

Before the Arbiter for Financial Services

Case ASF 025/2023

KW (The Complainant)

vs

Foris DAX MT Limited (C 88392)

(The Service Provider/Foris DAX)

Sitting of 7 September 2023

The Arbiter,

Having seen **the Complaint** dated 27 February 2023¹ relating to the Service Provider's alleged failure to prevent, stop or reverse the payment in crypto assets made by the Complainant from his account held with *Crypto.com* to a third party who was allegedly a fraudster.

The Complainant admitted that:

'I was naïve enough to believe that the trading platform where I was sending the money was legit and trustworthy, but it turned out to be a scam'.²

He further admitted that:

'I have been manipulated, socially engineered and coerced to engage these fraudulent criminals'.³

¹ Page (P.) 1 - 95

² P. 2

³ P. 29

The payment allegedly consisted of crypto assets 77.3079 Ethereum (ETH) which, according to the reply of the Service Provider, had a value of €122,809 as of 15 March 2023.⁴

The Complaint

The Complainant explained that on, or about, 11 May 2022, he fell victim to a multi-layered scam operation orchestrated by an entity referred to as '**Top Targets**'. He explained that ETH 77.3079 were 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 22 July 2022⁵ with the Service Provider in which he sought full refund of his loss from the Service Provider as he maintains that they are responsible for his loss, *inter alia*, for reasons that the Service Provider:

1. Made his infrastructure available to fraudsters
2. Failed to prevent the illicit transfer 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 transfer 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.

⁴ P. 101

⁵ P. 6 - 16

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 2.⁶

The Complainant sent another letter dated 09 December 2022,⁷ replying to the Service Provider's rebuttal of 26 July 2022⁸ 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 several concrete objections:

- 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 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 given the 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.***

⁶ EU 2015/2366 that entered into force 12.01.2016

⁷ P. 57 - 62

⁸ P. 56

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.⁹

The Complaint was filed by Complainant with the Office of the Arbiter for Financial Services (OAFS) on 27 February 2023, basically repeating the same issues made in the original complaint to the Service Provider and attaching a letter dated 05 January 2023¹⁰ that Complainant had sent earlier to OAFS which had concluded:

‘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

⁹ P. 62

¹⁰ P. 29 - 34

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 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.

I look forward to your input and would gladly cooperate to reach a fair and reasonable outcome.

*Thank you.*¹¹

Service Provider's reply

The Service Provider's official reply was received on 15 March 2023¹² 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 AU Pty. Ltd. (the Australian entity), a sister company ... incorporated in Australia.'*

In view of the above, the Service Provider maintains that the Complaint should be addressed to the relevant authorities in the Complainant's home country

¹¹ P. 34

¹² P. 101 - 102

against the Australian Entity and not to the Office of the Arbiter for Financial Services in Malta (OAFS) which 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 in terms of Chapter 555 of the Laws of Malta. They maintain that they never provided the Complainant with Crypto.com App services and that the transactions reported within the Complaint submitted before the OAFS would have been executed by Complainant while he was a customer of the Australian Entity.

Consequently, they cannot give the information sought in the Complaint. They maintain that the Complainant is not an eligible customer in respect of hearings before the OAFS.

The Hearing

A hearing was held on 20 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.

The Arbiter asked the Complainant to provide any proof that he was an eligible customer of the Service Provider, Foris DAX MT Limited, and that these had to be submitted by end of July 2023.

The Complainant did not submit any reply or evidence as requested in spite of an e-mail reminder of 01 August 2023 sent to him by the OAFS.

The Service Provider replied on 31 August 2023, re-stating their case that the Complainant never had any account relationship and specifically stating:

'The Respondent respectfully submits 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.

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.

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 AU Pty Ltd. These entities are all separate legal entities, operating in different jurisdictions and serving different customers based on their registered jurisdiction. Foris DAX AU Pty Ltd services customers who are residents of Australia. 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 New South Wales, Australia. This information was provided by the Complainant on page (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 the “Settings” menu, the Terms and Conditions would clearly name Foris DAX AU Pty Ltd as the service provider of the Complainant’s Crypto.com App account.

To summarize, the Complainant is not an “eligible customer” and accordingly, the Respondent is non-suited to answer to the claim of the Complainant due to the lack of a contractual or service provider – customer relationship with the Respondent.

For the above-mentioned reasons, the Company respectfully requests that the Complaint be rejected in its entirety, with costs ordered against the Complainant’.¹³

Having heard the parties

Having seen all the documents

Considers

¹³ P. 107

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 authorised by the Malta Financial Services Authority in terms of the Malta Financial Services Authority Act or any other financial services law ...'¹⁴

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

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:¹⁵

¹⁴ Art. 2 of Chapter 555

¹⁵ Article 2, definitions

‘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:¹⁶

*“‘financial services provider” means a provider of financial services **which is or has been licensed or otherwise authorized by the Malta Financial Services Authority**¹⁷ 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 were 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 appears to be an innocent victim of a scam. However, for the reason mentioned, the Arbiter does not have the jurisdiction to deal with the merits of the case, and is hereby dismissing it.

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

¹⁶ *Ibid.*

¹⁷ Emphasis added by the Arbiter