 2003

Number of complaints received in 2003	147
Files from 2002	63
Total files handled in 2003	210

Geographic breakdown[1] of the 210 complaints handled in 2003

Belgium	55	United Kingdom	2
Germany	48	Spain	2
Luxembourg	46	Portugal	1
France	20	Finland	1
Netherlands	3	Denmark	1
Sweden	3	Greece	1
Italy	3	Others	24

These figures confirm that the Luxembourg financial centre attracts clients from all over the world, but mainly from Belgium and Germany.

[1] *According to the home country of the plaintiff.*

Among the 210 complaints handled in 2003, 157 were closed, with the following outcome or reason for closing:

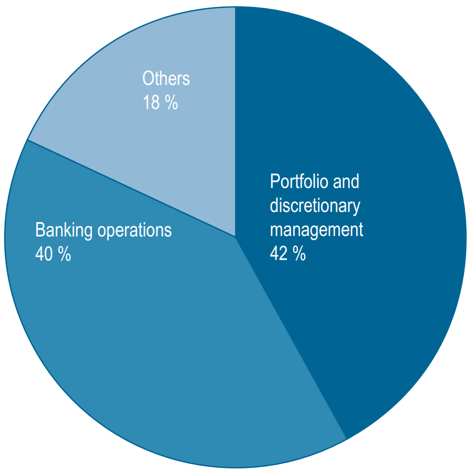
Closed files:		157
Article 58 non applicable	1	
Referral to a court	3	
Withdrawal by client	23	
Amicable settlement	13	
Justified or partly justified complaints	11	
Unjustified complaints	42	
Irreconcilable positions	52	
Other	12	
Files reported into 2004:		53

It has to be noted that 24 of the 53 files reported into 2004 were settled by 1 March 2004.

For 52 cases of the closed files, no amicable settlement could be reached, as the positions of the parties were irreconcilable and contradictory. As the CSSF does not act as judge or arbitrator making the sentence compulsory, but its role being limited to finding an amicable settlement to the case, the failure of discussions between the bank or another professional of the financial sector and the client puts an end to the CSSF's intervention. The category of files closed for other reasons includes twelve complaints for which the CSSF considers that the clients have not exhausted all the recourse available with the professionals. As a consequence, the clients were invited to address the professionals concerned and keep the CSSF informed, for a possible later intervention, of the results of their complaint. In the above-mentioned cases, it seems that the clients were able to solve their dispute with the professionals without requiring the intervention of the CSSF.

The analysis of complaints according to their object reveals that those relating to portfolio management (securities) still take the top position, followed by the category of banking operations of all kinds. The complaints relating to cross-border transfers alone represent nine cases.

Breakdown of complaints according to their object



Portfolio and discretionary management		88[2]
Non-execution of orders	11	
Fees and commissions	12	
Incomplete customer information	19	
Non-professional management	32	
Non-fulfilment of agreement	7	
Request of documents	1	
Other	19	
Banking operations		85
Non-execution of orders	18	
Fees and commissions	21	
Incomplete customer information	9	
General conditions	1	
Non-fulfilment of agreement	1	
Request of documents	4	
Cross-border transfers	9	
Others	26	
Others	37	

While 66% of the complaints were related to portfolio management in 2002, there has been a substantial decrease in complaints in this field for the first time with only 41.9%; the slight recovery of stock markets, in particular as from the second quarter 2003, certainly contributed to this development.

2. Analysis of complaints handled in 2003

2.1. Discretionary management

As far as investment is concerned, the discretionary management mandates are at the root of many complaints, the clients blaming the professional of the financial sector for poor management of their portfolio as soon as they record losses. However, it has been noted that in most cases, the decrease in the portfolio value is rather due to the fall of stock markets than to poor management by the portfolio manager.

The concept of the discretionary management mandate as such is simple: the client charges the professional with the management of his portfolio in a discretionary manner, without needing the client's prior agreement for the transactions executed. The client does not actively participate in the management of his portfolio. The situation is less clear where the client himself gives precise instructions the manager then executes. This type of situation often results in the client blaming the professional, as soon as things turn bad, for poor management within the scope of the discretionary management mandate.

Many problems could be avoided if the professionals were more rigorous in the fulfilment of their discretionary management mandate and/or if the clients refrained, within the scope of a discretionary management mandate, from giving instructions to the professional to buy or sell a specific financial product, knowing that it is difficult to reconcile these practices with the principles of a discretionary management agreement.

Within the scope of the disputes submitted to the CSSF, the question arose as to whether the professional who received such instructions within the context of a discretionary management is obliged to execute them.

[2] *Certain files can appear in several sub-categories.*

It must be referred to the terms of the agreement binding the parties in order to be able to answer this question and the relating disputes. The solution is easy if the agreement expressly provides for this possibility: the professional is obliged to execute the customer's orders. However, if the agreement only stipulates that the professional has discretionary power without needing to obtain prior authorisation by the client, the professional must take all the prudent steps he deems necessary to execute these orders. However, if the professional follows the client's orders, he must stick to this way of proceeding and cannot, in the future, ignore the client's orders. In this case, the discretionary management agreement must be interpreted in the light of the common intention of the parties, instead of keeping strictly to the literal sense of the terms and conditions.

It must also be noted that within the scope of the information requirement, the professional is obliged to inform the client of the incompatibility between the signature of a discretionary management agreement on the one hand, and the instructions given directly by the client on the other hand. The professional must, if necessary, direct the client towards a better-suited formula, such as an advice agreement, allowing the client to manage his portfolio himself by placing buying and selling orders.

2.2. Advice management

Notwithstanding the existence of an advice management agreement, clients sometimes give their manager a free hand to execute transactions on securities without their consent, or even without being aware thereof. This practice, based on a trust relationship between the client and the manager, is very common and works as long as the client ratifies the transactions afterwards, tacitly or in writing. However, problems become inevitable when the latter disputes a transaction that was detrimental to him, by invoking the absence of his instructions and of a discretionary management mandate. Other complaints stem from the attempt of one of the parties to establish the existence of a tacit discretionary management mandate.

The reverse side of this practice is that a simple trust relationship between the client and the manager can result in a dependence of the client vis-à-vis his manager, who manages the client's portfolio *de facto* in the absence of any discretionary management mandate.

In this context, the CSSF has dealt with a complaint where problems arose from the moment the portfolio manager left the bank. As the bank is not obliged to notify the client of the departure of the manager, the client was unaware thereof. It was only when he vainly tried to contact his account manager that he became aware that his portfolio was not actively managed anymore. The bank stated that it was not aware of the manager's practices and denied that a discretionary management mandate had existed. The client was unable to prove the contrary, nor to submit concrete elements to establish the existence of a tacit mandate between himself and the manager, so that the CSSF could not conclude that the bank acted wrongly. The CSSF can only recommend that both parties be prudent and vigilant and clearly set the obligations by which they are bound, which is in their own interest. Thus, where the bank regularly executes orders for the account of its client without prior instruction of the latter, it is highly recommended that they sign a discretionary management agreement.

The majority of the clients benefiting from an advice management agreement and those who give their instructions independently from the bank's advice, require that their funds be rapidly invested on the stock market and therefore often use not very formalised means to transmit their orders, such as telephone, fax or e-mail. However, these clients would be well-advised to conscientiously keep records of their orders and not to hesitate to request, if necessary, a written confirmation of the orders given, allowing them to complain to the professional within a short period of time, with supporting documents to prove their claim. Indeed, any tangible element likely to support the position of the parties will afterwards make it easier not only to prove the arguments discussed in the complaint letter, but also to find an amicable settlement, as it will allow to establish the truth.

In one case submitted to the CSSF, the client claims to have given a written order by fax to buy four securities, specifying a month's deadline. However, he noticed several months later that two of these securities had been bought after the deadline. The bank denies having received the fax in question. It confirms that the orders are encoded without indication of deadline, except otherwise specified by the client, and invoked that according to its general terms and conditions, the orders are systematically validated until the end of the civil year during which they have been encoded. While the bank maintains that it never received the fax concerned, the client transmitted copies of the faxes sent to the bank and his detailed telephone bills, proving that not only a fax had been sent to the bank at the said date, but also that the bank had received this fax together with a certain number of other faxes (not disputed by the bank) referring directly to the fax in question. The bank however maintains that the client must have given oral unlimited orders; but it does not have any elements whatsoever to prove its points, such as telephone recordings or transcriptions. Moreover, the bank considers that in the absence of any dispute by the client within the given time limit, only the notes are sufficient prove of the orders given by the client, according to its general terms and conditions. However, as the client thought that the order had expired after the month in question, the client was not aware that his order was still valid. In this dispute, the documents provided by the client as proof are very important. The bank, however, does not have any arguments in the presence of the client's instructions, which were clear and had been reiterated many times by fax. Following our reasoned opinion, the client was entirely compensated for the loss sustained by the acquisition of the securities.

2.3. Information on risks

The CSSF is also contacted by clients complaining that they were only insufficiently warned of the risks inherent in the purchase of one or several financial products. They often become aware of the risks only after having sustained substantial losses.

The professionals of the financial sector are bound by the obligation to inform the clients on all the risks inherent in a financial product and to give useful advise by taking into consideration their investment profile (financial situation, targets, experience, etc.). It is important that they provide sufficient and complete information to the clients and make sure that the latter are fully aware of the scope of their commitment. This obligation is all the more important as many clients are only fairly experienced in this field and are not used to such transactions. The professional must therefore inform the clients on the risks inherent in the transactions they envisage, so as to allow them to invest with full knowledge of the facts. On the other hand, the clients are also obliged to take the initiative to seek information on the products they are interested in, as they are the ones who decide.

A significant number of clients blame their bank for having bought too speculative securities within the scope of a discretionary management mandate.

The following case demonstrates how essential it is that the professional ensures that the client chooses the adequate profile from the beginning, even though this is often difficult, as the client's requirements are often unclear or ambiguous. A dispute concerned the fact that the client had decided on a discretionary management with a dynamic management profile and claimed afterwards that he had laid down the condition that the bank should withdraw his portfolio from the market in case of a loss of a maximum of 15% of the total investment. He sustained that at no moment had he been advised of the risks inherent in an active management of a 100% share investment. However, a clause of the signed agreement stipulated that he had been made aware of the risks. The bank explained that on the basis of the elements and evidence of managers and account managers, the client had never expressed the wish to have his losses limited to 15% and that such a limitation was in direct contradiction with a dynamic profile. As the CSSF did not have any element at its disposal proving the client's claims, and considering that the latter even refused several times to change his investment profile, the bank could not be blamed for any incorrect behaviour.

It has to be stressed that as far as stock market matters are concerned, even the best-informed clients having a thorough knowledge of the risks, should seek more information on the technical nature of the products in which they wish to invest.

In one case submitted to the CSSF, it seems that the client was unaware of the fact that European-type bonds cannot be realised before their maturity date and can be subject to margin calls. However, the documents relating to transactions on bonds stated that the client had been made aware that the risks inherent in leveraged derivatives were unlimited. He could thus not reproach the bank with selling shares of his portfolio in order to increase his cover and with closing the short positions following his inability to provide further funds.

2.4. Third-party management agreement

A less widespread management formula is the third-party management agreement, which consists in giving a management mandate to a person of one's choice, charged with managing his portfolio on one's behalf and for one's account, and not to a professional of the financial sector.

The CSSF handled a case where the professional, although only a third party to this mandate, found himself involved in this matter, as the mandate had been given to one of his employees (client's personal friend). However, the client blames the professional for the drop in the value of his portfolio, claiming that the portfolio management had not been made in a non-speculative perspective and that the parity of the shares and bonds had not been respected. In principle, the professional should not consider himself as a third party to this agreement, as the latter had been signed with one of his employees. However, in this particular case, the professional was able to prove that the client gave this mandate knowingly to his friend *intuitu personae* and that no contract had bound him to the company, as he had refused to sign an agreement with the latter. The CSSF can only disapprove of this type of practices, which result in ambiguous situations.

2.5. Fees and commissions

Another category of complaints concerns fees charged by banks and which are deemed excessive. In this respect, it should be pointed out that the CSSF does not, in principle, interfere in the determination of the price list of the professionals, which is of the sole remit and responsibility of the latter. Indeed, the CSSF does only interfere with a professional with respect to prices, if the latter failed to apply the prices communicated to the client or failed to inform him about the existence of fees and commissions beforehand.

Given the fact that a substantial number of complaints concerned problems relating to the fees charged by the banks, of which the clients claim they had not been informed beforehand, the CSSF advises the professionals to make their clients aware that the price list is available (should it not be handed out anyway) and to inform them of any subsequent change thereto.

The clients must not however adopt a purely passive attitude: they must be reminded that they are themselves obliged to seek information.

Among the cases concerning fees and commissions, the following are of particular interest.

A client bought units of funds at issuance price. The prospectus stated that the maximum loss that could be incurred could not exceed 3% of the invested capital. At maturity date, this was the case. The client then complained that he was reimbursed less than the guaranteed minimum and that the bank had charged a commission for the order transmission, as well as account charges. The client blames the bank for not having informed him beforehand of the annual deduction of account charges through the sale of fund units held (leading to a lesser refund) and demands to be refunded. The bank specifies that a distinction has to made between the operations consisting in investment in funds and the keeping of funds acquired by the client. Indeed, the latter had opened a deposit account with the bank to this end. By doing this, he had expressly signed and acknowledged that he had been informed of the general terms and conditions, which provide for annual account fees to be charged for the management of the deposit account, and that all the fees and commissions would be fixed according to the prices applied within the bank. The terms and conditions also provide that the bank is entitled to cover the account costs through the sale of fund units or parts of fund units respectively, up to the amount of charges.

In a certain number of cases, clients of the same bank were surprised by the changes made to the price list. While the bank had managed the clients' deposit accounts for free for many years, the clients received a letter in December 2002, informing them about the new terms and conditions of the bank applicable as of January 2003 and providing for the introduction of advice fees. However, the letter did not specify that this new bimonthly fee applied to all the holders of deposit accounts, even if they did not enjoy advice from the bank to manage their portfolio. The clients who did not feel concerned by this new fee, did not deem it necessary to terminate their relationship on the grounds of the fee being too high in relation to the funds deposited. It was only when the fees were eventually charged that the client became aware that they were compulsory for all the account holders. The bank agreed to reimburse the clients and to rectify the general terms and conditions in order to make them more transparent.

2.6. Obligation of the client to seek information

Besides the obligation of the professional to inform and advise the clients, the clients have to seek information themselves, making use, where applicable, of the sources at their disposal.

In one case, the client reproaches the bank for not having informed him, not even by means of documents, of the high risk inherent in the investment in an investment fund and claims to be reimbursed of the loss incurred following the acquisition of the fund units. The bank informed the CSSF that, at the launch of the new sicavs, it had sent a notice thereon to the clients, inviting them to contact one of the advisers or the commercial secretariat in order to obtain further information on the product. According to the bank, the notice sent to the clients was not in the least intended to provide comprehensive information (notably on risks), but only aimed to inform the clients about the existence of this product, specifying that adequate information was available upon request. The bank was not able to pronounce on what had been discussed on the phone, but stressed that according to general practice, the marketing people assess the different aspects of the proposed financial products with the clients. The bank admits that the publication rating the fund's risk as very high had only been made available to clients on express request and that it did not have any evidence proving that the client had made such a request. After having examined the explanations provided by both parties, the CSSF concluded that the bank had given the opportunity to the client to obtain further information; however, the latter had never made use of this possibility.

Moreover, the clients are obliged to keep themselves informed about the development of their portfolio through statements of account and wealth and other means made available by the professional and must, where applicable, regularly check their mail held by the professional. Indeed, the professionals are only obliged to inform the clients of important losses in certain determined cases.

This is illustrated by the following case where a client, whose portfolio had sustained a loss exceeding 10%, considered that the bank should have notified him thereof. However, the CSSF informed the client that circular CSSF 2000/15 did not apply in this case, as article 5.10 of the circular only applies to substantial losses sustained in relation to the investments made for the client within the scope of the discretionary portfolio management. In that case, the professional is indeed obliged to immediately inform the client of the negative development of his portfolio. As this dispute did not lie within the scope of a discretionary management mandate, this article did not apply. Moreover, the client was permanently in touch with his account manager with whom he discussed the content and the performance of his portfolio. He could therefore not have been unaware of his portfolio's negative development. A client is thus obliged to request himself information from the bank on the state of his wealth; the managers of the banks are in charge of assisting and advising him.

2.7. Cross-border credit transfers

Under the scope of article 41-10 of the law of 5 April 1993 on the financial sector as amended, the CSSF had to deal with a certain number of disputes relating to provisions of directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers (hereinafter the "Directive") transposed into Luxembourg legislation by the law of 29 April 1999 amending the law of 5 April 1993 on the financial sector as amended, as well as of Regulation (EC) No 2560/2001 of the European Parliament and of the Council of the 19 December 2001 on cross-border payments in euro (hereinafter the "Regulation").

Under the terms of article 7 point 1 of the Directive: *"The originator's institution, any intermediary institution and the beneficiary's institution, after the date of acceptance of the cross-border credit transfer order, shall each be obliged to execute that credit transfer for the full amount thereof unless the originator has specified that the costs of the cross-border credit transfer are to be borne wholly or partly by the beneficiary".*

The Directive foresees the option OUR (all charges to the originator of a payment) as default option in order to avoid double charging and to ensure the arrival of the full amount transferred on the account of the beneficiary.

The CSSF has noted that certain banks apply, if they do not leave the choice to the originator of the sharing of costs, the principle of shared costs (hereinafter "SHARE"), according to which the originator as well as the beneficiary each bear the costs charged by their respective bank. Other banks however levy the entire charges on the originator (hereinafter "OUR"), in case no choice is given, and also those levied by the beneficiary's bank.

The Regulation sets out, from 1 July 2003, the principle of equal charges for cross-border transactions within the European Union and for domestic transactions. Thus, a credit transfer up to EUR 12,500 indicating the beneficiary's IBAN code (International Bank Account Number) and the BIC code (Bank Identifier Code) of the beneficiary's bank, has to be handled like domestic credit transfers.

Costs for domestic credit transfers, which, until that date, had been free of charge, have been introduced in Luxembourg.

The purpose of the Regulation is to ensure equal charges for any credit transfers, domestic or international, as soon as the conditions described above are fulfilled. Indeed, the introduction of the IBAN and BIC codes aims to reduce the transfer costs through the automated processing of credit transfers. If these codes are not indicated, the banks can levy additional charges in order to compensate for manual manipulations needed to execute the credit transfer.

Since the implementation of the Regulation, the CSSF has received a certain number of complaints related to the fact that banks levied intermediary bank charges on top of the transfer charges. The banks justify these deductions by explaining that intermediary institutions are levying these charges. Thus, Luxembourg banks claim they only levy on the customer those charges that the other institutions charged on themselves.

The intermediary bank charges levied by Luxembourg banks stem from the distinction made since the transposition of the Directive depending on whether the cross-border credit transfers are executed according to the option chosen by the originator: BEN (all charges to the beneficiary), OUR (all charges to the originator) or SHARE (shared costs between originator and beneficiary). With the coming into force of the Regulation, the SHARE option became, within the scope of the execution of a cross-border credit transfer, a condition to be fulfilled in order to apply the same charges as those applied for a domestic transfer, as only this option allows to automatically route the transfer orders through the settlement systems (Straight Through Processing, hereinafter "STP").

This can be explained by the fact that with the Regulation, concrete measures to simplify the technical processing of cross-border credit transfers in euro became necessary. The European banks, in conjunction with the European Payments Council, have thus drafted the Credeuro Convention, which defines the characteristics of a standard credit transfer to be processed through STP, thus guaranteeing an efficient and low-cost execution with an execution time of a maximum three days.

A basic credit transfer must contain the IBAN and BIC codes, must be of up to an amount of EUR 12,500, the bank of the originator and that of the beneficiary must be located in a EU Member State and the mode of cost sharing must be SHARE (shared costs). If these criteria are fulfilled, the account of the beneficiary will be credited with the full amount (less domestic charges deducted, if applicable, by the beneficiary bank).

A second convention, the Interbank Convention on Payments (ICP), aims to supplement the new regime and covers the charging principles by laying down new pan-European rules relating to the standard charging procedure between banks for cross-border STP credit transfers falling under the scope of the Regulation.

This Convention lays down two main principles:

- the use of the SHARE charging option as a standard for the execution of a basic credit transfer. The originator and the beneficiary will only be charged for the costs levied by their own bank (and not for any intermediary bank charges);

- the elimination of any deduction by intermediary banks of any charges or replacement of these intermediary charges by interbank charges (levied on the banks). Consequently, the full amount will always be credited to the beneficiary.

The banks remain free to propose the charging option BEN and OUR, which give rise to extra costs, as these services do not fall under the scope of the ICP. The CSSF considers it essential that the Luxembourg banks better inform their customers about the fact that the options BEN (costs borne by the beneficiary) and OUR (costs borne by the originator) entail extra costs, as well as about the reasons of these costs. The banks must also inform their clients that the choice of the SHARE mode allows in principle to ensure that the amount ordered is fully credited to the beneficiary of the transfer, as in the majority of countries, the banks do not charge any costs for receipt of the funds.

2.8. Banking operations

In one case, a client handed in five securities for collection and got a receipt mentioning "five securities worth 10,000". Another bank, which is the principal paying agent for this issue informed the first bank that they were not worth 10,000, but 50,000, and that consequently, the client's account has been credited with the corresponding amount. The receipt has been changed following the correction communicated by the principal paying agent. Almost ten months later, the latter informed the bank that it noted, after having checked the issue, that it were five securities of 10,000 and not five securities of 50,000 and requested the immediate refund by the bank of the excess payment made to the client. The bank then debited the client's account despite the opposition of the latter. The bank insists that this way to proceed is covered by the general terms and conditions relating to transfers, which provide that the client authorises the bank to reverse any transaction whose execution has been called into question.

The bank, under the threat of legal proceedings by the principal paying agent, justifies the fact of having debited the client's account, by providing a judgement of the court of appeal, which declared as justified the recovery of payments made by mistake, as the payment had been executed following a material mistake on the number of deposited securities.

In another case, a client claimed to have submitted a certain number of securities for redemption. One month later, the bank informed the client that a mistake, which had been made when the securities had been counted, has been noted during the course of an internal control and that the agency had counted a significantly higher number of securities than the securities that had actually been deposited. The bank demands the refund of the payment made by mistake to the client on the grounds of the payment conditions signed by the client, which mention an "under reserve" clause, allowing the bank to claim, without time limit, the amount of the securities that have been counted and cannot be collected. The bank reserves the right to reverse the amounts paid, under reserve, on the client's account, or, failing that, demand the amounts in question directly from the client. As the client contests this position, without however specifying the number of securities he had actually deposited, the bank required him to provide a proof of the number of securities deposited. However, the client considers that he must not produce such a proof, as the receipt of the deposit should serve as proof. But the receipt is not an indisputable proof. The bank thus applied the under reserve clause correctly. The CSSF considered that the bank did not make any mistake while debiting the client's account, given the absence of proof regarding the number of securities actually deposited by the client, and the presentation by the bank of a copy of the securities deposited. The bank is thus entitled to reverse the amounts paid to the client, even though it made a material mistake.

3. FIN-NET network, the cross-border out-of-court complaints network for financial services

The FIN-NET network was established by the European Commission and gathers the bodies responsible for the out-of-court settlement of cross-border disputes relating to financial services within the European Economic Area, among which the CSSF. Two meetings were held in Brussels (3 March 2003 and 4 November 2003) under the aegis of the European Commission. These meetings notably covered the exchange of experience within the framework of the network's functioning and recent developments within the field of out-of-court settlement of disputes, as well as in the more vast area of financial services in the European Union.

The number of complaints submitted to the CSSF by bodies responsible for the out-of-court settlement of disputes of other Member States remained very low and amounted to two in 2003. This is due to the fact that the Luxembourg financial centre is at the heart of Europe and its for the most part foreign customers, who do not hesitate to directly turn to the CSSF without addressing the Fin-net. Thus, among the 210 complaints handled in 2003, 147 originate from another Member State of the European Union. The number of complaints transmitted by the CSSF to the competent authority within the Fin-net network amounted to six.