

Before the Arbiter for Financial Services

Case ASF 138/2021

SQ (The Complainant)

vs

Foris DAX MT Limited (C 88392)

(The Service Provider/Foris DAX)

Sitting of the 28 September 2022

The Arbiter,

Having seen the complaint¹ whereby the Complainant submits that on or about the 18 June 2021, she fell victim of a scam orchestrated by 'Victor' (the scammer) who operated fraudulent 'investment services' with the sole aim of defrauding clients through a predetermined cycle of clients' money.

The Complainant further submitted that she wanted to transfer money from her crypto Wallet to the Wallet of her husband who was in Turkey, but her transfer of 13,000 USD in crypto currency ended up into the pockets of the fraudster.

She only knows the fraudster as 'Victor' through Crypto.com. The equivalent of 13,060.28 USD was transferred from her Wallet utilising Crypto.com services.

According to the Complainant, Crypto.com failed to give her an official response to her claim. The details and further submissions made by the Complainant are found on pages 19 - 25 of the records of these proceedings.

¹ P. 2; 19-25

The Complainant is asking the Arbiter to order Crypto.com *'to put things in the right perspective by reversing the total amount of 13,060.28 USD paid to scammers'* as her losses *'are substantial and I have suffered a great loss because of this fraud'*, which affected her emotionally and financially.

Having seen the reply filed by the Service Provider which basically states that:

With regards to the complaint filed by SQ 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 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.
- SQ (the 'Complainant'), e-mail address: XXXXX.XXXXXXX@gmail.com and, subsequently, XXXXXXXXX@gmail.com, became a customer of Foris DAX Global IE Limited through the Crypto.com App and was approved to use the Wallet on 14 June 2021. On 3 August 2021, SQ ceased to be a customer of Foris DAX Global IE Limited and became a customer of Foris DAX Inc by accepting the Terms and Conditions of the Wallet offered by the latter.

It is to be noted that while SQ is a customer of the Crypto.com App, she is not a customer of Foris DAX MT Limited and the reported transaction was executed while she was a customer of Foris DAX Global IE Limited.

While we note that SQ is not a customer of Foris DAX MT, we would still like to provide our official reply to the submitted complaint.

Timeline:

15 June 2021 – The Complainant purchased the total amount of 0.322 BTC (Bitcoin) in exchange for 13,060.28 USD through the Crypto.com App using her personal debit/credit card.

(A screenshot of all Bitcoin purchases is provided on page 55).

The amount of 0.3216 Bitcoin was subsequently withdrawn to an unknown external wallet address; this is the disputed transaction mentioned by SQ.

(A screenshot of the transfer is provided on page 55).

Kindly note that the additional amount of 0.0004 displayed in the screenshot above is the processing fee associated with Bitcoin withdrawals.

Later, on the same day, the Complainant contacted the Crypto.com Support Team reporting that she has been the victim of a scam and that her virtual asset holdings were transferred to an external wallet address she has no access to.

A copy of the communication has been provided for your perusal under the file named – crypto_com_2021_06_15_58368006284464.

In her communication with our Customer Support Team, the Complainant confirmed she had personally facilitated the instruction of the reported withdrawal to an external wallet address, provided to her by a person under the name of 'Victor' (the 'Scammer') and she further allowed access to her personal mobile device to that same person through the use of TeamViewer, a remote control and access software that allows third parties to connect directly to a person's device and control it from a distance.

Users are expected to maintain adequate security of their personal mobile devices, login and authentication details. For your reference, please find the relevant part of the Foris DAX Global IE Limited Terms of Use below:

Quote

6. Your Device

6.2 Without prejudice to the foregoing and any other terms in these Terms, we assume that any and all instructions received from your Enabled Device have been made by the rightful owner. You are solely responsible and liable for keeping your Enabled Device safe and for maintaining adequate security and control of your login and authentication details (including, but not limited to, your username and password), and shall likewise be solely responsible for any access to and use of the Crypto.com App and the Services through your Enabled Device, notwithstanding that such access and/or use may have been effected without your knowledge, authority or consent. We will not be liable to you for any loss or damage resulting from such access and/or use.

UNQUOTE

Our Customer Support representatives have correctly advised SQ that once processed, Crypto.com cannot revoke any virtual asset withdrawals as transactions done on the blockchain are immediate and immutable. We have also advised the Complainant that the Company cannot be held responsible for her actions and inactions which lead to the unfortunate event of her transferring the said amount to a third party under their instruction and possibly supervision/control via the TeamViewer software she agreed to install, launch and use to provide access to the Scammer to her personal device and applications installed therein.

In summary, it seems evident that the Complainant has been the victim of an alleged scam and has voluntarily transferred the amount of 0.3216 Bitcoin from her Crypto.com account to an external address she has no access to. The alleged owner of the said external address has refused to cooperate with SQ and return her crypto assets. As outlined in the Foris DAX Global IE Limited Terms of Use, the Complainant is solely responsible for the security and authenticity of all instructions submitted through the Crypto.com App.

While the above presents the current chain of events involving SQ 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 to be a customer of Foris DAX MT at the time of the reported scam as well as at this point in time. As such the Company undertakes the responsibility to refer the Complaint to the relevant authorities in the USA since she is a customer of Foris Inc.

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 the Arbiter 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 MT Limited.

The Service Provider stated that as of 3 August 2021, the Complainant became a customer of Foris DAX Inc. Although the Complainant is a customer of Crypto.com App, she is not a customer of Foris DAX MT Limited and the reported transaction was executed when the Complainant was a customer of Foris DAX Global IE Ltd which is based in Ireland.²

On the 15 June 2021, the Complainant purchased the total amount of 0.322 BTC (bitcoin) in exchange for 13,060.28 USD through the Crypto.com App using her personal credit/debit card.³ The amount of 0.3216 Bitcoin was subsequently withdrawn to an unknown external wallet address. This is the disputed transaction mentioned by the Complainant.⁴

Later, on the same day, the Complainant contacted Crypto.com Support Team reporting that she has been the victim of a scam and that her virtual asset

² P. 117

³ P. 55

⁴ *Ibid.*

holdings were transferred to an external wallet address which she had no access to. It resulted that the transaction was authorised by the Complainant herself.

The Complainant explained how she was deceived by a person calling himself Victor and, pretending to help her transfer the crypto assets to her husband's wallet, did in fact steal her money. This is clearly a scam.

The representative of the Service Provider explained that:

'SQ has never been a customer of Foris DAX MT Ltd. She first became a customer of the Crypto.com App by contracting Foris DAX Global IE Limited. This is an Irish entity that she contracted and accepted the Terms and Conditions of that entity on the 14 June 2021.

At the material time, SQ was a customer of Foris DAX Global IE Ltd and the record for entities registered under is evidenced in file FS-2.

*The Complainant was onboarded on the same day, 14 June 2021 and there were no changes to another entity until 3 August 2021. The transactions occurred at the material time when SQ was a customer of the Irish entity.'*⁵

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.'*

⁵ P. 117

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

'Eligible customer' is defined as follows:⁶

'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:⁷

*“financial services provider” means a provider of financial services **which is or has been licensed or otherwise authorized by the Malta Financial Services Authority**⁸ 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 transaction complained of took place on the 15 June 2021⁹ when the Complainant was a customer of Foris DAX Global IE Limited and she was never a customer of Foris DAX MT Limited. Only Foris DAX MT Limited is authorised and licensed by the Malta Financial Services Authority (MFSA). Foris DAX Global IE Limited 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.

The Arbiter sympathises with the Complainant which is an innocent victim of a scam.

This decision is without prejudice to any action which the Complainant may be entitled to file in another jurisdiction.

⁶ Article 2, definitions

⁷ *Ibid.*

⁸ Emphasis added by the Arbiter

⁹ P. 76

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**