

## **Before the Arbiter for Financial Services**

**Case ASF 127/2021**

**IG (The Complainant)**

**vs**

**Foris DAX MT Limited (C 88392)**

**(The Service Provider/Foris DAX)**

### **Sitting of the 18 August 2022**

**The Arbiter,**

**Having seen the complaint**<sup>1</sup> where, in summary, the Complainant submits that on the 15 August 2021, her Crypto account was compromised, the security settings bypassed, and the digital assets valued at 89417USD were transferred to an external Crypto Wallet. There was a total of 16 transactions.

The Complainant believes that her crypto account was targeted in that the person committing the theft of her crypto assets, accessed her email account connected to crypto.com account, had an email sent with a link to log into her account on the app, which logged her out on her phone, bypassed the security settings, and made the withdrawals. On the 16 August when she was able to reset her email password and accessed her Crypto.com account, she discovered that her balance was just 427USD.

She reported this fact to Crypto.com *vis-a-vis* their chat feature on their app. They suspended her account to secure it and requested information pertaining

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<sup>1</sup> P. 3 *et seq.*

to the incident and she complied. They then denied any responsibility and did not provide her any assistance or direction regarding the matter.

Later, the Service Provider informed her that after investigating the case they did not find any irregularity since there was no change of email or passcode used to access her account, which means that whoever accessed her account knew them both.

The Complainant further states that in summary, Crypto.com do not provide the services they promise and did not keep her account secure or protect her assets.

Moreover, Crypto.com authorized transactions that should not have been authorized and did not comply with their own Terms and Conditions.<sup>2</sup>

The Complainant is asking the Arbitrator to order the Service Provider to reverse all transactions detailed in the documentation, and refund her the sum of 89416 USD, or 81231.69 in USD Coin and 2.49843 Ethereum. She should not be charged any transaction fees or reversal fees. She is also asking for profit loss on potential investments and for the undue stress they caused her.

#### **Having seen the reply filed by the Service Provider:**

With regards to the complaint filed by IG with the OAFS, kindly find below a full summary of the events, which precede the formal complaint. Kindly note that the entity previously known as MCO Malta DAX Limited had changed its name to Foris DAX MT Limited and the company is licensed as a Class 3 VFA Service Provider by the MFSA.

#### **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 on own account. Services are offered through the Crypto.com App (the 'App'). The Wallet is only accessible through the App and the latter is only accessible via a mobile device. The Wallet offered by the Company is not accessible or available to residents of the United States of America as of 21 January 2021. As of 22 January 2021, residents of the USA have been migrated to the Wallet offered by Foris DAX Global IE Limited, a sister

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<sup>2</sup> The full details of the Complaint are found in pages 3 -7 of the file

company of Foris DAX MT Limited based in Ireland. As of 28 June 2021, residents of the USA have been further migrated to be serviced by Foris DAX Inc, a sister company of Foris DAX MT and Foris DAX Global IE located in the USA.

- IG (the 'Complainant'), e-mail address: [XXXXXX@XXXXXXXXXX.net](mailto:XXXXXX@XXXXXXXXXX.net) and, subsequently, [XXXX.XXXX@XXXXXXXXXX.com](mailto:XXXX.XXXX@XXXXXXXXXX.com), became a customer of Foris DAX MT Limited through the Crypto.com App and was approved to use the Wallet on 31 July 2019. On 22 January 2021, IG ceased to be a customer of Foris DAX MT and became a customer of Foris DAX Global IE Limited by accepting the Terms and Conditions of the Wallet offered by the latter. Further to that, on 6 July 2021, IG ceased to be a customer of Foris DAX Global IE and became a customer of Foris DAX Inc by accepting that her Wallet will be migrated under the premises of the latter and agreeing to the Foris DAX Inc Terms and Conditions governing the provision of her Wallet and the digital asset buy and sell services, as well as any digital asset transfers done in her Wallet.

It is to be noted that while IG is a customer of the Crypto.com App, she is not a customer of Foris DAX MT Limited and the reported transactions were executed while she was a customer of Foris DAX Inc.

#### **Timeline:**

**16 August** – The Crypto.com Risk Team detected suspicious logins and transactions on the Complainant's account.

As a result, IG's account was temporarily suspended in order to prevent any damages. (A screenshot confirming the internal escalation is provided on page 104).

On the same day, the Complainant also contacted the Crypto.com Customer Support Team through her in-app chat facility reporting that the digital assets in her Crypto.com Wallet were missing.

A full copy of the communication has been provided for your reference under `crypto_com_2021_08_16_58368007456665`.

Kindly note that in her communications with us, IG reported in writing that her personal email address has been compromised. (An extract from the communication is found on page 105).

During the communication, the Complainant claimed that on the 15 and 16 of August 2021, her Wallet was accessed by a third party who exchanged eight (8) of IG's digital asset holdings (LINK, MATIC, VET, XLM, DOT, SHIB, BTC, TFUEL) into ETH (Ethereum) and USDC (a digital stablecoin that is pegged to the value of the United States dollar). The total amount of 81,147.69 USDC and 2.482427 ETH were then withdrawn to external crypto wallet addresses that the Complainant reportedly had no access to.

(A screenshot of all reported unauthorised activities is provided on page 105).

Upon authentication of the Complainant's identity, including a current selfie photograph provided by the Complainant to this effect, the reported case was escalated to the Crypto.com Risk Team for an additional review. The case was classified as an alleged account takeover ('ATO') and put through the Crypto.com ATO Internal Process. The Complainant was then requested to provide replies to an 'Account Takeover Questionnaire'.

**18 August 2021** – The Complainant provided the filled in Account Takeover Questionnaire.

IG provided her answers to our Account Takeover Questionnaire as a separate PDF file, a copy of which has been included for your perusal under 'IG Crypto Transaction Details 081521 to 081621'.

**26 August 2021** – The assessment of the ATO case was completed by the Crypto.com Risk Team and their decision was provided to the Complainant via email.

Following the receipt of the ATO Questionnaire, the Risk Team reviewed the answers and issued an opinion that, based on the facts laid out in the said questionnaire, a reimbursement of the claimed amounts was to be declined due to a clear indication that the Complainant had wilfully or unwilfully, by exerting negligence in regard to the privacy and security of her personal credentials, facilitated the alleged unauthorised access to her Wallet.

Please find additional context in support of the said decision below:

- The alleged perpetrator must have been in possession of the Complainant's Crypto.com App passcode and must have had access to the Complainant's registered personal email in order to access the Wallet and execute the above-mentioned transactions. Our audit trail shows that no change of passcode or login credentials, or any failed login attempts have been registered in the Wallet of the Complainant, hence, one can conclude that the Wallet has been accessed with the same credentials used before the date of the reported incident – the same email address and passcode as provided and set by the Complainant herself.
- The login to the Crypto.com Wallet App from a new device used to perform the alleged unauthorised transfers was confirmed from the Complainant's registered personal email address.

(A screenshot of the feedback provided to IG is included on page 107).

Following the reported unauthorised access and transactions, the Complainant's Wallet was reported after taking the necessary steps to secure the identity of the Wallet holder and the Wallet itself by following the steps here below:

- The registered email address for the Complainant's Crypto.com Wallet was changed to a new one provided by IG on the 16 August 2021;
- The Complainant's Crypto.com App password was reset;
- The Complainant was urged to start using 2FA (2 Factor Authentication) in addition to her passcode when using her Crypto.com Wallet.

In summary, we consider the Account Takeover to be the result of either: (i) negligence on the Complainant's part; or (ii) wilful or unwilful participation of the Complainant in the exposure of her personal credentials. To successfully carry out the reported unauthorised activity, the alleged perpetrator had to be in possession of: (i) the Complainant's passcode; and (ii) have access to the Complainant's personal email. Both items are personal credentials that are in the sole possession of the Complainant.

While the above presents the current chain of events involving IG and her Crypto.com Wallet, as well as Crypto.com's decision making process to refuse a reimbursement of any claims, we kindly ask you to note that the Complainant is not deemed a customer of Foris DAX MT at the time of the reported unauthorised transactions as well as at this point in time, the Company is of the view that such complaint should be addressed to the relevant authorities in her home country and not to the Arbiter for Financial Services in Malta.

### **Having heard the parties**

### **Having seen all the documents**

### **Considers**

In accordance with Article 22(2) of Chapter 555 of the Laws of Malta, which regulates the Arbiter's procedure:

*'(2) Upon receipt of a complaint, the Arbiter shall determine whether the complaint falls within his competence.'*

The Arbiter's competence is limited by law and can only deal with complaints against a 'financial service provider':

*'which is or has been licensed or otherwise authorized by the Malta Financial Services Authority in terms of the Malta Financial Services Authority Act or any other financial services law ...'.*

The Service Provider raised the plea that at the time when the transactions complained of occurred, the Complainant was not a client of Foris Dax Malta but of Foris Dax Inc.

The Service Provider stated:

*'IG ... became a member of Foris DAX MT Limited through the Crypto.com App and was approved to use the Wallet on the 31 July 2019. On the 22 January 2021 ceased to be a member of Foris DAX MT and became a customer of Foris DAX Global Ltd by accepting the Terms and Conditions of the Wallet offered by the latter. Further to that, on 6 July 2021 IG ceased to be a customer of Foris DAX Global IE and became a customer of Foris DAX Inc by accepting that her wallet will be migrated under the premises of the latter and agreeing to the Foris DAX*

*Inc Terms and Conditions governing the provision of her Wallet and the digital asset, buy and sell services, as well as any digital asset transfers done in her Wallet.*

*It is to be noted that while IG is a customer of the Crypto.com App she is not a customer of Foris DAX MT Limited and the transactions were executed while she was a customer of Foris DAX Inc.’<sup>3</sup>*

In her testimony, the Service Provider’s representative reiterated that:

*‘The transactions that IG has identified as being unauthorised occurred between the 15 August and 16 August 2021, and if we take into consideration what has been said above,<sup>4</sup> it should be noted that at the time of the unauthorised transactions reported by IG, she was not a customer of Foris DAX MT Ltd. Therefore, we believe there is no standing at the Office of the Arbiter in respect of the current complaint.’<sup>5</sup>*

The Complainant did not contradict these statements in her testimony and for her what was important was that she traded on the Crypto.com website. However, the Service Provider explained that Crypto.com was just a trade name under which separate entities worked:

*‘Being asked who actually owns the assets which were in the Complainant’s account, on whose balance sheet were they reported, I say IG was a customer of Foris DAX Inc. Crypto.com is a brand name; it is not a company name. It is in the Terms and Conditions. If you go on the app, in the settings you can see that the Terms and Conditions identify the actual entity that you are contracting.’<sup>6</sup>*

Document FS1,<sup>7</sup> submitted by the Complainant, reveals that Complainant was a customer of Foris DAX Inc. ‘a Delaware corporation and registered money services business’.<sup>8</sup>

Moreover, the Complainant was conscious of the fact that she was a customer of Foris DAX Inc. (the US Company) because she had filed complaints in the US

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<sup>3</sup> P. 103 - 104

<sup>4</sup> Namely that at that time Complainant was not a customer of Foris Dax MT Ltd but of Foris DAX Inc, p. 236

<sup>5</sup> P. 237

<sup>6</sup> P. 239

<sup>7</sup> P. 147

<sup>8</sup> *Ibid.*

as well. In fact, she had complained with the Consumer Protection and Anti-Trust Bureau in New Hampshire<sup>9</sup> and with the Consumer Financial Protection Bureau (CFPB).<sup>10</sup>

The CFPB describes itself as follows:<sup>11</sup>

*'We're the Consumer Financial Protection Bureau, a U.S. government agency dedicated to making sure you are treated fairly by banks, lenders and other financial institutions ...*

*The Consumer Financial Protection Bureau is a 21st century agency that implements and enforces Federal Consumer Financial Law and ensures that markets for consumer financial products are fair, transparent, and competitive ...*

*When we enforce the law, we or a court may order the defendant to take action to remedy the harm it caused consumers. This can include requiring the person or company to compensate its victims for this harm by providing consumer redress. Obtaining consumer redress is a top priority in any enforcement action.'*

### ***The Arbiter's Jurisdiction***

Chapter 555 of the Laws of Malta (the Act) regulates the procedure before the Arbiter for Financial Services.

The Act *'set up the Office of the Arbiter for Financial Services with power to mediate, investigate, and adjudicate complaints filed by a **customer** against a **financial services provider**.*

Article 19 (1) further stipulates that:

*'It shall be the primary function of the Arbiter to deal with complaints filed by **eligible customers** through the means of mediation in accordance with article 24, and where necessary, by investigation and adjudication.'*

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<sup>9</sup> P. 237

<sup>10</sup> P. 249 *et seq.*

<sup>11</sup> <https://www.consumerfinance.gov/enforcement/payments-harmed-consumers/> ; <https://www.consumerfinance.gov/about-us/>

Therefore, the Arbiter has to examine whether the Complainant was an **eligible customer** of the **financial service provider**.

**'Eligible customer'** is defined as follows:<sup>12</sup>

*'a customer who is a consumer of a financial services provider, or to whom the financial services provider has offered to provide a financial service, or who has sought the provision of a financial service from a financial services provider. '*

Then, **financial services provider** is described as follows:<sup>13</sup>

*"financial services provider" means a provider of financial services **which is or has been licensed or otherwise authorised by the Malta Financial Services Authority**<sup>14</sup> in terms of the Malta Financial Services Authority Act or any other financial services law'.*

As already mentioned above in this decision, it results that the transactions complained of took place on the 15 August 2021. The Complainant became a customer of Foris DAX Inc on the 6 July 2021 and, consequently, the transactions complained of occurred when the Complainant had ceased to be a customer of Foris DAX MT Limited which is the only company authorised and licensed by the Malta Financial Services Authority (MFSA). Foris DAX Inc is not licensed by the MFSA.

## **Decision**

**For this reason, the Arbiter does not have the jurisdiction to deal with the merits of the case. Furthermore, since the Complainant has also filed a complaint before another ADR entity,<sup>15</sup> he is also precluded from entering into the merits of the case.**

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<sup>12</sup> Article 2, definitions.

<sup>13</sup> *Ibid.*

<sup>14</sup> Emphasis added by the Arbiter

<sup>15</sup> Article 21 (2): *'An Arbiter shall decline to exercise his powers under this Act where: the conduct complained of is or has been the subject of a lawsuit before a court or tribunal or is or has been the subject of a complaint lodged with an ADR entity in any other jurisdiction, initiated by the same complainant on the same subject matter'.*

**The Arbiter sympathises with the Complainant for the ordeal she suffered due to the loss of her assets but, unfortunately, he cannot investigate the merits of her case due to the legal constraints as explained in this decision.**

**Due to the novelty and special circumstances of this case, and also because the case has been decided on a procedural issue, each party is to pay its own costs of these proceedings.**

**Dr Reno Borg  
Arbiter for Financial Services**