CHAPTER IX

CUSTOMER COMPLAINTS

1. Complaints in 2004
2. Analysis of complaints handled in 2004
3. FIN-NET network, the cross-border out-of-court complaints network for financial services

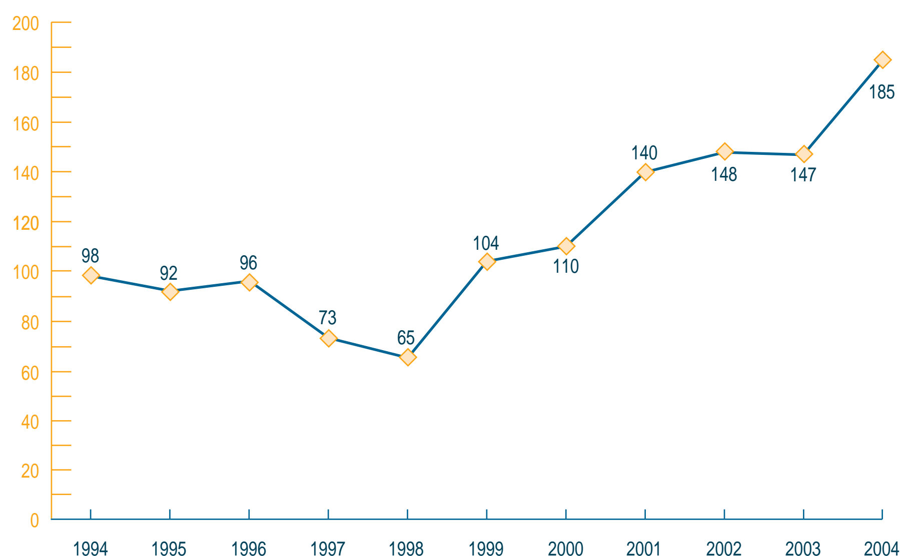
1. COMPLAINTS IN 2004

The law of 5 April 1993 on the financial sector as amended confers on the CSSF the task of mediating between the entities under its supervision and their customers. Under the terms of article 58 of this law, the CSSF is competent to receive complaints from clients of the entities subject to its supervision and to intercede with these entities with a view to settle the disputes amicably.

Within the CSSF, the General Secretariat handles these disputes.

The number of new complaints handled by the CSSF in 2004 increased considerably. This rise is partly due to the fact that customers are better informed about the CSSF's functions with regard to complaint handling, so that they refer more readily to an out-of-court complaint settlement system, which has notably the advantage of being speedy and free of charge.

Development in the number of complaints



Among the 185 complaints received in 2004, 176 were lodged by natural and nine by legal persons. Forty-one complainants contacted the CSSF through a lawyer or a representative. The European Consumer Centre, the EEJ-Net network and the *Union Luxembourgeoise des Consommateurs* (Luxembourg Consumer Union) each forwarded one complaint to the CSSF. The majority of complaints (175) concerned credit institutions, while ten concerned PFS.

Number of complaints handled in 2004

Number of complaints received in 2004	185
Files from 2003	53
Total files handled in 2004	238

Geographic breakdown[1] of the 238 complaints handled in 2004

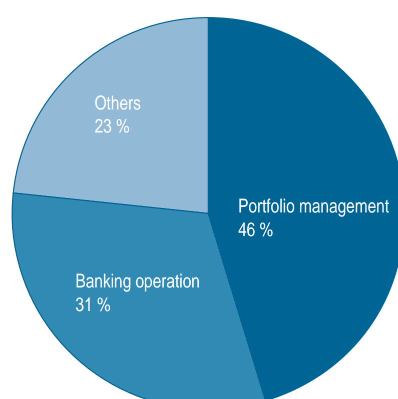
Belgium	76	Denmark	3
Germany	48	Netherlands	2
Luxembourg	48	Italy	2
France	22	Portugal	1
United Kingdom	9	Austria	1
Spain	6	Greece	1
Sweden	3	Others (non EU)	16[2]

Among the 238 files handled in 2004, 189 could be closed, with the following outcome or reason for closing:

Files closed		**189**
Unjustified complaints	65	
Justified or partly justified complaints	9[3]	
Amicable settlement	36	
Absence of amicable settlement	25	
Withdrawal by client	42[4]	
Others	12[5]	
Open files carried forward into 2005		**49**
Total		**238**

It has to be noted that 16 out of the 49 files carried forward into 2005 were settled by 1 March 2005.

Breakdown of complaints (closed in 2004) according to their object



[1] According to the home country of the complainant.

[2] Including South Africa (4), Switzerland (2).

[3] This category concerns all the cases where the CSSF concluded that the complaints were justified or partly justified, but where no amicable settlement could be reached as the client refused the settlement proposed by the professional, even if, in certain cases, the parties resumed negotiations in order to find a solution to their dispute.

[4] This category not only encompasses the complaints on which the complainant does not follow up, but also those where the client decided to refer his matter directly to the courts, thus putting an end to the CSSF's intervention.

[5] This category notably covers the cases where the CSSF decided to end its intervention in accordance with article 58 of the law of 5 April 1993 on the financial sector as amended as it noticed during the procedure that a legal investigation is taking place.

Banking operations		**86**[6]
Deficient client information	16	
Non-execution or incorrect execution of orders	17	
Fees, commissions, interest rates	25	
Cross-border transfers	8	
Non-fulfilment of agreement	5	
Dispute over the existence of consent	3	
Deadlines	2	
Various disputes[7]	32	
Portfolio management (advice and discretionary management)		**59**
Deficient client information	24	
Including cases relating to non-information about risks	11	
Unprofessional management	13	
Dispute over the existence of a discretionary management mandate	9	
Non-execution or incorrect execution of orders	9	
Dispute over the existence of consent	6	
Non-observance of investment profile	4	
Fees and commissions	4	
Non-fulfilment of agreement	3	
Others		**44**[8]

While the total number of complaints handled by the CSSF increased in 2004, the number of complaints relating to private portfolio management, already decreasing in 2003, continued to drop. The more general category of complaints relating to banking operations has taken the lead with 45.5% of the complaints closed in 2004.

- ***Complaints regarding UCIs***

In 2004, the department Supervision of UCIs dealt with sixteen complaints lodged by investors regarding UCIs. Fourteen files have been closed or are about to be closed. Two complaints could be settled amicably while another one was withdrawn by the investor. Analysis of the breakdown of complaints relating to UCIs according to object shows that the vast majority relate to a delay in the payment of the redemption proceeds of units of UCIs, or to the performance or investment policy of UCIs.

The 2004 statistics of the General Secretariat do not include complaints regarding UCIs. It has to be noted that the General Secretariat will deal with these complaints as from 2005.

2. ANALYSIS OF COMPLAINTS HANDLED IN 2004

2.1. Banking operations

Most of the complaints received in 2004 concerned all sorts of banking operations, from account opening, to the different transactions made on the account, including the closing.

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

[7] This category encompasses complaints relating to a wide range of daily banking operations, most of them with low economic stakes.

[8] Including, among others, disputes arising from inheritance and account search procedures, issues relating to the freezing of accounts, communication issues between clients and professionals and disputes relating to the general terms.

2.1.1. When establishing a business relationship

Some of the complaints received related to the nature and importance of the information required by the professional at the account opening. Certain clients had difficulties understanding why the credit institution, at the time of the account opening, enquired about their possible connections to politicians or senior civil servants, as the clients considered this as a violation of their privacy. It should be explained in this context that the professionals require this information in order to comply with the due diligence and know-your-customer procedures they are obliged to set up within the scope of the fight of money laundering and terrorist financing. As the credit institutions are required, within the framework of anti-money laundering measures, to keep their client files up to date, this kind of information can even be requested from long-standing clients. Certain professionals respond more firmly in case they have not received the information, as shown in the complaint lodged by a client who reproached the bank for not being able to dispose of his account, as it was frozen until reception of the requested information. The professional explained that the account was frozen as a result of the client's refusal to deliver a certain number of information concerning his personal situation. Given the rules of conduct as regards anti-money laundering measures, the CSSF could not blame the credit institution for any misconduct and invited the client to provide the information requested.

The CSSF came to the same conclusion in a case where the client, the co-account holder, could not dispose of the account because he failed, despite several notices, to provide the credit institution with the information relating to the account's beneficial owner. The CSSF agreed with the credit institution, which denied the client access to his account until reception of the documents required within the fight against money laundering and terrorist financing.

2.1.2. In the course of the business relationship

The contractual relation between a client and a professional, which rests on mutual trust, is governed by the general terms and contracts whose clarity is a condition *sine qua non* for sound business relations. The professional must ensure that the documents governing the relations between the parties do not give rise to divergent interpretations that could mislead the client.

One case submitted to the CSSF related to the terms of the contract, which were not formulated in a clear manner, and more particularly to the interpretation of "rates offered on the eurocredit market" mentioned in the loan agreement that the client had signed with the credit institution. While the client considered that "rates offered on the eurocredit market" referred to the Euribor rates, the credit institution stated that the contract indisputably referred to its refinancing rate. The CSSF concluded that the client's claim was justified. The wording the client disputed was indeed misleading as it lacked precision and allowed two fundamentally different interpretations. The formulation was thus out of line with point 5.6 of circular CSSF 2000/15 relating to the rules of conduct in the financial sector, which provides that all information provided to the client must be clear, truthful, accurate, complete and comprehensibly formulated, in an adequate form and reflect the assessment the professional made of his client's knowledge and experience. Following the CSSF's intervention, the credit institution proposed an amicable settlement to the client. Moreover, the CSSF invited the credit institution, so as to remove any ambiguity and avoid further complaints, to amend the wording of its contracts and to specify more explicitly that it refers to the refinancing rate of the credit institution.

It is important to stress that any amendment to the terms binding the professional and the client must be communicated to the latter beforehand in a clear and unequivocal manner. This information must be provided to the client within reasonable time by letter or in any other form. New prices or increases in existing prices must be communicated to the client before they take effect.

Throughout the business relationship, the client is informed about the state of his account by means of statements of accounts and wealth he must sign, etc. These documents contain a certain number of important information, e.g. concerning the value dates, which are regularly disputed. Within the scope of these complaints, the CSSF informs the complainants that accounting of operations with value dates is a common practice in the financial markets, and recognised by the European Commission, according to which transactions on bonds should be effected within T+3, T being the date of the transaction, plus three working days. The credit institution's decision to apply one or several value dates depends on its commercial and pricing policy with which the CSSF does not interfere, provided that the clients have been appropriately informed. Indeed, the CSSF only intervenes in this field if the credit institution violates the prices communicated to the clients or a legal provision.

Many complaints submitted to the CSSF in 2004 concerned prices and fees, notably those submitted by foreign clients who disputed all sorts of costs billed by Luxembourg credit institutions.

A certain number of complaints concerned the amount of securities transfer fees billed by credit institutions. These transfer fees are in general calculated according to the security concerned and the securities lines. In principle, the professional's general terms provide that the professional is entitled to charge fees that can be looked up on the price list available to clients. By signing the general terms, the client acknowledges being aware of their content, and even having accepted how fees are charged. The CSSF can therefore only intervene in order to seek an amicable settlement between the professional and the client in matters where the client has not been informed beforehand of the existence of these fees and commissions, or has not been able to obtain this information, or where the credit institution did not abide by the prices communicated.

Furthermore, the CSSF concluded that a credit institution that had granted preferential rates to a client over several consecutive years for the payment of coupons is not bound to continue to do so. Preferential fees and commissions compared to the standard price list should not be taken for granted. The credit institution is indeed not obliged to apply for every future transaction the discount conceded. However, where the credit institution decides to revise its decision and apply the standard price, it should refrain from doing so with retroactive effect.

2.1.3. At the closing of accounts

The CSSF informed the clients concerned that charging costs for account closing is in line with practices existing in the Luxembourg financial centre and that the pricing policy is in principle the remit and responsibility of the professionals. These costs mostly cover those relating to administration and banking organisation.

In principle, a business relation between the professional and the client ends at the initiative of the latter. In one case submitted to the CSSF, the client was surprised by the contrary. A credit institution can close an account without being obliged to justify its decision provided that it abides by the existing procedures, i.e. in general, prior notice by registered letter within a reasonable period of time, unless otherwise stipulated in the general terms.

2.1.4. Inheritance

In 2004, the CSSF was solicited several times with respect to problems concerning inheritance. The majority of complainants were confronted with issues relating to banking secrecy when they searched for accounts of deceased relatives. Article 41 of the law of 5 April 1993 on the financial sector as amended provides that the professionals are obliged to keep secret the information entrusted to them within the scope of their professional activity, or will incur criminal sanctions. In general, heirs or legatees searching for bank accounts of the deceased request credit institutions in

writing to provide information on the existence of bank accounts that belonged to the deceased. Credit institutions respond in the most diverse ways to such requests. Where the credit institutions do not respond at all, the heirs can be led to complain to the CSSF. The CSSF informed the client that in Luxembourg, only a credit institution that establishes that the deceased held an account, is bound to reply positively to the request of a legal heir or universal legatee having proven his capacity by means of the required official documents. This position is in line with established jurisprudence. The banking secrecy, which is opposable to any person save for the client himself, is not opposable to the heirs entitled to a compulsory portion after the client's decease. Indeed, heirs continue the person of the deceased client and have consequently the same rights *vis-à-vis* the credit institution than the deceased who was a client of the credit institution.

The banking secrecy is also invoked within the scope of other complaints. Thus, in one complaint submitted to the CSSF, the heir of the beneficial owner of an account requested information on the account. However, insofar as no contractual link binds the beneficial owner and the credit institution, the bank refused to provide any information. Indeed, only the client can enter into a contractual relationship with the credit institution and become the holder of the inherent rights and obligations. The identification of the beneficial owner within the scope of the fight against money laundering does therefore not imply that the latter can exercise the same rights and obligations as the account holder. Thus, the credit institution can legally invoke the banking secrecy against the beneficial owners themselves or against their heirs or proxies. According to the CSSF, the complaint was not justified.

2.2. Portfolio management

The fact that discretionary management mandates and advice contracts are not always clearly delimited also generated many complaints in 2004.

A certain number of clients trust and allow managers to act freely without any discretionary management mandate. However, these same clients do not hesitate to invoke the absence of a mandate as soon as losses are recorded, pretending not to be aware of the transactions that had been effected on their account.

Thus, in one case, a client pretended having sustained a major material loss because the professional had invested his assets in risky financial products, without having signed a discretionary management contract or agreement, or given instructions. After having analysed the positions of both parties, the CSSF concluded that the client could hardly invoke the absence of a discretionary management mandate. Indeed, the facts, and in particular the fact that the client did not object during his telephone conversations with his manager or when he received his statements of account, prove that the client could not be unaware of the transactions made within his portfolio.

Since the client has never raised any objection in this regard, one can justifiably consider that in this case, the entries were tacitly approved. Indeed, the silence of the client at the reception of the statements of account can imply tacit agreement of the entries and the conditions applied, without however depriving the client of a subsequent liability action. However, it needs to be stressed that in this case, the credit institution is not entirely faultless. Indeed, the credit institution had confirmed that it had concluded a verbal discretionary management agreement with the client from the outset of business relations and that a general framework for investments had been laid down, fixing the limits within which the account manager could act. Therefore, the credit institution can be blamed for not having laid down these conditions in writing as the discretionary management included investments in high-risk technology securities. The credit institution had thus voluntarily accepted a vague situation, which could turn out to be detrimental for both parties afterwards.

In this context, the CSSF reminds that the provisions of point 5.3 of circular CSSF 2000/15 on the rules of conduct, according to which the contract between parties must state at least the objectives of the management, the categories of securities and instruments the portfolio can include, the modes of communicating investment developments to the client, the duration, the terms of renewal and termination of the contract, as well as the basis on which the professional will be remunerated. The CSSF requires that this information be laid down in writing and signed by both parties.

The professional having managed on a discretionary basis, as in the present case, a portfolio comprising derivatives without having concluded a written contract, was an aggravating factor given the very high risk inherent in futures markets. In order to make professionals cautious, point 5.5 of the above-mentioned circular requires professionals to have their clients sign a written warning notice if the latter wishes to invest in products such as derivatives or other leveraged instruments. Thus, a client cannot blame a professional, as was the case in a complaint submitted to the CSSF, for not having carried out his orders, since he had never, despite the reminders of the professional, signed and returned the document allowing the professional to operate on the options or futures markets and which included a detailed description of the characteristics and risks of this type of investment.

In one case submitted to the CSSF, the client complained that the professional had pressured him into investing in derivatives without making him aware of the risks incurred and that the professional had thus disregarded circular CSSF 2000/15. The professional however was able to prove that the client had authorised the professional in writing to invest in the securities concerned and that the manager had notified the client in writing on the risk of losing the whole outlay at the maturity of the securities concerned, notably of the call options. Furthermore, the professional had made the client sign a written warning notice that detailed the futures operations and made the client aware of the risks incurred. The professional could thus not be blamed for having disregarded circular CSSF 2000/15, and notably point 5.5.

In another portfolio management case, the professional was able to prove by means of several conversation reports that the client had been regularly alerted against investment decisions that the professional considered as inconsiderate. The client was always carried away by his taste for risk investments according to his own “strategy”, despite the professional’s warnings. In fact, the professional only advised the client, the client always made the final decision. The transcriptions of the orders show that they were all given over the phone and that to this end, the client had signed an agreement to discharge the professional. Finally, the client was informed in writing about all the transactions and balances of the account that were available to him by way of hold mail. The client can therefore hardly blame the professional for not having allowed him to take informed decisions.

The professionals shall inquire about the financial standing of their clients, their experience in investments, their objectives concerning the requested services. They are required to transmit any useful information to the clients in order to allow the latter to make a decision with full knowledge of the facts. Some complaints are due to the fact that even though the management profile of a client was duly defined at the outset of the business relationship, the latter blames the professional for having disregarded his profile within the scope of the advice contract signed between both parties, as the professional had invested in too risky products and not diversified his portfolio. In another case submitted to the CSSF, the professional, although he had fulfilled his advice mission, could not protect the client against his own decisions knowing that within the scope of an advice contract signed between parties, he must follow the instructions of the client. The professional’s role is restricted to advising the client in his decisions.

Therefore, establishing the client’s profile in accordance with points 4.2 and 4.3 of circular CSSF 2000/15 proves to be of the foremost importance and the professional should thus ensure to keep

the profile up to date throughout the business relationship. An investment profile, which is not adapted to the client's objectives and needs, gives rise to complaints, within the scope of the advice management as well as the discretionary management. In order to avoid any subsequent disputes, the profiles should be established in writing, signed by the client and follow the same procedure in case of subsequent amendments to the profile.

One complaint related to non-compliance with the conservative profile of the client who affirmed that the professional had invested, on his own initiative, in speculative products without being informed and made aware of the inherent risks. The client had signed a discretionary management contract. However, the profile had not been laid down in writing at the beginning of the business relationship. The client's profile had then been modified, according to the professional at the client's request, from conservative to aggressive. The professional explained that on the occasion of many meetings, the client repeated that his portfolio be managed in a speculative manner and that this management should not be changed. The client however persisted in saying that he never wished to change his conservative profile. Given the contradictory positions, no amicable settlement could be reached in this case as there was no document signed by the client regarding, on the one hand, the establishment, and on the other hand, the modification of his profile. Indeed, the professional produced a testimonial of the account manager as sole proof of the client's agreement to modify his profile. It has therefore been impossible to establish if the client initiated himself the modification of the investment profile. It is also important to note that these events occurred before circular CSSF 2000/15 came into force, which now requires that the client's investment profile be laid down in writing.

3. FIN-NET NETWORK, THE CROSS-BORDER OUT-OF-COURT COMPLAINTS NETWORK FOR FINANCIAL SERVICES

On 18 and 19 March 2004, the UK Financial Ombudsman Service had organised an international conference in London, intended for "Ombudsmen" and bodies responsible for the out-of-court settlement of cross-border disputes, as well as for those that plan to set up bodies responsible for handling disputes relating to financial services (credit institutions, insurance undertakings, etc.). Within the scope of this conference was also held the Fin-Net plenary meeting, which concentrated on how to promote a more comprehensive geographical and sectoral coverage in this area.

The second Fin-Net plenary meeting, held on 15 October 2004 in Brussels, concerned the possibilities to improve communication with the public and within Fin-Net itself. Furthermore, statistics relating to the complaints handled in 2003 by Fin-Net were presented to its members.

Department General Secretariat

First row, left to right:

Carine CONTE | Iwona MASTALSKA | Danièle BERNA-OST | Nadine HOLTZMER

Second row, left to right:

Gilles HAUBEN | Benoît JUNCKER | Danielle MANDER | Jean-François HEIN | Steve HUMBERT

Absent:

Natasha DELOGE | Christiane TRAUSCH