

## Before the Arbiter for Financial Services

Case ASF 032/2023

ON (The Complainant)

vs

Foris DAX MT Limited (C 88392)

(The Service Provider/Foris DAX)

### Sitting of 25 August 2023

#### The Arbiter,

Having seen **the Complaint** dated 7 March 2023<sup>1</sup> relating to the Service Provider's alleged failure to prevent, stop or reverse the payment in crypto with a value equivalent to CAD (Canadian \$)104,884.31 made by the Complainant from his account held with *Crypto.com* to a third-party who was allegedly a fraudster.

#### The Complaint

The Complainant explained that on or about 06 October 2021, he fell victim to a multi-layered scam operation orchestrated by an entity referred to as '**Douglas Financial Limited**'.

He explained that the equivalent of CAD 104,884.31 was transferred from his wallet, utilizing the services of *Crypto.com*, to this scammer.

The Complainant filed an elaborate multi-page (10 pages plus attachments) complaint letter dated 12 July 2022<sup>2</sup> with the Service Provider in which he

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<sup>1</sup> P. 1 - 125

<sup>2</sup> P. 16 - 25

sought full refund of his loss from the Service Provider as he maintains that they are responsibilities for his loss *inter alia* for reasons that the Service Provider:

1. Made his infrastructure available to fraudsters.
2. Failed to prevent the illicit transfers of wealth caused by the alleged fraud.
3. Failed to perform adequate Anti-Money Laundering (AML) and Know Your Customer (KYC) procedures resulting in onboarding of fraudsters.
4. Failed to notice clear signals that the transfers effected by the Complainant to the fraudsters were suspicious and therefore had a duty to warn the Complainant that he was making himself vulnerable to a fraudulent scheme.
5. Failed to have monitoring systems to distinguish between normal activity and other activities which are not normal and suggest an illegal enterprise.
6. Made negligent misrepresentations about the security of their systems.
7. Aided and abetted, knowingly or with severe recklessness, the execution of fraudulent transactions as suffered by the Complainant possibly enriching themselves unjustly in the process.

In the Complaint, the Service Provider is often referred to as a Financial Institution and there is an expectation that it should have adopted transaction monitoring systems as required by the EU Payment Services Directive 2 – PSD 2.<sup>3</sup>

The Complainant sent another letter dated 13 August 2022,<sup>4</sup> replying to the Service Provider's rebuttal of 27 July March 2022<sup>5</sup> where, apart from repeating the original complaints, he concluded that:

*"I hereby contend that even given lack of statutory or regulatory obligation on your part to safeguard customers and their funds to the best of your ability, your view nevertheless faces a number of concrete objections:*

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<sup>3</sup> EU 2015/2366 that entered into force 12.01.2016

<sup>4</sup> P. 6 - 13

<sup>5</sup> P. 14

1. *Your account of the subject matter seems rather incomprehensive as it reprehensibly standardizes (and thus deliberately chooses not to engage) alarmingly unusual conditions; homing in on that which is absolutely indispensable to protect consumers and enhance the integrity of financial systems.*
2. *Suppose I grant, for the sake of argument, that there is no such obligation under the law in any way, shape or form – then your retort would seem quite out of place, given (i) the ease with which you could have forestalled the fraudulent activities depicted herein; and (ii) the increasingly individualized approach that is newly being offered to consumers in view of best industry standards aiming at minimizing financial crime and fraud.*
3. *Your understanding of the role of financial institutions in society is seriously flawed. It certainly does not help to solve the rising problem of online fraud and financial threats that unfortunately go unheeded and unchecked, nor does it show any readiness or willingness to ward off such unlawful activities.*

*As one who responsibly approaches this subject with the utmost gravity and objectivity, I am resoundingly confident that there is no available sound foundation for, let alone a persuasive argument in support of, your position.*

*If despite these objections, my concerns are not appropriately taken into consideration and are instead simply dismissed, you can be assured that alternative action will be taken, and I will make it a point to share our exchanges with the public so that at least pre-emptive action can be taken by other potential clients to avoid any dealings with organizations where customer security is not a priority”.<sup>6</sup>*

The Complaint was filed by Complainant with the Office of the Arbiter for Financial Services (OAFS) on 7 March 2023, basically, repeating the same issues made in the original complaint to the Service Provider, and attaching a letter dated 24 November 2022<sup>7</sup> that Complainant had sent earlier to OAFS which had concluded:

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<sup>6</sup> P. 12 - 13

<sup>7</sup> P. 29 -34

*“Based on my analysis, and as confirmed by various authorities concerned with such matters, there is abundant evidence that forward-thinking financial institutions ought to take reasonable steps to forestall fraud, or at least mitigate its risk by using an effective risk management system, demonstrating their undisputed ability to responsibly and pre-emptively respond to questionable transactions in the digital arena. The use of such systems, largely based on newly adopted technologies aimed at effectively navigating the evolving threat landscape, is only one of a number of possible endeavours undertaken in this connection, alongside the application of past knowledge and experience related to popular fraudulent practices.*

*Astonishingly, I am pondering how it is that, despite being shown that Crypto.com’s business conduct was insufficient insofar as background checks are concerned, they keep refuting their indisputable role and responsibility in connection with the matter herein discussed. The points that I have hitherto made are too crucial to be taken lightly. Crypto.com’s non-observance of the fundamental principles of justice – that is, to completely overlook and not even remotely try to mitigate the suffering of vulnerable consumers – is inexcusable given the size of the establishment and the vast resources at its disposal as the direct result of the patronage of clients like myself.*

*If it was, indeed, solely my responsibility, we must then believe at least one of the following clauses: a) financial institutions have absolutely no role whatsoever in preventing and detecting fraud, b) the fraud in question was not reasonably foreseeable, or c) the transactions in question were not sufficiently alarming. Unfortunately, Crypto.com pushes quite hard for me to believe all three of these things – despite evidence to the contrary.*

*In summary, I respectfully ask your organization to consider my points, given your personal and companywide obligation to provide a fair and reasonable investigation into the complaint.”*

However, in his official Complaint, the Complainant sought a potentially lower remedy than what had been sought in the direct complaint to the Service Provider.

***“I would like to be reimbursed in the full amount or in the amount that is mutually satisfactory to both me and the provider.”<sup>8</sup>***

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<sup>8</sup> P. 2

### **Service Provider's reply**

The Service Provider's official reply was received on 16 March 2023<sup>9</sup> stating that:

- *“Foris DAX MT Limited (‘the **Service Provider**’) offers the following services: a crypto custodial wallet (‘the **Wallet**’) and the purchase and sale of digital assets on own account. Services are offered through the Crypto.com App (the ‘**App**’). The Wallet is only accessible through the App and the latter is only accessible via a mobile device. In addition, the App is provided by different entities depending on the unique registration details of the user.*
- *(The Complainant) ... is not and was never a customer of Foris DAX MT Ltd. Instead, the Complainant is serviced by Foris DAX Inc. (the ‘**US Entity**’), a sister company of the Service Provider, incorporated in the USA, which offers the Wallet services to Canadian residents on a cross border basis.”<sup>10</sup>*

In view of the above, the Service Provider maintained that the Complaint should be addressed to the relevant authorities in the Complainant's home country or that of the US Entity and not to the Office of the Arbiter for Financial Services in Malta (OAFS) who only has jurisdiction over complaints directed against a service provider licensed, or otherwise authorised, by the Malta Financial Services Authority (MFSA).

Consequently, the Service Provider raised a preliminary plea on the competence of the Arbiter to hear this case as they maintain that the Complainant was not an eligible customer.

### **The Hearing**

A hearing was held on 19 June 2023. The Arbiter referred to the preliminary plea raised by the Service Provider claiming that the Complainant is not an ‘*eligible customer*’ as defined by Chapter 555 of the Laws of Malta and, hence, the Arbiter has no competence to hear this Complaint.

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<sup>9</sup> P. 132 -133

<sup>10</sup> P. 132

The Arbiter asked the parties to make written submissions on this preliminary plea which needs to be addressed before proceeding with the merits of the case.

The Complainant replied on 18 July 2023, basically, merely attaching screen shots of the transactions that were already attached to the original Complaint.<sup>11</sup>

The Service Provider's reply was filed on 11 August 2023, stating that:

*"the Complainant has failed to establish that he is an eligible customer of the Respondent or that he has any contractual relationship with the Respondent (and) by way of a preliminary plea, the Respondent submits that the Complainant is not, and was never a customer of the Respondent nor did the Complainant have a contractual relationship with the Respondent. As such, the Complainant has no standing before the OAFS in respect of their current complaint."*<sup>12</sup>

They explained further that:

*"The name 'Crypto.com' is not a legal entity and is merely the brand or trade name for several affiliated legal entities, including but not limited to, Foris DAX MT Limited (Respondent) and Foris DAX, Inc. These entities are all separate legal entities, operating in different jurisdictions and serving different customers based on their registered jurisdiction. Foris DAX, Inc. services customers who are residents of the United States and Canada. Each entity has its own unique set of Terms and Conditions to which the users must accept and agree to. The relevant Terms and Conditions are readily available in the Crypto.com App under the 'Settings' menu.*

*The Respondent would like to highlight that the Complainant resides in Vancouver, Canada. This information was provided by the Complainant on page one (001) of the Complaint.*

*Lastly, the Respondent stresses that if the Complainant were to open the Crypto.com App on his mobile device and access the Terms and Conditions under*

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<sup>11</sup> P. 135 - 169

<sup>12</sup> P. 171

*the 'Settings' menu, the Terms and Conditions would clearly name Foris DAX, Inc. as the service provider of the Complainant's Crypto.com App account.*"<sup>13</sup>

### **Having heard the parties**

### **Having seen all the documents**

### **Considers**

In accordance with Article 22(2) of Chapter 555 of the Laws of Malta, which regulates the Arbiter's procedure:

*"(2) Upon receipt of a complaint, the Arbiter shall determine whether the complaint falls within his competence."*

The Arbiter's competence is limited by law and the Arbiter can only deal with complaints against a "*financial service provider*":

*"which is or has been licensed or otherwise authorized by the Malta Financial Services Authority in terms of the Malta Financial Services Authority Act or any other financial services law ...".<sup>14</sup>*

The Service Provider raised the plea that the Complainant was never onboarded "*and in fact has never been a customer of*" Foris DAX MT Limited.

In the submissions filed on 18 July 2023, the Complainant failed to explain what the Arbiter had demanded in the hearing of 19 June 2023, i.e., to explain his contention that he was an eligible customer of the Service Provider.

It is further noted that in the Service provider's reply of 16 March 2023. they state that:

*"(The Complainant) is not and was never a customer of Foris DAX MT Ltd. Instead, the Complainant is serviced by Foris DAX, Inc. (the '**US Entity**'), a sister company of the Service Provider, incorporated in the USA, which offers the Wallet services to Canadian residents on a cross border basis.*"<sup>15</sup>

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<sup>13</sup> *Ibid.*

<sup>14</sup> Art. 2 of Chapter 555

<sup>15</sup> P. 132

The Complainant has not in any way argued against the Service Provider's claim that Foris DAX, Inc. is a US entity which is also not under the auspices of the OAFS or the Maltese regulator.

Nor has the Complainant, who is a user based in Canada (and, in fact, the transactions were conducted in CAD), denied or brought any evidence to deny that his transactions were conducted through US Entity and, as such, he has never been onboarded or serviced by the Service Provider who is today part of these proceedings.

### ***The Arbiter's Jurisdiction***

Chapter 555 of the Laws of Malta (the 'Act') regulates the procedure before the Arbiter for Financial Services.

The Act "*set up the Office of the Arbiter for Financial Services with power to mediate, investigate, and adjudicate complaints filed by a **customer** against a **financial services provider***".

Article 19(1) further stipulates that:

*"It shall be the primary function of the Arbiter to deal with complaints filed by **eligible customers** through the means of mediation in accordance with article 24, and where necessary, by investigation and adjudication."*

Therefore, the Arbiter has to examine whether the Complainant was an **eligible customer** of the **financial service provider**.

**"Eligible customer"** is defined as follows:<sup>16</sup>

*"a customer who is a consumer of a financial services provider, or to whom the financial services provider has offered to provide a financial service, or who has sought the provision of a financial service from a financial services provider ..."*

Then, **financial services provider** is described as follows:<sup>17</sup>

*"'financial services provider' means a provider of financial services **which is or has been licensed or otherwise authorized by the Malta Financial Services***

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<sup>16</sup> Article 2, definitions

<sup>17</sup> *Ibid.*



***Authority<sup>18</sup> in terms of the Malta Financial Services Authority Act or any other financial services law***”.

As already mentioned above in this decision, the service and transactions subject to this Complaint was not provided by the Service Provider but rendered by a company that has no licence or other authority from the MFSA.

### **Decision**

**The Arbiter sympathises with the Complainant who is an innocent victim of a scam. However, for the reasons mentioned, the Arbiter does not have the jurisdiction to deal with the merits of the case.**

**This decision is without prejudice to any action which the Complainant may be entitled to file in another jurisdiction.**

**As the case has been decided on a procedural issue, each party is to pay its own costs of these proceedings.**

**ALFRED MIFSUD**

**Arbiter for Financial Services**

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<sup>18</sup> Emphasis added by the Arbiter