

Before the Arbiter for Financial Services

Case ASF 077/2024

MA

(‘the Complainant’)

vs

Foris DAX MT Limited

(C88392) (‘Foris DAX Malta’ or

‘the Service Provider’)

Sitting of 11 October 2024

The Arbiter,

Having seen the Complaint made against Foris DAX MT Limited (‘Foris DAX’ or ‘the Service Provider’) relating to its alleged failure to implement Strong Customer Authentication measures to verify the identity of users accessing its services, where it was claimed that this led to the loss of funds held in the Complainant’s wallet following the unauthorised access and transactions carried out on his wallet by a third party.

*The Complaint*¹

In his Complaint Form to the Office of the Arbiter for Financial Services (‘OAFS’), the Complainant submitted that he was a victim of a cybercrime perpetrated through *Crypto.com* whose misconduct allowed the hacker to steal his money.

He noted that the European headquarters of *Crypto.com* is located in Malta under *Foris DAX MT Limited*, a company incorporated in Malta with company registration number C88392 and trading under the name ‘*Crypto.com*’, with its

¹ Complaint Form on Page (P.) 1 - 6 with extensive supporting documentation on P. 7 - 155.

offices located at Level 7, Spinola Park, Triq Mikiel Ang Borg, St Julians SPK 1000, Malta.

The Complainant alleged that *Crypto.com* did not follow the European Union Recast Payment Services Directive ('PSD2') regarding strong customer authentication and did not appropriately check the identity of the hacker, letting him change passwords, phone numbers, reset the two-factor authentication, and ultimately steal his money.

The Complainant submitted that he sent several emails complaining about *Crypto.com's* misconduct but their reply was that it was the Complainant's responsibility to secure and protect his wallet account.

The Complainant contended that the Service Provider claims that his wallet showed no registered change of access credentials, including no change of registered email address or passcode, before or at the time of the reported transactions. He notes, however, that they do not mention that they allowed the hacker to register a new phone for two-factor authentication just with a simple email sent from the Complainant's email account, which was previously hacked, and without checking the hacker's identity. He submitted that this, therefore, is a violation of Strong Customer Authentication.

Remedy requested

The Complainant demanded a complete refund of the stolen money, amounting to EUR 6,394.99 plus interest, and possibly damages and lost profit.

Having considered, in its entirety, the Service Provider's reply, including attachments,²

where the Service Provider provided a summary of the events which preceded the Complainant's formal complaint and explained and submitted the following:

1. *Background*

- a. That Foris DAX MT Limited offers the following services: a crypto custodial wallet (the '*Wallet*') and the purchase and sale of digital assets through the *Wallet*. Services are offered through the

² P. 161 - 162, with attachments from P. 163 - 240.

Crypto.com App (the 'App'). The Wallet is only accessible through the App and the latter is only accessible via a mobile device.

- b. At the material time, the Complainant also utilized the services of the *Crypto.com* Exchange platform, which are provided by the legal entity *Foris DAX Limited* (formerly *CRO DAX Limited*), a Cayman Islands registered company. *Foris DAX Limited* offers a cryptocurrency exchange platform which is separate and different from the *Crypto.com* App.

Foris DAX Limited's ('Foris DAX Cayman') services are offered through the *Crypto.com Exchange* platform (the 'Exchange'), which is accessible through the following website: <https://crypto.com/exchange/> and the *Crypto.com Exchange* mobile application.

- c. The Complainant's e-mail address: XXXXXXXX@hotmail.com, became a customer of *Foris DAX MT Limited* through the *Crypto.com* App and was approved to use the Wallet on the 15th of August, 2021.
 - d. The Company noted that in his complaint, the Complainant outlined that his desired remedy was a reimbursement for incurred financial losses.
2. The Service Provider noted that while the Complainant is a *Crypto.com* App user, he has never performed any transactions via the App. It provided a screenshot of the Complainant's *Crypto.com* App account transaction overview as part of its submissions.³
 3. Foris DAX Malta believes that the transaction occurring on 24th January 2022 that the Complainant is requesting reimbursement for and reported within the file submitted before the OAFS (page 155 of the Complaint), was one that was executed via the *Crypto.com Exchange* platform. It submitted that this assumption is also supported by the fact that the Complainant has himself filed a copy of the *Crypto.com Exchange* Terms and Conditions ('Terms and Conditions') (Index E of the Complaint beginning at page 022).

³ P. 162

It noted that the Complainant has only filed a partial copy of the Terms and Conditions and, for completeness, it attached to its reply (as Annex 1) a full copy that was in effect at the material time.⁴ It noted that the Defined Terms clearly state that the *Crypto.com Exchange* service is offered by CRO DAX Limited [which is now named Foris DAX Limited in Cayman] (as per page 6 of the Terms and Conditions).

4. The Service Provider accordingly submitted that the Complainant is thus not a client of Foris DAX Malta for the purposes of this Complaint. It explained that Foris DAX Cayman is not an entity which is licensed by the Malta Financial Services Authority ('MFSA') and that, therefore, Foris DAX Cayman and its respective activities fall outside of the supervisory remit of the MFSA. It respectfully submitted that the OAFS accordingly does not have the competence to hear the matter in question.
5. Based on the information laid out above, Foris DAX Malta believes that the Complaint should be refused for lack of competence. As the disputed transaction was executed via the *Crypto.com Exchange* platform, it submitted that the Complainant is not an eligible customer in respect of hearings before the OAFS.

Preliminary

Competence of the Arbiter

The preliminary plea raised by Foris DAX Malta that the Arbiter has no competence to hear this Complaint was highlighted during the hearing of 15 July 2024.⁵

During the hearing, the Arbiter referred to the Service Provider's plea and, also, the additional submissions made by the Complainant as to why the Complainant felt the Arbiter is competent to hear the case.⁶ The Arbiter then proceeded to provide Foris Dax Malta time to present a written note explaining any additional submissions regarding the plea about his competency.

⁴ P. 163 - 240

⁵ P. 329 - 330

⁶ *Ibid.*

In its noted that in his note of submissions of 7 July 2024,⁷ the Complainant *inter alia* raised the following points, which are particularly relevant to the plea involving the Arbiter's competency:⁸

- (i) That the *Crypto.com Exchange* platform ('the Exchange') and the App are fully integrated. He explained that in order to access the Exchange on the web, there is an option to read a QR code from the App. It was further noted that one can transfer assets from the App to the Exchange and vice versa and one can also see the Exchange balance from the App.⁹
- (ii) That unauthorised transactions occurred on the Complainant's account on 24 January 2022. He explained that the hacker changed his phone number for two-factor authentication (2FA) using only an email request, connected from a new and completely different IP address, whitelisted a new external wallet and transferred all the funds to the new wallet, thus compromising his account.
- (iii) He noted that Foris DAX Malta considers that the Arbiter is not competent to handle the case since the transaction in question was allegedly conducted through the *Crypto.com Exchange* platform operated by Foris DAX Cayman.

He, however, rebutted the jurisdictional claim noting that the Service Provider's claim was misleading. The Complainant submitted that Foris DAX Malta was unable to demonstrate that the transaction in question was executed through the Exchange platform and that, in fact, no relevant documentation, including digital evidence, was provided in support of its arguments.

He further noted that he knows for sure that the hacker connected to *Crypto.com* through a mobile phone (the one which was whitelisted). The Complainant submitted that this made it more likely that the hacker used the App. He claimed that the interconnected nature of the entities, corporate structure, shared security protocols and the unified user

⁷ P. 242 - 247

⁸ P. 242 & Section IV of his submissions titled '*Competence of the Malta Financial Services Authority (MFSA) and OAFS*' - P. 244 - 246

⁹ P. 242

experience under the *Crypto.com* brand, moreover, justify the jurisdiction of the OAFS in Malta.

- (iv) The Complainant also explained in more detail his submissions with respect to the *'Interconnected Ownership and Security Protocols'*, the *'Unified Security Approach and Communication'*, the *'Terms and Conditions Agreements'*, the *'Account Protection Programme (APP)'*, the *'User Experience and Unified Platform'*, the *'Principal Place of Business'* and *'Consumer Protection'* as further described in his document of 7 July 2024.¹⁰

The Complainant particularly highlighted the following aspects in this regard:

- That Foris DAX Malta and Foris DAX Cayman *'and other associated entities are part of a broad corporate structure'* involving *Crypto.com* where ultimately there is a common controlling party and common co-founders/senior officials involved in the core management;¹¹
- That *'security and communication and protocols are standardized and shared across all entities within the Crypto.com group'* and that there is *'a unified approach to security measures, making no distinction between the App and the Exchange in terms of user protection and protocol enforcement'*;¹²
- That various provisions of the Terms and Conditions Agreements for the App and the Exchange *'reinforces again the idea of the integrated and cohesive nature of the Crypto.com Group's operations and security'*;¹³
- Emphasised again *'the integrated security measures within the Crypto.com ecosystem'* and that *'the shared branding, security features and user interfaces reinforce the notion of a singular, cohesive service platform'*;¹⁴

¹⁰ P. 244 - 246

¹¹ P. 244

¹² P. 245

¹³ P. 246

¹⁴ *Ibid.*

- That Foris DAX Malta served as *'the European headquarters for Crypto.com operations'* which he argued implied *'a significant operational and administrative connection'* to his activities;¹⁵
- That in terms of EU consumer protection regulations, he had a right to seek recourse in the jurisdiction where he received the service, arguing that as an EU citizen, he received the services of *Crypto.com* in the EU and was a customer of the Maltese entity and hence *'entitled to seek arbitration in Malta for disputes arising from his use of the Crypto.com services'*.¹⁶

The Complainant reiterated that Foris Dax Malta was *'unable to demonstrate that the transaction in question was executed through the Exchange platform'* and neither that *'no operations [where] carried out by the hacker on the App'*.¹⁷ He highlighted the *'operational scope'* of Foris DAX Malta and pointed out that it was *'impossible to separate the security approach and protocols of the different companies under the Crypto.com umbrella'*.¹⁸

On its part, Foris DAX Malta reiterated in its further submissions¹⁹ that the Complainant was not an *'eligible customer'* in terms of Chapter 555 of the Laws of Malta. It claimed that the Complainant made a number of *'inaccurate, unfounded and misleading claims'* in his note of 7 July 2024.²⁰ In essence, the Service Provider highlighted *inter alia*:

- That it was *'important to note that Crypto.com is a brand offering a variety of services through different services entities'*;²¹
- That separately to Foris DAX Malta, *'Crypto.com also offers a product by the name of the Crypto.com Exchange, available both as an App, (the 'Crypto.com Exchange App'), and on the website ... (the 'Crypto.com Exchange Website'), which are offered by Foris DAX Cayman'*;²²

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ P. 247

¹⁹ P. 332 - 333

²⁰ P. 332

²¹ *Ibid.*

²² *Ibid.*

- That although the Complainant held an account with Foris DAX Malta via the *Crypto.com App account* no transactions were ever performed through such account as evidenced by the screenshot of his *Crypto.com App transaction overview* which indicates no transactions;²³
- That it was evident that the Complainant maintained a *Crypto.com Exchange account* and that it is Foris DAX Malta's assumption that the disputed transaction occurred through such account. It further submitted that Foris DAX Malta is unable to provide transactions relating to the Exchange account as it did not provide such services to the Complainant;
- It contended that the Complainant failed to produce records of any transaction ever performed on his *Crypto.com App account* and to demonstrate that Foris DAX Malta carried out the transaction. It further submitted that Foris DAX Malta was at no point responsible for providing any services to the Complainant either;
- That the name '*Crypto.com*' is not a legal entity and is merely the brand or trade name for several affiliated legal entities. It noted that these entities are separate and operate in different jurisdictions providing different services, each with its own unique set of Terms & Conditions. It further submitted that the services of *Crypto.com Exchange App* and the *Crypto.com Exchange website* are accessed exclusively through their own separate applications and/or website.

Having considered the submissions made by both parties on the said preliminary plea regarding his competence, the Arbiter observes the following:

That as provided for under Article 19(1) of the Arbitration for Financial Services Act, Chapter 555 of the Laws of Malta ('the Act') relating to the functions and powers of the Arbiter, '*It shall be the primary function of the Arbiter to deal with complaints filed by eligible customers ...*'.

An '*eligible customer*' is in turn defined under Article 2 of the Act as follows:

"eligible customer" means a customer who is a consumer of a financial services provider, or to whom the financial services provider has offered to

²³ P. 162 & 332

provide a financial service, or who has sought the provision of a financial service from a financial services provider. It includes the lawful successor in title to the financial product which is the subject of the relevant complaint and also consumer associations’.

Under Article 2 of the Act, a ‘financial services provider’ is further defined as:

“financial services provider” means a provider of financial services which is, or has been licensed or otherwise authorized in terms of the Malta Financial Services Authority Act or in terms of any other financial services law, and is related to investment services, banking, financial institutions, credit cards, pensions, insurance, and any other service which in the opinion of the Arbiter constitutes a financial service, which is, or has been resident in Malta or is, or has been resident in another EU Member State or in another EEA Member State and which offers, or has offered its financial services in and, or from Malta ...’.

The Arbiter notes that it is amply clear and undisputed that whilst the Arbiter has jurisdiction to hear complaints about Foris DAX Malta, the Arbiter has no jurisdiction under the Act to consider a complaint against Foris DAX Cayman, given that the latter does not fall under the definition of a ‘financial services provider’ under the Act. This is given that Foris DAX Cayman was never licensed by the MFSA, nor resident in Malta, nor had it ever offered its services in or from Malta. Furthermore, although Foris DAX Cayman and Foris DAX Malta are affiliated entities, they are undisputably separate and distinct entities - with the former incorporated and licensed in Cayman and the latter incorporated and licensed in Malta.

In order to consider whether he has the competence to hear this Complaint, the Arbiter accordingly needs to determine whether the Complainant satisfies the definition of ‘eligible customer’ under the Act in respect of Foris DAX Malta for the complaint in question. The Arbiter needs to determine, in this regard, whether the Complainant can be deemed to be either (i) a consumer of Foris DAX Malta or (ii) a customer to whom Foris DAX Malta has offered to provide a financial service or (iii) the Complainant has sought the provision of a financial service from Foris DAX Malta.

Having weighed the relevant key determining matters on this case, the Arbiter determines that, in the particular circumstances, there is no sufficient basis on which he can reasonably and justifiably deem the Complainant to satisfy the definition of ‘eligible customer’ under the Act in respect of the dispute subject of this Complaint. This decision is also based when taking into consideration the following:

- a) *Particularities of the Complaint* – It is considered that responsibility for the alleged failures in the measures taken to avoid the claimed unauthorised access to/unauthorised transactions of the Complainant’s account cannot really be attributed to Foris DAX MT in this case – this is particularly so in the instance where no sufficient evidence has emerged that the disputed transaction occurred on the account, or involved financial services, offered by Foris DAX MT to the Complainant.

In the absence of evidence of any disputed transactions occurring on the Complainant’s account held with Foris DAX Malta,²⁴ the Arbiter will not speculate whether the disputed transactions occurred through the services offered by any related company of the Service Provider that is not licensed in Malta.

- b) *Access to account* – It is noted that whilst the Complainant claimed that it was ‘more likely that he [the hacker] used the App’ of Foris DAX Malta to gain access to his account and execute the unauthorised transaction,²⁵ however, the Service Provider, on its part, explained that Foris DAX Cayman was the entity which offered the ‘“Crypto.com Exchange”, available both as an APP (the “Crypto.com Exchange App”) and on the website www.crypto.com/exchange (the “Crypto.com Exchange Website”)’.²⁶ Both the distinct ‘Crypto.com App’ and ‘Crypto Exchange App’ were also mentioned in an Exhibit produced by the Complainant.²⁷

²⁴ Screenshot of the Complainant’s Crypto.com App account held with Foris DAX Malta refers (P. 162). It is noted that in his final submissions, the Service Provider again confirmed that ‘The Respondent further submits that if the Complainant were to check his Crypto.com App account history, he would find there no transactions have ever been performed in this said account’ (P. 333). It is also noted that the extract provided by the Complainant of the disputed transaction (on P. 155) does not demonstrate that these are transactions of Foris DAX Malta’s account.

²⁵ P. 244

²⁶ P. 332

²⁷ P. 250

The Arbiter notes that, first, it is unclear which mobile application the fraudster used to gain access and undertake the unauthorised transaction.

In any case, the *Crypto.com App Terms & Conditions* (both the version dated 11 December 2021 and 15 January 2024) dealing with the *Crypto.com App Services* offered by Foris DAX Malta included a proviso to distinguish between the services offered by different affiliated entities irrespective of the access. The said proviso stipulated that:

*'You may also access some services and products which are offered by Affiliates of Foris DAX MT Limited via the Crypto.com App, such services and products are governed by separate sets of terms and conditions'.*²⁸

- c) *Nature of services* – Whilst it has not satisfactorily emerged that Foris DAX MT's App was used to access the Exchange platform of Foris DAX Cayman, the Arbiter will, furthermore, not speculate about any inter-group arrangements that may exist for one group company to outsource any processes to another group company whilst remaining primarily responsible versus its clients.

In addition, and most importantly, the Arbiter considers that no sufficient comfort has ultimately emerged that the subject matter of the Complainant's dispute in this Complaint involves the VFA (virtual financial assets) services that Foris DAX MT is authorised by the MFSA to provide (in its function as a VFA Service Provider).²⁹ This is because the complaint is, in essence, not about a disputed transaction carried out by or on Foris DAX MT's own systems.

It is further noted that the *Crypto.com App Terms & Conditions* that was exhibited by the Complainant³⁰ and which deals with the *Crypto.com App Services* offered by Foris DAX Malta, includes a list of the specific services under the said *Crypto.com App*. The said services are not the subject of the complaint given that no transactions were indicated as having taken place under the *Crypto.com App* of Foris DAX Malta as considered in this decision.

²⁸ P. 311 & 337 – Emphasis added by the Arbiter

²⁹ Under the Virtual Financial Assets Act, Cap. 590 - <https://www.mfsa.mt/financial-services-register/>

³⁰ P. 308 – Exhibit 7

- d) *Claimed Loss* – The Arbiter notes that it has not been demonstrated nor emerged that the loss allegedly suffered by the Complainant (following the claimed unauthorised access and transaction) was on his account with Foris DAX MT. Given that the Complainant’s account with Foris DAX MT lists no transactions, it can reasonably be deduced that the disputed transaction has not occurred on the account offered by Foris DAX Malta. In the instance where the loss claimed by the Complainant ultimately involves an account which is not of Foris DAX Malta, then it is considered that the Service Provider is justified in its challenge of the validity of a complaint filed against it.

The Arbiter further considers that even in the hypothesis that the fraudster may have gained access to the *Crypto.com Exchange* from the App account of Foris DAX Malta, the material consequences (that is the loss complained about and in respect of which the Complainant is requesting compensation) has not resulted on the account held with Foris DAX Malta (given no transactions were undertaken on such account as submitted by the Service Provider). In such an instance, it would be Foris DAX Cayman, which would reasonably be answerable to the alleged failures of inadequate measures to prevent the fraudster from accessing and executing unauthorised transactions on its systems.

- e) *Other general aspects* – The Foris DAX entities mentioned are ultimately distinct legal entities based in different jurisdictions and subject to different conditions and legal frameworks. They cannot justifiably and reasonably be treated as one.

In the circumstances, the Arbiter decides that there is no sufficient basis on which he can consider that the Complainant truly satisfies the criteria of an eligible customer under the Act in respect of the dispute in question.

Whilst the Arbiter understands and sympathises with the Complainant’s unfortunate situation and, also, the lack of clarity that can arise to a retail client when common branding and application of harmonised user interface is broadly applied by a group of companies, the Arbiter, however, finds no legal basis which can adequately support the Complainant’s attempt to pick and choose against which company he decides to make a complaint just because he holds a relationship with both affiliated entities.

In light of the key determining aspects as considered above, the Arbiter accepts the preliminary plea raised by the Service Provider that the Arbiter has no competence to hear this Complaint under the Act.

Conclusion and Decision

The Arbiter is accordingly dismissing this case for the reasons amply explained.

Given that the case was dismissed on a preliminary plea, the Arbiter decides that each party is to bear its own costs of these proceedings.

The above decision is without prejudice to any right that the Complainant may have in terms of applicable law to file a complaint against other affiliated entities to Foris DAX MT Limited.

**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 Arbitrator'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.