

Before the Arbiter for Financial Services

Case ASF 051/2023

DC ('the Complainant')

vs

Foris DAX MT Limited (C 88392)

('Foris DAX' or 'the Service Provider')

Sitting of the 10 November 2023

The Arbiter,

Having seen **the Complaint** dated 21 April 2023¹ relating to the Service Provider's alleged failure to prevent, stop or reverse the payment in crypto with a value equivalent to CHF 11,696.12^{2 3} 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 commencing on 03 March 2022, he fell victim to a multi-layered scam operation orchestrated by an entity referred to as '**glprimetrade.com**'. He explained that the equivalent of CHF 11,696.12 or BTC 0.3263693 were transferred from his wallet, utilising the services of *Crypto.com*, to this scammer.

The Complainant filed an elaborate multi-page (12 pages plus attachments) complaint letter dated 30 November 2022⁴ with the Service Provider in which he 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 P. 1 - 69

² CHF refers to Swiss Francs.

³ P.2: or Bitcoin (BTC) 0.3263693

⁴ P. 7 -18 and attachments

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.

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 2.⁵

The Complainant sent another letter dated 19 December 2022⁶, replying to the Service Provider's rebuttal of 02 December 2022⁷ 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:

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*

⁵ EU 2015/2366 that entered into force 12. 01.2016

⁶ P. 25 - 31

⁷ P. 32

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.”⁸

The Complaint filed by Complainant with the Office of the Arbitrator for Financial Services (OAFS) basically repeats the same issues stating:

*“I was not warned by Crypto.com about potential fraud and therefore the mentioned crypto currency transfers were made under false pretences of investments. My point is that crypto.com consciously or unconsciously became a participant in the crypto currency money laundering process and is responsible for the loss of my funds”.*⁹

⁸ P. 39 -40

⁹ P. 2

As compensation, the Complainant seeks reimbursement of the funds he lost, CHF 11,696.12.

Service Provider's reply

The Service Provider's official reply was received on 11 May 2023¹⁰ stating that:

Foris DAX MT Limited ('Foris DAX' or 'the Service Provider') offers a crypto custodial wallet ('the Wallet') and the purchase and sale of digital assets on own account, through the *Crypto.com* App. The Wallet is only accessible through the App and the latter is only accessible via a mobile device.

The Complainant became a customer of Foris DAX through the *Crypto.com* App on 10 May 2021, and the alleged fraudulent transactions subject of the Complaint, happened between 03 and 08 March 2022.

The following timeline was provided by the Service Provider:

- a) On 02 March 2022, Complainant bank-transferred €1,000 to his wallet and on the same day converted these to Bitcoin (BTC) which were then transferred on the next day to an unknown external wallet.
- b) The operation was repeated on 04 March 2022 when Complainant transferred a further €1,000, converted same into BTC and, again, transferred them out to an unknown external wallet on the same day.
- c) On 08 March 2022, Complainant transferred €10,000, converted same into BTC and, again, transferred them out to an unknown external wallet on the same day.

In summary, Complainant transferred €12,000 to his *Crypto.com* account, converted same to BTC and transferred 0.3245693BTC to the unknown external wallet. The current value of these BTC is around €10,400 but BTC price is very volatile and changes rapidly.

The Service Provider submitted that:

'While we sympathise with the Complainant and recognize that he may have been misled or induced into transferring funds to an alleged fraudster, it is important

¹⁰ P. 75 - 78

to note that these transfers were made solely at the Complainant's request. We must also emphasize that Crypto.com cannot revoke any virtual asset withdrawals because blockchain transactions are fast and immutable.

While this is an unpleasant scenario, the Company cannot be held liable for the Complainant's conduct, which resulted in him moving his virtual asset holdings to a third party.

Furthermore, the account security feature two-factor authentication (2FA) for Mr DC's account was active at the material time.

As outlined in the Foris DAX MT Limited Terms of Use, which the Complainant has agreed to upon registering an account with Crypto.com, he is solely responsible for the security and authenticity of all instructions submitted through the Crypto.com app, and as such, the Company cannot accept the liability for the veracity of any third party or for the instructions received from the Complainant themselves.

Please see the relevant section of the Terms of Use accepted by the Complainant for your reference:

“QUOTE

7. TOP-UPS TO DIGITAL ASSET WALLET AND DIGITAL ASSET TRANSFERS

7.2 Digital Asset Transfers

...

(b) Crypto.com processes all Digital Asset Transfers according to the Instructions received from you and does not guarantee the identity of any recipient. You should verify all transaction information prior to submitting Instructions for a Digital Asset Transfer to Crypto.com as the Digital Asset Transfer may not be cancelled or reversed once processed by Crypto.com unless Crypto.com decides at its sole discretion that the transaction should be cancelled or reversed and is technically capable of such cancellation or reversal. You acknowledge that you are responsible for ensuring the accuracy of any Instructions submitted to Crypto.com and that any errors may result in the irreversible loss of your Digital Asset.

...

UNQUOTE”.

In summary, it seems conceivable that the Complainant has been the victim of an alleged scam. While we fully empathize with Mr DC in this regard, it cannot be overlooked that he had willingly, according to his statements and to the information available on our platform, transferred his BTC virtual asset holdings from his Crypto.com Wallet to external wallet addresses which he had no access to.”¹¹.

The hearing process

The first hearing was scheduled for 04 September 2023 where the Complainant submitted that:

‘I say that it was a couple of years ago. I met a guy, I think it was on Instagram, and he wrote to me and said that he was a trader. He told me that he could trade for me with my money and that I could expect to have large amounts of money.

I was a little bit sceptic because it was not realistic for me to hear that he would give me 50%, after some weeks or a couple of days. So, I tried; I said that I would not put too much money in it, and he said that I could put how much I wanted and then, I will see.

I put in a small amount of money, maybe CHF 1,000 (equivalent to a €1,000) and then it began exploding. He wanted the money in cryptos, so I have to send from my bank to Crypto.com; I made those cryptos and I made this transfer to him. It was great; the numbers were really exploding, and I put in another CHF 1,000, I think, and then, I was confident enough to put in CHF 10,000.

If I remember well, it was a total of round about CHF 12,000. Then, I was told that if I wanted to go on, I have this challenge. They told me that if I accept this challenge, I could gain (I don’t know) 2 or 4 Bitcoins. I said, ‘OK”, and I accepted the challenge and then, I realised it was a scam after that. Now, after two days I had to pay 1 or 2 Bitcoins or else, another person had to put this Bitcoin. When I did not do this, the money in the account was frozen. And I could do nothing.

¹¹ P. 79 -80

He told me that the money was there, but it was frozen; and he told me to put in money or else to search for someone to put this money, and I realised that the money was gone.

The Arbiter is asking me why I think that the service provider, Foris DAX, is responsible for this loss and why I am claiming that they make up for this loss.

I say that I do not really know who Foris DAX really are. The story then goes that I searched to solve this issue. I saw this company, PAYBACK Company, to get my money back. So, I looked them up and went on Trust Pilot to gain confidence. I say that I have made a real, signed contract with this company and this company is now engaged to make the research for me. I have sent them all of my Instagram and WhatsApp correspondence with this guy, and they made all the work for me because I do not have the time and the knowledge. They made all this investigation.

To be honest, I don't think Foris Dax is responsible. We cannot trace this guy. And I thought maybe there was this possibility through Crypto.com. The emails between PAYBACK Company and Crypto.com said that they can do nothing. I say that it's not me who made these accusations directly, but it is in my name.

I have lost my money and I would like to get my money back from this guy.¹²

During cross examining the Complainant admitted he had given authenticated instructions to make the transfers out of his wallet to the unknown external wallet and that his instructions were in conformity with the two factor authentication.

Or the second hearing held on 16 October 2023, the Service Provider submitted in writing that the loss suffered was resulting from the Complainant's gross negligence and concluded that:

'On the balance of the foregoing, it is the Respondent's case that the Complainant should be responsible for any losses which occurred out of his own gross negligence. The Respondent appreciates the Complainant's honesty in admitting in his oral testimony that he does not believe the Respondent is responsible for his loss in relation to the Disputed Transactions. While the Complainant appears to

¹² P.87 - 88

*have fallen victim to a scam, there is no doubt that he himself had personally authorized the BTC withdrawals and the Respondent has merely carried out his express instructions. In summary, the Respondent would submit that the Fraudulent Transactions were carried out by the Complainant and it was the direct result of the gross negligence of the Complainant.'*¹³

During the hearings, no claim was made or evidence provided that the fraudsters or the fraudulent wallet had any connection with the Service Provider.

Final Submissions

The Complainant informed he had no further submissions to make.

The Service Provider repeated the claims of gross negligence on the part of the Complainant and that the Complainant himself had agreed during the hearings that they are not responsible for the claimed losses.¹⁴

Having heard the parties and seen all the documents and submissions made,

Further Considers:

The Merits of the Case

The Arbiter is considering the Complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555¹⁵ which stipulates that he should deal with complaints in '*an economical and expeditious manner*'.

The Service Provider

Foris DAX is licensed by the Malta Financial Services Authority ('MFSA') as a VFA Service Provider as per the MFSA's Financial Services Register.¹⁶ It holds a Class 3 VFSA licence granted, on 16 April 2021, by the MFSA pursuant to Article 15 of the Virtual Financial Assets Act, 2018 ('VFSA').

¹³ P. 92

¹⁴ P. 129

¹⁵ Art. 19(3)(d)

¹⁶ <https://www.mfsa.mt/financial-services-register/>

As per the unofficial extract of its licence posted on the MFSA's website, the Class 3 VFAA Licence authorises Foris DAX to provide the following VFA Services: (i) Execution of orders on behalf of other persons (ii) Dealing on own account and (iii) Custodian or Nominee Services to Experienced and Non-Experienced investors.¹⁷

As outlined in the disclaimer section of the *Crypto.com* website, Foris DAX is 'trading under the name 'Crypto.com' via the *Crypto.com* app'.¹⁸

The Application

The *Crypto.com* App is a 'mobile application software developed, owned and released by *Crypto.com* and available for download for Android or Apple iOS...'.¹⁹

It offers the account holder 'a crypto custodial wallet' and 'the purchase and sale of digital assets on own account'.²⁰

Observations & Conclusion

Summary of main aspects

The Complainant made a transfer of his digital assets (BTC) using the *Crypto.com* app. The said transfer was made to an external wallet address allegedly used by a fraudster. The transfer was in respect of a fake trading platform which the Complainant claimed was a scam.

In essence, the Complainant is seeking compensation from Foris DAX for the Service Provider's failure to prevent, stop or reverse the payment he made to the fraudster.

The Complainant *inter alia* claimed that the services provided by Foris DAX were not correct given that it transferred the funds but failed to protect him from fraud and allowed their infrastructure to be used for fraudulent purposes.

On its part, the Service Provider is, in essence, claiming that it has no responsibility for the payment done by the Complainant as he himself had to

¹⁷ <https://www.mfsa.mt/financial-services-register/>

¹⁸ <https://crypto.com/eea/about>

¹⁹ P. 212

²⁰ P. 157

verify the transaction information (as per the provisions of the *Crypto.com App Terms of Use*) and that it was not possible for Foris DAX to revoke or reverse the crypto withdrawal once the transaction was done on the blockchain.

During the hearings, however, the Complainant basically departed from his original complaint and stated:

*'To be honest I don't think Foris Dax is responsible. ... I say it's not me who made these accusations directly, but it is in my name.'*²¹

Furthermore, the fact that the Complainant did not cross-examine the Service Provider for the evidence submitted for the second hearing, shows signs of lack of conviction about his claims on the Service Provider.

Applicable Regulatory Framework

As outlined above, Foris DAX is the holder of a Class 3 VFAA licence granted by the Malta Financial Services Authority ('MFSA') under the Virtual Financial Assets Act, 2018 ('VFAA').

Apart from the relevant provisions under the VFAA, and the *Virtual Financial Assets Regulations, 2018 (L.N. 357 of 2018)* issued under the same act, Foris DAX is also subject to the rules outlined in the Virtual Financial Assets Rulebook ('the VFA Rulebook') issued by the MFSA. The said rulebook complements the VFAA by detailing *inter alia* ongoing obligations applicable for VFA Service Providers.

Chapter 3 of the VFA Rulebook specifically includes the rules applicable for VFA Service Providers which such providers must adhere to.

The Arbiter further notes that in the year 2020, the MFSA has also issued a '*harmonised baseline guidance on Technology Arrangements*'²² applicable to its licence holders (including under the Virtual Financial Assets) titled '*Guidance on Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements*' ('the Guidance').

²¹ p. 88

²² Guidance 1.1.2, Title 1, '*Scope and Application*' of the '*Guidance on Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements*'.

Further Considerations

Having considered the particular circumstances of the case including the submissions made and evidence provided, the Arbiter considers that there is no sufficient and adequate basis on which he can uphold the Complainant's request for the reimbursement by the Service Provider of the sum the Complainant himself transferred to an external wallet from his crypto account. At no stage has the Complainant raised any doubt as to his having authenticated the transactions personally.

This is particularly so when taking into consideration various factors, including, the nature of the complaint, activities involved, and the alleged shortfalls as further detailed below:

- The Complaint involves a series of payments made by the Complainant from his account held with Foris DAX to an allegedly fraudulent external trading platform causing a loss to the Complainant of CHF 11,696.12.

The Complainant expected the Service Provider to prevent or stop his transactions. He claimed that the Service Provider had an obligation to warn him of potential fraud.

The Arbiter considers that no adequate and sufficient evidence has however emerged to substantiate the claim that the Service Provider could have itself prevented or stopped the transaction. This is also given the nature of the transaction which involved crypto assets, the type of service provided, and other reasons as outlined below.

- The exchange of fiat currency into crypto and withdrawals from one's crypto account, including withdrawals to an external wallet is, in its own right part of the typical services provided to millions of users by operators in the crypto field such as the Service Provider.
- Furthermore, it has not been demonstrated nor emerged that the alleged fraudster to whom the payment was made by the Complainant was another *Crypto.com* App user and, thus, a client of the Service Provider in the first place. The transfer was rather indicated to have been done to an '*external wallet*' and hence the Service Provider had no information about the third

party to whom the Complainant was transferring his crypto. Furthermore, the Complainant himself had 'whitelisted' the address giving the all clear signal for the transfer to be executed. In fact, the Complainant himself dismissed that he had any suspicion or evidence that there was any link between the Service Provider and the external wallet address he himself provided.

- The Complainant seems to have only contacted the Service Provider late on 30 November 2022, nearly 9 months after the disputed transactions were already executed and finalised.²³

Once finalised, the crypto cannot be transferred or reversed as specified in the Service Provider's Terms and Conditions of Use (and as typically indicated on various other internet sites).²⁴

Once a transaction is complete and, accordingly, is not in a pending state, the crypto transaction cannot be cancelled or reversed by the Service Provider as provided for and warned in the Terms and Conditions of Foris DAX.

As indicated by the Service Provider, Clause 7.2(b) of its Terms and Conditions regarding the use of the Crypto.com App Services specifies that:

*'Crypto.com processes all Digital Asset Transfers according to the Instructions received from you and does not guarantee the identity of any recipient. You should verify all transaction information prior to submitting Instructions for a Digital Asset Transfer to Crypto.com as the Digital Asset Transfer may not be cancelled or reversed once processed ...'*²⁵

It is also noted that Clause 7.2(d) of the said Terms and Conditions which deals with '*Digital Asset Transfers*' further warns a customer about the following:²⁶

²³ Crypto transactions may be processed and completed within a few minutes or hours (as indicated on various websites following a general search on the internet).

²⁴ E.G. <https://www.chargebackgurus.com/blog/chargebacks-more-volatile-complex-than-cryptocurrency>

²⁵ P. 108

²⁶ P. 109

'We have no control over, or liability for, the delivery, quality, safety, legality or any other aspect of any goods or services that you may purchase or sell to or from a third party. We are not responsible for ensuring that a third-party buyer or seller you transact with will complete the transaction or is authorised to do so. If you experience a problem with any goods or services purchased from, or sold to, a third party using Digital Assets transferred from your Digital Asset Wallet, or if you have a dispute with such third party, you should resolve the dispute directly with that third party'.

On the basis of the facts presented during the case, the Arbiter could not conclude that the Service Provider failed to adhere to any specific obligation, or any specific regulatory requirements applicable to it, nor did he find any infringement of the Terms and Conditions applicable in respect to the service offered.

It is noted that in his formal complaint to the Service Provider, the Complainant only referred in a general manner to the regulations and standards applicable to Foris DAX *'as a licensed and regulated financial institution'*.²⁷ In the said formal complaint reference was also made to *'The Federal Trade Commission (FTC) Act, 15 U.S.C.'*,²⁸ enacted in the USA.

However, these are not considered applicable also given that the Service Provider is not *'a licensed and regulated financial institution'*. Foris DAX is only regulated and licensed as a VFA Service Provider based in Malta as outlined above.

The regulatory regime applicable to a VFA Service Provider is indeed a different one and does not necessarily reflect the requirements and consumer protection measures applicable to a financial institution falling under EU regulatory regimes.²⁹

Indeed, if the Complainant is seeking protection under PSD 2 obligations applicable to banks and payment institutions, he could seek advice on the

²⁷ P. 12; 14;16

²⁸ p. 9

²⁹ Financial institutions based in Malta are regulated under a separate and distinct regulatory framework, namely, that provided for under the Financial Institutions Act (Cap. 376) which also covers the Payment Services Directive (PSD2), (Directive EU 2015/2366 on payment services in the internal market).

appropriateness of seeking such protection from the Bank(s) that made the transfer to his Crypto account

It is clear that the Complainant has unfortunately fallen victim of a scam done by a third party and no evidence resulted that this third party in any way related to the Service Provider.

- **Ultimately, the Arbiter does not consider that in the case in question, there is any clear and satisfactory evidence that has been brought forward, and/or emerged, during the proceedings of the case which could adequately corroborate that the Service Provider failed in any of the applicable obligations, contractually and/or arising from the VFA regulatory regime applicable in respect of its business.**
- The Arbiter notes that the crypto business is a relatively new area with no *harmonised regulation* existing at the time of the disputed transactions. A regulatory framework is still yet to be implemented for the first time in this field within the EU.³⁰

Whilst this area of business remains unregulated in certain jurisdictions, other jurisdictions, like Malta, chose to regulate this field in the meantime and subject it to a home-grown national regulatory regime. While such regimes offer a certain amount of security to the consumer, since they are still relatively in their infancy, may not necessarily reflect the same standards and protections applicable in other sectors of the financial services industry which have long been regulated.

A person who chooses to venture into the area of crypto which, itself, is typically a highly speculative and risky market, needs to also be highly conscious of the potential lack of, or lesser, consumer protection measures applicable to this area of business, as compared to those found and expected

³⁰ Provisional agreement has been reached on the EU's Markets in Crypto-Assets Regulation (MiCA) only in June 2022 - <https://www.consilium.europa.eu/en/press/press-releases/2022/06/30/digital-finance-agreement-reached-on-european-crypto-assets-regulation-mica/>
MiCA is expected to enter into force in 2025 – <https://www.financemagnates.com/cryptocurrency/can-mica-take-europe-to-the-crypto-promised-land/>

in other established sectors of the financial services industry. EU regulatory bodies have issued various warnings to this effect over the past years.³¹

Decision

The Arbiter sympathises with the Complainant for the ordeal he suffered as a victim of a scam but, in the particular circumstances of this case, he cannot accept the Complainant's request for compensation for the reasons amply mentioned. The Arbiter is accordingly rejecting the Complaint.

However, since trading and investing in crypto assets is a new area in the financial services sector, the Arbiter would like to make a few observations.

Apart from the high risks and speculative nature commonly associated in trading with crypto, a consumer venturing in this area needs to be conscious and aware of the additional risks being taken, also, due to other factors including the risks associated with the infancy of the regulatory regime applicable, if at all, to this sector in general, which may not provide the same safeguards and protection normally expected and associated with other well-regulated sectors of the financial services sector.

Moreover, given the increasing and alarming volume of scams and fraud existing in the crypto field, retail consumers need to, more than ever, be vigilant and take appropriate and increased measures to safeguard themselves as much as possible to minimise and avoid the risk of falling victim for scams and fraud.

Retail unsophisticated investors would do well if, before parting with their money, they bear in mind the maxim that if an offer is too good to be true then, in all probability, it is not true.

The Arbiter cannot help but notice the lack of or inadequate knowledge that many retail consumers have with respect to the various risks applicable to this area and on how to better protect themselves, despite the rush by many to join and participate into this sector. In fact, the Arbiter notes that apart from the

³¹ https://www.eiopa.europa.eu/document-library/other-documents/crypto-assets-esas-remind-consumers-about-risks_en
https://www.esma.europa.eu/sites/default/files/library/esa_2022_15_joint_esas_warning_on_crypto-assets.pdf

fraud aspect of this loss, Complainant bought into BTC at quite peak prices, and fraud apart, he would still be nursing considerable investment losses.

The Arbiter considers that much more needs to be done on this front, apart from in other areas, to better protect consumers. Service providers operating in this field need to also do their part and actively work to improve their onboarding process by evaluating the much-needed knowledge of benefits and risks for consumers who opt to venture into this field.³²

Each party is to bear its own legal costs of these proceedings.

Alfred Mifsud
Arbiter for Financial Services

³² It would not be amiss if, at onboarding stage, retail customers are informed of typical fraud cases involving crypto asset transfers and warned against get rich quick schemes.