

Before the Arbiter for Financial Services

Case ASF 214/2023

UR (the ‘Complainant’)

vs

Foris Dax MT Limited

Reg. No. C 88392

(‘FDM’ or ‘Service Provider’)

Sitting of 21 June 2024

The Arbiter,

Having considered in its entirety, the Complaint filed on 22 December 2023, including the attachments filed by the complainant,¹

The Complaint

Where, in summary, the Complainant claimed FDM closed his account with them but are still holding various balances of fiat currency and crypto assets which he has not been able to withdraw for over 9 months (at the time of filing the complaint) without any clear explanation from the Service Provider.

By way of remedy the Complainant requested the immediate release of all his funds/crypto assets to the bank accounts/crypto wallets that he has indicated.

¹ Page (P.) 1 - 7 and attachments P. 8 – P. 77

The reply of the Service Provider

In their reply of 15 January 2024,² the Service Provider stated that the Complainant was their customer since 13 March 2021, and provided the following timeline of events:

'Timeline:

23 January 2023 – *As a result of the Company's routine account review process, full access of the Complainant's account was restricted.*

24 January 2023 – *Mr UR received an email from one of our internal responsible teams with a request for additional information as part of the afore-mentioned routine review that was being performed on his account.*

25 April 2023 – *Following a thorough review of the account, the Company decided to suspend the offering of its services to the Complainant via the Crypto.com App. A representative of the Company contacted Mr UR notifying him of our intention to close his account and further asked Mr UR for information to help us facilitate a refund of the available balance. Accounts are only deemed closed once the refund of the account's balances have been made. Please find a transcript of our email here below:*

QUOTE

We recently performed a review of your account and found that it does not meet our requirements for user conduct, as outlined in our Terms and Conditions.

After careful consideration, we regret to inform you that we can no longer provide you with our services, and will move forward with closing your account.

To be able to complete the closure, please provide the following details:

- 1. Please provide us with external addresses which you want to withdraw your available cryptocurrency assets to, along with a preferred network.*
- 2. Please confirm whether it is a private wallet or custodian wallet, along with the ownership of the wallet.*

² P. 83 – P. 87

Please accept our apologies for any inconvenience caused by this, as we will revert with feedback shortly.

(ref: 2023-04-25T15:04:00.1463252)

UNQUOTE

In spite of the above, and as outlined in the Foris DAX MT Limited Terms and Conditions, the Company reserves the right to terminate, suspend, or limit the use of the Crypto.com App Services at its sole discretion. This is in accordance with the following parts of the Terms of Use accepted by the Complainant and quoted below:

QUOTE

2. THE SERVICES

2.2 Subject to Applicable Law, we reserve the right and without liability to you to:

- (a) update, change, remove, cancel, suspend, disable or restrict access to or discontinue the Crypto.com App Services or change any features, component or content thereof, or to delist from the Crypto.com App Services or otherwise cease to support any Digital Asset;*
- (b) decline, suspend, cancel, reverse, void or partially execute any Fiat to DA Conversion, Digital Asset Conversion or Digital Asset Transfer Instruction; or*
- (c) reverse, cancel, clawback, change any terms or refuse to honour any reward, bonus or pay-out for any incentive programmes regardless of your entitlement, including but not limited to any reason specified in Clause 15.1(a) to (g) below.*

2.3 Subject to Applicable Law, we reserve the right to suspend, restrict or terminate your access to any or all of our Services and to deactivate your account, including without limitation;

- (a) Where it is our reasonable opinion that we are required to do so by Applicable Law or any court or other adjudicating authority to which we are subject in any jurisdiction;*

- (b) upon reasonable suspicion that you may be in breach of these Terms or are otherwise trying to circumvent these Terms such as by opening multiple accounts or abusing any of our incentive schemes;*
- (c) upon reasonable suspicion that a transaction is fraudulent or erroneous;*
- (d) upon reasonable suspicion that your account has been compromised or the Services are being used in a fraudulent or unauthorised manner;*
- (e) upon reasonable suspicion of money laundering, terrorist financing, fraud or any other financial crime; or*
- (f) upon reasonable suspicion that you are conducting any fraudulent or illegal activities including but not limited to any Ponzi scheme, pyramid scheme, phishing or dark-net transactions; or*
- (g) where any of your Crypto.com wallets or you are subject to pending litigation, investigation or government proceedings.*

...

4.ONBOARDING

...

4.1 By signing up to use the Crypto.com App Services, you represent and warrant that:

- (a) you are at least eighteen (18) years of age, or the minimum age required in your jurisdiction of residence to have the necessary legal capacity, right, power and authority to accept these Terms;*
- (b) you have the full right, power and authority to agree to these Terms;*
- (c) you are not a resident or a Tax resident of, and do not otherwise have any relevant connection with, any jurisdiction which Crypto.com has notified as being subject to prohibitions or restrictions on accessing or using the Crypto.com App Services;*

(d) you are not a resident or Tax resident of, and do not otherwise have any relevant connection with, any jurisdiction in which entry into or performing your obligations under these Terms or the delivery, holding, use or exchange of Digital Assets is unlawful or restricted in any way or requires licensing, registration or approval of any kind.

(e) you are the authorised user of your Enabled Device, and your Enabled Device is not jailbroken, meaning that you have not, nor are you aware of anyone having, used an exploit to remove manufacturer or carrier restrictions from the relevant device;

(f) you are not currently registered as a user of the Crypto.com App Services;

(g) you are not impersonating any other person, operating under an alias or otherwise concealing your identity;

(h) you are not located in, under the control of, or a national or resident of (i) any international sanctioned countries, or (ii) any country to which the United States has embargoed goods or services; and (iii) are not identified as a 'Specially Designated National' by the Office of Foreign Assets Control of the U.S. Department of the Treasury;

(i) you are not placed on the U.S. Department of Commerce, Bureau of Industry and Security's Denied Persons List;

(j) you will not use our Services if any Applicable Laws in your country prohibit you from doing so in accordance with these Terms;

(k) you will use our Services solely for your own personal use only and not for any commercial or business purposes;

(l) you are the sole ultimate beneficial owner of your account and not acting on behalf of or representing any other natural person, legal person or legal entity;

(m) you are the beneficial owner of (or if you are acting as a trustee, the legal owner) of any Digital Asset or fiat currency subject to these Terms and forming the subject matter of the Services;

and

(n) you are compliant with all Applicable Law requirements to which you are subject, including without limitation, all tax laws and regulations, exchange control requirements and registration requirements.

...

15. LIMITATION OF SERVICES/TERMINATION/ACCOUNT CLOSURE

15.1 *Subject to Applicable Law, Crypto.com may at any time and without liability to you, terminate, suspend, or limit your use of the Crypto.com App Services (including but not limited to freezing the Digital Assets in your account or freezing or closing your Digital Asset Wallet, refusing to process any transaction, or wholly or partially reversing, cancelling or voiding any Transactions that have been effected) for any reason, including (but not limited to): (a) in the event of any breach by you of these Terms and all other applicable terms; (b) for the purposes of complying with Applicable Laws; (c) where Crypto.com suspects that a transaction effected by you is potentially connected to any unlawful activities (including but not limited to money laundering, terrorist financing and fraudulent activities); (d) to remedy the effects of any defect in or compromise to any information system upon which Crypto.com relies on; (e) as may be informed by its internal monitoring policy and the profile of spending reasonably anticipated for the type of consumer group you belong to; (f) in Crypto.com's opinion that an order or transaction has been executed based on an aberrant value; or (g) in Crypto's opinion, you are intentionally abusing the Crypto.com Services and products, or engaging in actions to defame, abuse, harass, stalk, threaten or otherwise violate any of the rights of Crypto.com and/or its employees.*

UNQUOTE

At the time, Mr UR held the following balances across different services offered by the Crypto.com Group; via the Crypto.com App (please note that the Complainant still currently holds the balances outlined below in his account):

- *0.168225910620348791 Ethereum (ETH) (approximately 406.92 EUR based on average market prices as of 11 January 2024 12:50 CET).*
- *19503.84507626 Cronos (CRO) (approximately 1,675.86 EUR based on average market prices as of 11 January 2024 12:50 (CET)).*
- *0.02 EUR within his Fiat wallet, one of the wallets in the Crypto.com App which holds fiat funds topped-up through bank transfer.*
- *18,174.55 EUR within his Crypto.com Visa card. The Crypto.com Visa card is a prepaid card issued by UAB Payrnet, a licensed Visa Card Issuer and EMI, integrated within the Crypto.com App, but offered by another entity within the Crypto.com Group.*
- *291.36 GBP within his GBP currency wallet purse, available in the Crypto.com Visa card.*

5 May 2023 – *Mr UR provided the Company with details concerning his bank account and external cryptocurrency wallet.*³

They confirmed that various balances indicated in the timeline have not been refunded to the Complainant. They state that their decision has been taken in accordance with their legal and regulatory obligations and pursuant to, *inter alia*, Clauses 2.2., 2.3, 4.1 and 15.1 of the terms and conditions and in accordance with the applicable law.

Hearings

The first hearing held on 5 March 2024⁴ was dedicated to the case of the Complainant who basically repeated his claim to have his funds/assets for value of about €20,000 immediately released and sent to the bank/wallet details he has already provided. He accused the Service provider of blocking him unjustly without offering a proper explanation for their action even after he provided all the information they had sought.

In the second hearing held on 20 April 2024,⁵ the Service provider re-stated their case as was reported in their reply and stressed that they were acting in

³ P. 83 - P. 87

⁴ P. 88 - P.89

⁵ P. 153 – P. 155

compliance with their terms and conditions as well as the applicable law in reaching those decisions and being unable to give further information.

When the Complainant asked whether the funds could not be released because he had, knowingly or unknowingly, violated some legal laws of Malta, he was informed that it is a legal question which the Service Provider is not in a position to answer.

Consideration and analysis

The Arbiter, having heard the parties and seen all the documents and submissions made, proceeds to adjudicate the case as provided in Article 19(3)(b) of Chapter 555 of the Laws of Malta by reference to what, in his opinion, is fair, equitable and reasonable in the particular circumstances and substantive merits of the case.

From the evidence provided, and from the fact that FDM's behaviour complained about is very specific to the Complainant and has no general application to other clients of the Service Provider, it does not result that FDM are acting capriciously, unethically, or illegally in not complying with Complainant's request to release the funds/assets.

Decision

In the circumstances, the Arbiter is refuting the Complainant's request to order FDM to release his fiat currency funds and crypto assets. Each party is to bear its own costs related to this case.

The Service Provider is, however, ordered to keep Complainant informed, within the limits allowed by law, about the status of his request to release his funds/assets.

Alfred Mifsud
Arbiter for Financial Services

Information Note related to the Arbiter's decision

Right of Appeal

The Arbiter's Decision is legally binding on the parties, subject only to the right of an appeal regulated by article 27 of the Arbiter for Financial Services Act (Cap. 555) ('the Act') to the Court of Appeal (Inferior Jurisdiction), not later than twenty (20) days from the date of notification of the Decision or, in the event of a request for clarification or correction of the Decision requested in terms of article 26(4) of the Act, from the date of notification of such interpretation or clarification or correction as provided for under article 27(3) of the Act.

Any requests for clarification of the award or requests to correct any errors in computation or clerical or typographical or similar errors requested in terms of article 26(4) of the Act, are to be filed with the Arbiter, with a copy to the other party, within fifteen (15) days from notification of the Decision in terms of the said article.

In accordance with established practice, the Arbiter's Decision will be uploaded on the OAFS website on expiration of the period for appeal. Personal details of the Complainant(s) will be anonymised in terms of article 11(1)(f) of the Act.
