

Before the Arbiter for Financial Services

Case ASF 190/2024

RH

(‘the Complainant’)

vs

Foris DAX MT Limited

(Reg. No. C 88392)

(‘Foris’ or ‘the Service Provider’)

Sitting of 30 May 2025

The Arbiter,

Having seen the Complaint made against Foris DAX MT Limited relating to its alleged failure to warn client that his transfer of USDT 41,592.10¹ to a fraudulent platform has caused him a financial loss for which he is seeking compensation of €41,000² being the fiat currency transfers effected to finance the acquisition of the crypto assets transferred to fraudsters.

The Complaint³

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 fraudster operating through trading platform NIXSE to steal his money.

He claims to have made 8 transfers totalling €40,426.55 from his bank accounts in France to his account with *Crypto.com* to invest as pressurised by NIXSE who

¹ Page (P.) 58

² P. 4

³ P. 1 - 7 with supporting documentation on P. 8 - 43

were promising substantial profits from his investments. These transfers were made between 24 August 2023 and 08 November 2023 in relatively small amounts with highest being €9,000 and smallest €2,500.

At one stage, he was informed by NIXSE that his investment had generated a substantial profit which started to dwindle as a result of his failure to make further payments, but still his account with NIXSE was showing a balance of €54,700.⁴

The fraudsters continued to make pressure on Complainant to make further payments but ultimately running out of resources the Complainant realised it was a scam and made a report to the relevant French Authorities.⁵

In his Complaint, he presented extensive documentation of contracts and correspondence exchanged with NIXSE explaining the investment. However, as the Arbiter has no competence against NIXSE, this documentation is quite irrelevant to this Complaint as Foris was not a party to such contracts, and had no access to such knowledge at the time when the transfers complained of were being executed.

He maintained that Service Provider should have detected the irregularity of the transactions on his account and, therefore, held them responsible for his loss.

Service Provider's Reply

Having considered in its entirety the Service Provider's reply,⁶ where the Service Provider provided a summary of the events which preceded the Complainant's formal Complaint and explained and submitted the following:

'Background

- *Foris DAX MT Limited (the "Company") 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 Crypto.com App (the "App"). The*

⁴ P. 9; 24 - 26 and attachments

⁵ *Ibid.*

⁶ P. 49 - 59 with attachments from P. 60 - 71

Wallet is only accessible through the App and the latter is only accessible via a mobile device.

- *Our Company additionally offers a single-purpose wallet (the “Fiat Wallet”), which allows customers to top up and withdraw fiat currencies from and to their personal bank account(s). This service is offered by the legal entity Foris MT Limited.*
- *Mr ... (the “Complainant”), e-mail address became a customer of Foris DAX MT Limited through the Crypto.com App and was approved to use the Wallet on 14 August 2023.*
- *The Company notes that in the submitted complaints file, (the Complainant’s) representative has outlined the desired remedy as: (i) reimbursement for incurred financial losses.’⁷*

The Service Provider then provided a timeline for the transactions of the Complainant’s account with them. These included 8 inward transfers of Euro fiat currency collectively amounting to €40,426.55 between 24 August 2023 and 08 November 2023. These funds were then converted to crypto-assets (USDT) and transferred to three external wallets on the instructions of the Complainant.

The Service Provider concluded that:

‘Based on our investigation, the Company has concluded that we are unable to honor the Complainant’s refund request based on the fact that the reported transfers were made by (the Complainant) himself.

While we sympathize with the Complainant and recognize that he may have been misled or induced into transferring funds to an alleged fraudster, it is important to note that these transfers were made solely at the Complainant’s request. We must also emphasize that the addresses the funds were transferred to, do not belong to the Company and, as such, any due diligence of the ownership of these addresses falls under the responsibilities of the provider of said wallets.

⁷ P. 49

Unfortunately, Crypto.com cannot revoke any virtual asset withdrawals because blockchain transactions are fast and immutable.

The Complainant is solely responsible for the security and authenticity of all instructions submitted through his Wallet as outlined in the Foris DAX MT Limited Terms of Use.

Please see the relevant section of the Terms of Use for your reference.

QUOTE

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. However, due to the nature of the external wallet and the fact that it is not hosted or operated by Foris DAX MT, we can neither confirm nor deny this.

Whilst we fully empathize with (the Complainant) in this regard, it cannot be overlooked that he had willingly, transferred his virtual asset holdings from his Crypto.com Wallet to an external wallet address which he nominated.

As outlined above in the Foris DAX MT Limited Terms of Use, the Complainant is solely responsible for the security and authenticity of all instructions

submitted through the Crypto.com App and, as such, the Company cannot accept liability for the veracity of any third party or for the instructions received from the Complainant themselves.’⁸

Hearings

During the hearings, the Complainant failed to make presence and was represented by his French counsel.

This raised objections from the Service Providers who, in the absence of possibility to cross-examine the evidence submitted by Complainant, claimed that such evidence should not be considered.

The Arbiter ruled that in the absence of Complainant making himself available for cross-examination, he is taking a clear position that the payments and transfers complained of were executed with the full authority of the Complainant and the Service Provider will only be asked to defend themselves from the claim that through their monitoring systems, they should have stopped the transfers to external wallets controlled by the fraudsters as there were clear signs of fraud.

Complainant’s lawyers assented to such decision whilst Service Provider wished to register the following statement:

‘I would like to have a general statement in the note verbal of all these cases with regard to the fact that as agreed, the evidence of the complainant was not given; it was given by his representative, and the cross-examination was very limited.

However, I do not want that to be an acceptance of all the other allegations being made by the complainant. So, I want to make it clear from the service provider’s side that the absence of the complainant’s testimony is not being taken as an acceptance of his allegations, but it is rather being dismissed and obviously it cannot be considered evidence because he is not available.

So, everything else is being dismissed because the only assumption and the only thing that Foris DAX has accepted is that there is the authorisation of the complainant and that has been accepted; but everything else is not being

⁸ P. 58 - 59

accepted, that is, whatever the complainant said for which he has not been called in to testify.⁹

It was established during the first hearing of 17 February 2025, that Complainant intends to open a complaint against his bank, *Revolut*, to hold them responsible for not withholding the transfers he was making to his *Crypto.com* account.¹⁰

The Complainant's representative explained:

'The credit agreement mentioned in the complaint is between (the Complainant) and Nixse.

It is being said that I mentioned that there were regular exchanges made between the complainant and this so-called financial advisor. Asked how these regular exchanges were made, whether by AnyDesk App installed on (the Complainant's) laptop or phone, I say that, no, there is no AnyDesk App installed on his phone. (The Complainant) made these transfers on his own initiative.

The Complainant used to talk to the fraudulent advisor on the phone and then, they downloaded the Crypto.com App. These fraudulent advisors would talk on the phone with (the Complainant), offer recommendations on investments and then, he would make the investments.

Asked whether a complaint was filed with Nixse since in the complaint there is a balance, and although Crypto.com cannot have access to the external wallet, from the information provided it seems that there is a balance of €54,700 (page 3 of the complaint), I say that the current balance that is showing is €54,700.

However, the amount invested by Mr Bourhis was €41,400 but there was actually a profit which but currently this profit is visible as fictitious, part of the scam, where sometimes they show fake profits to encourage further investments.

⁹ p. 79

¹⁰ p. 76

Asked whether we have opened up any procedures against Nixse, I say that (the Complainant) attempted several times to get back the amount but since the advisor is a fraudster, they are not returning the money so, yes, we have filed a complaint against Nixse. We filed a complaint with the Chamber of Criminal Law.’¹¹

During the second hearing of 01 April 2025, the Service Provider submitted:

‘Transaction monitoring was something that the service provider did carry out with respect to each and every one of the withdrawals.

I can also confirm that for each and every one of the withdrawals of all five cases, nothing was triggered at our internal end by our own transaction monitoring or that of our service providers, which we do rely on to indicate that none of the withdrawals were in ordinary or to wallet addresses which had been identified as those being associated to scams or other bad actions. So, it is a common pattern across all five hearings that the withdrawals occurred to wallet addresses which were not flagged by any transaction monitoring carried out by the service provider.

In this case, there were a series of transactions that occurred from the 25th of August to the 9th of November, totalling 41,592.10 of USDT; in respect of those transactions, the withdrawals went to three separate external wallets. None of these external wallets are operated by Crypto.com, for the avoidance of doubt. Regarding the withdrawals, I can confirm that none of the transactions were flagged by any transaction monitoring system to indicate that these transactions or withdrawals, were for any errant activity.’¹²

Complaint’s representative declined offer to cross-examine.

Final Submissions

In their final submissions the parties basically repeated what had already emerged in the Complaint, the Reply and the hearing proceedings.

¹¹ P. 76

¹² P. 78 - 79

Having heard the parties

Having seen all the documents

Considers

In failing to give proper evidence before the Arbiter and denying the Service Provider their right for a proper cross-examination of the case made in his Complaint, the Complainant has substantially prejudiced his case.

As the identity of the beneficial owners of the external wallets' recipients of the claimed fraudulent payments cannot be established, it was necessary to hear an emphatic negation from the Complainant that he himself was not a party to such wallets. Such emphatic negation was only forthcoming from the side of the Service Provider.

Applicable Regulatory Framework

Foris DAX was, at the time of the events leading to this Complaint, the holder of a Class 3 VFSA licence granted by the Malta Financial Services Authority ('MFSA') under the Virtual Financial Assets Act, 2018 ('VFSA').

Apart from the relevant provisions under the VFSA, and the *Virtual Financial Assets Regulations, 2018 (L.N. 357 of 2018)* issued under the same act, Foris DAX was also subject to the rules outlined in the Virtual Financial Assets Rulebook ('the VFA Rulebook') issued by the MFSA. The said rulebook complements the VFSA 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*'¹³ applicable to its licence holders (including under the Virtual Financial Assets) titled '*Guidance on*

¹³ Guidance 1.1.2, Title 1, '*Scope and Application*' of the '*Guidance on Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements*'.

Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements' ('the Guidance').

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 fund the crypto assets that were eventually transferred from his crypto account on his instructions to external wallets.

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 unknown external wallets.

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 also given the nature of the transactions 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.

- The Complainant seems to have only contacted the Service Provider on 07 February 2024, some 3 months after the last of the disputed transactions was already executed and finalised.¹⁴

Once finalised, the crypto cannot be cancelled or reversed as specified in the Service Provider's Terms and Conditions of Use (and as typically indicated on various other internet sites).¹⁵

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 ...'.*¹⁶

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.

In arriving at his decision, the Arbiter considered the following aspects:

¹⁴ 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).

¹⁵ E.G. <https://www.chargebackgurus.com/blog/chargebacks-more-volatile-complex-than-cryptocurrency>

¹⁶ p. 59

i. AML/CFT Framework

Further to the Prevention of Money Laundering Act (Cap. 373) and Prevention of Money Laundering and Funding of Terrorism Regulations ('PMLFTR'), the Financial Intelligence Analysis Unit (FIAU) issued Implementing Procedures including on the *'Application of Anti-Money Laundering and Countering the Funding of Terrorism Obligations to the Virtual Financial Assets Sector'*.¹⁷

These are *'sector-specific Implementing Procedures [which] complement the Implementing Procedures – Part I [issued by FIAU] and are to be read in conjunction therewith'*.¹⁸ Section 2.3 of these Implementing Procedures detail the monitoring and transaction records obligations of VFA licensed entities.

It is noted that the VFA Act, mainly imposes transaction monitoring obligations on the Service Provider for the proper execution of their duties for Anti-Money Laundering ('AML') and Combating of Financing of Terrorism ('CFT') obligations in terms of the local AML and CFT legislative framework.

Failures of the Service Provider in respect of AML/CFT are not in the remit of the OAFS and should be addressed to the FIAU. In the course of these proceedings, no such failure was indeed alleged. The Arbiter shall accordingly not consider compliance or otherwise with AML/CFT obligations in this case.

ii. MiCA and the Travel Rule

As to the identification of the recipient of the funds, it is noted that MiCA¹⁹ and Travel Rule²⁰ obligations which entered into force in 2025, and which give more protection to consumers by having more transparency of the owners of the recipient wallets were not applicable at the time of the events covered in this Complaint which largely happened in 2023.

¹⁷ https://fiaumalta.org/app/uploads/2020/09/20200918_IPsII_VFAs.pdf

¹⁸ Page 6 of the FIAU's Implementing Procedures on the *'Application of Anti-Money Laundering and Countering the Funding of Terrorism Obligations to the Virtual Financial Assets Sector'*

¹⁹ EU Directive 2023/1114 on markets in crypto assets <https://eur-lex.europa.eu/legal-content/EN/AUTO/?uri=celex:32023R1114>

²⁰ EU Directive 2023/1113 <https://eur-lex.europa.eu/legal-content/AUTO/?uri=CELEX:32023R1113&qid=1740401464257&rid=1> and EBA Guidelines on Travel Rule <https://www.eba.europa.eu/sites/default/files/2024-07/6de6e9b9-0ed9-49cd-985d-c0834b5b4356/Travel%20Rule%20Guidelines.pdf>

The Arbiter shall thus not consider the MiCA provisions and Travel Rule obligations for the purposes of this Complaint.

iii. Othis - Technical Note

A Technical Note (issued in 2025) with guidance on complaints related to pig butchering was recently published by the Arbiter. In respect of VFA licensees the Technical Note states as follows:

'Virtual Financial Assets Service Providers (VASPs)

VASPs should be aware that with the coming into force of Regulation (EU) 2023/1113 and the Travel Rule Guidelines²¹ their obligation to have reliable records on the owners of external (unhosted) wallets increases exponentially as from 30 December 2024.

Arguments that they have no means of knowing who are the owners of external wallets which have been whitelisted for payments by their client will lose their force.

VASPs have been long encouraged by the Office of the Arbiter (in decisions dating back from 2022),²² for the devise of enhanced mechanisms to mitigate the occurrence of customers falling victims to such scams.

Furthermore, in the Arbiter's decisions of recent months there is a recommendation that VASPs should enhance their on-boarding processes where retail customers are concerned warning them that custodial wallets may be used by scammers promoting get-rich-quick schemes as a route to empty the bank accounts of retail customers and disappear such funds in the complex web of blockchain anonymous transactions.²³

Compliance with such recommendations or lack thereof will be taken into consideration in future complaint adjudications.²⁴

²¹ Guidelines on information requirements in relation to transfers of funds and certain crypto-assets transfers under Regulation (EU) 2023/1113 - EBA/GL/2024/11 of 04/07/2024

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32023R1113>

<https://www.eba.europa.eu/publications-and-media/press-releases/eba-issues-travel-rule-guidance-tackle-money-laundering-and-terrorist-financing-transfers-funds-and>

²² Such as Case ASF 158/2021

²³ Such as Case ASF 069/2024

²⁴ Emphasis added by the Arbiter

The Arbiter will not apply the provisions of the Technical Notes retroactively.

Hence, for the avoidance of any doubt, the said Technical Note is not applicable to the case in question.

iv. Duty of Care and Fiduciary Obligations

It is noted that Article 27 of the VFA Act states:

'27. (1) Licence holders shall act honestly, fairly and professionally and shall comply with the requirements laid down in this Act and any regulations made and rules issued thereunder, as well as with other legal and regulatory requirements as may be applicable.

(2) A licence holder shall be subject to fiduciary obligations as established in the Civil Code (CAP 16) in so far as applicable.²⁵

Article 1124A (1)(a) of the Civil Code (Chapter 16 of the Laws of Malta), in turn further provides the following:

'1124A. (1) Fiduciary obligations arise in virtue of law, contract, quasi-contract, unilateral declarations including wills, trusts, assumption of office or behaviour whenever a person (the "fiduciary") –

(a) owes a duty to protect the interests of another person and it shall be presumed that such an obligation where a fiduciary acts in or occupies a position of trust is in favour of another person; ...'²⁶

It is further to be pointed out that one of the High Level Principles outlined in Section 2, Title 1 'General Scope and High Level Principles' Chapter 3, Virtual Financial Assets Rules for VFA Service Providers of the VFA Rulebook, that applied to the Service Provider at the time of the disputed transactions in 2022, provides that:

²⁵ Emphasis added by the Arbiter

²⁶ Emphasis added by the Arbiter

‘R3-1.2.1 VFA Service Providers shall act in an ethical manner taking into consideration the best interests of their clients and the integrity of Malta’s financial system.’

It is also noted that Legal Notice 357 of 2018, Virtual Financial Assets Regulations, 2018 issued under the VFA Act, furthermore, outlined various provisions relevant and applicable to the Service Provider at the time. Article 14 (1) and (7) of the said Regulations, in particular, which dealt with the *‘Functions and duties of the subject person’* provided the following:

‘14. (1) A subject person having the control of assets belonging to a client shall safeguard such assets and the interest of the client therein.

...

(7) The subject person shall make appropriate arrangements for the protection of clients' assets held under control and shall ensure that such assets are placed under adequate systems to safeguard such assets from damage, misappropriation or other loss and which permit the delivery of such assets only in accordance with the terms and conditions of the agreement entered into with the client.’

The Arbiter is of the view that for the general fiduciary obligations to apply in the context of the VFA ACT, there must be something which is truly out of the ordinary and which should really act in a conspicuous manner as an out of norm transaction which triggers the application of such general fiduciary duties.

No such out of norm event can be claimed during the short period of some 2/3 months when the fraudulent transfers were happening in relatively very small quantity values.

The Arbiter thus considers that the Service Provider did not breach, in terms of the provisions outlined in this decision, the duty of care and fiduciary obligations towards its customer, the Complainant, when considering the particular circumstances of this case.

Decision

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 is, 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. An EU regulatory framework was only recently implemented effective for the first time in this field in 2025.²⁷

Whilst this area of business had remained 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.

In fact, the Arbiter notes that in his Complaint, the Complainant refers to provisions of the PSD 2,²⁸ as translated into French legislation, which whilst applying to Banks are not applicable to VFA licensees.

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

²⁷ 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 entered into force in 2025 – <https://www.financemagnates.com/cryptocurrency/can-mica-take-europe-to-the-crypto-promised-land/>

²⁸ EU Directive 2015 - 2366

of business, as compared to those found and expected in other established sectors of the financial services industry. EU regulatory bodies have issued various warnings to this effect over the past years.²⁹

The Arbiter sympathises with the Complainant for the ordeal he may have 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.

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

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

²⁹ https://www.eiopa.europa.eu/document-library/othis-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

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.