

Before the Arbiter for Financial Services

Case ASF 156/2021

YO ('the Complainant')

vs

Foris DAX MT Limited (C 88392)

('Foris DAX' or 'the Service Provider')

Sitting of the 28 September 2022

The Arbiter,

Having seen **the Complaint** relating to the Service Provider's alleged failure to prevent, stop or reverse the payment in crypto (USDT) made by the Complainant from his account held with *Crypto.com* to a third-party who was allegedly a fraudster.

The Complaint

The Complainant explained that on 16 September 2021, he fell victim to a multi-layered scam operation orchestrated by Cigna Limited at *c.mtuhdde.top*. He explained that the equivalent of 68,848 USDT were transferred from his wallet, utilizing the services of *Crypto.com*, to this scammer.

The Complainant noted that when he searched the scammer's website, <https://cc.mtuhdde.top/dist/#/>, this link automatically redirected to the website <https://omgfin.com/exchange> ('OMGFIN'). He noted that at the bottom of the said website there is information that OMGFIN is registered with the Financial Intelligence Unit of Estonia.

The Complainant pointed out that the company is registered under the brand name OMGFIN OÜ (OMGFIN Limited) with registration number 14556327 under

the Laws of the Republic of Estonia. He further noted that this is licensed and regulated by the Financial Intelligence Unit under license number FVR000604 for providing services of exchanging a virtual currency against a fiat currency, and FRK000513 for providing a virtual currency wallet service. He submitted that all this however did not prevent the company from committing fraudulent activities.

A copy of the comprehensive and detailed formal complaint dated 22 October 2021 made by the Complainant with the Service Provider was also attached to the Complaint Form.¹

The Complainant also provided evidence of the transactions made with *Crypto.com*,² and extracts of the communications he exchanged with the scammer.³

In his formal complaint with the Service Provider, the Complainant included *inter alia* a detailed explanation of the merchant's fraud scheme and the alleged misconduct of the Service Provider.

His claims against the Service Provider included the following:

- That Foris DAX *'completely failed to adequately investigate the circumstances surrounding the transaction(s) in question and willfully blinded itself to obvious red flags'*;⁴
- That his *'funds were transferred without [his] permission'*⁵
- That suspicions should have been raised at Foris DAX in respect of *'the unusual activity taking place in [his] account'* with the Service Provider having *'at best merely and insufficiently performed some hasty and haphazard review of [his] account or maybe asked only a few trivial questions regarding the suspicious activities, and at worst, shut [its] eyes completely rather than being careful, methodical and vigilant'*;⁶

¹ P. 7-18

² P. 21-29

³ P. 32-46

⁴ P. 12

⁵ *Ibid.*

⁶ *Ibid.*

- That had the necessary checks been made, the Service Provider *'would probably have realized that the disputed transactions are associated with fraud and financial crime, rather than some other legitimate activity'*;⁷
- That Foris DAX sought *'no adequate information or/and documentation'* and *'no appropriate safeguards were implemented at all'*;⁸
- That there would be a breach of duty of care if a financial institution executed a customer's order to transfer money knowing to be dishonest or acting recklessly in failing to make the necessary enquiries. It was claimed that, in such case, *'the financial institution shall be liable to its clients for damages in negligence'*;⁹
- That *'on the basis of various signs, [Foris DAX] should have assumed that something fishy was going on and suspended transaction(s) until [it] had made reasonable enquiries to satisfy [itself] that the transaction(s) was/were properly to be executed'*;¹⁰
- That he was a victim of the Service Provider's negligence, who allegedly facilitated the misappropriation of funds and did little to safeguard his financial interests;
- That *'any reasonable staff member would have realized that there were 'many obvious, even glaring signs' that [he] was a fraud victim'*. Reference was made to the case *'Singularis Holdings Limited vs Daiwa Capital Markets Europe Limited [2019] UKSC 50'*;¹¹
- That had Foris DAX *'audited or reviewed the Blockchain history of the cryptocurrencies in question, it would have been transparent and beyond obvious ... that those transaction were not in any way legitimate, but rather fraudulent in nature'*;¹²

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ P. 12/13

¹¹ P. 13

¹² *Ibid.*

- That Foris DAX *'knew or should have known that the funds being transferred through [its] services did not rightfully belong to the recipient fraudsters'* and had *'no legitimate or lawful purpose'*;¹³
- That Foris DAX *'turned a blind eye to the crimes that [it has] facilitated and thus provided an array of essential Crypto transfer services, acting as a vehicle, with the awareness that it was enabling the fraudsters to commit crimes and enrich themselves with victims' assets'*;¹⁴
- That the services of Foris DAX *'undoubtedly served as a crucial element in the fraudulent scheme'*, and had the Service Provider *'conducted an adequate account analysis, including proper KYC, [Foris DAX] would have discovered [his] vulnerability, [his] financial illiteracy, and the nature of [his] relationship with the recipient'* and acted appropriately;¹⁵
- That Foris DAX *'had the duty to stop those crimes, yet [it] refused to do so because [it was] more interested in enriching [itself]'*.

The Complainant further claimed that accordingly, the Service Provider *'did not have in place adequate security measures to properly safeguard [his] assets'* and has *'irreparably harmed [him]'*;¹⁶

- That as a *'regulated and licensed financial institution, [Foris DAX had] strict statutory and regulatory obligations to monitor transactions and report any suspicious activities to law enforcement authorities'*.

The Complainant further claimed that:¹⁷

'The importance of implementing robust internal systems to detect and report money laundering and other suspicious activities has been continuously emphasized in the industry in addition to having the appropriate policies, procedures and internal controls in place to ensure ongoing compliance in respect of the aforementioned systems. [Foris DAX] should have analysed distinguish thereafter between what may be normal

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ P. 14

activity and that which might suggest an illegal enterprise. This is a well-known standard industry practice which plays a substantial role in preventing criminals from liquidating and laundering the public's funds';

- That the Service Provider was furthermore *'liable for committing actual fraud'*,¹⁸ with the Complainant also claiming that there was, on the part of the Service Provider *'negligent misrepresentation, 'unjust enrichment', and 'violations of international law'* (the latter with respect to anti-fraud policies).

It was further claimed that the Service Provider *'aided and abetted'* the fraudster and exercised *'lack of vigilance'* by failing to prevent the Complainant, as customer, from engaging in the said activity;¹⁹

- That the Service Provider *'failed to satisfy [itself] that the cryptocurrencies are actually being sent to legitimate recipients'* and in its *'indisputable duty to inquire and/or report if suspicious activities are involved in the movement of the digital funds'*;²⁰
- That it was upon the Service Provider *'to invest in fraud detection services, irrespective of whether or not it is expressly specified in the relevant regulatory requirements'*.²¹

The Complainant further submitted that it was *'expected of firms to take action within the existing legislative and regulatory framework to suspend or freeze payments based on their risk assessment managing the risks of financial crime. The standards that financial institutions need to meet would include processes – such as use of technology, rules and procedures – that help prevent and respond to scams ...'*²²

Remedy requested

¹⁸ P. 14

¹⁹ P. 14-16

²⁰ P. 16

²¹ P. 17

²² *Ibid.*

The Complainant requested compensation of his stolen funds, which he indicated were equivalent to USD68,848.²³

In its reply, Foris DAX MT Limited essentially submitted the following:²⁴

That *Foris DAX MT Limited* ('Foris DAX' or 'the Service Provider'), previously known as *MCO Malta DAX Limited*, is licensed as a Class 3 VFA Service Provider by the MFSA.

That Foris DAX offers a crypto custodial wallet ('the Wallet') and the purchase and sale of digital assets on own account, through the *Crypto.com* App. The Wallet is only accessible through the App and the latter is only accessible via a mobile device.

That the Complainant became a customer of Foris DAX through the *Crypto.com* App on the 14 September 2021.

The following timeline was provided by the Service Provider:

- a) 15 September 2021 – The Complainant deposited the amount of 10,000 Euro to his Wallet via his personal bank account. A screenshot was provided of the said deposit.²⁵
- b) 16 September 2021 – The Complainant purchased the total amount of 11,510.69 Tether (USDT) across two separate transactions in exchange for 9,999.91 Euro.

Later, on the same day, the Complainant transferred 11,485.69 Tether (USDT) from his Wallet to an unknown external wallet address. A screenshot was provided of the purchases and the subsequent transfer.²⁶

The transactions were successfully executed and a withdrawal transaction fee of 25 USDT was debited from his Wallet, as per the screenshot provided.

²³ P. 3

²⁴ P. 157-160

²⁵ P. 158

²⁶ *Ibid.*

- c) 17 September 2021 – The Complainant deposited the amount of 50,000 Euro to his Wallet via his personal bank account. A screenshot was provided of the said deposit.²⁷
- d) 18 September 2021 – The Complainant purchased 57,388.96 Tether (USDT) in exchange for 50000.08 Euro.

Later, on the same day, the Complainant transferred 57,363.96 Tether (USDT) from his Wallet to an unknown external wallet address. A screenshot was provided of the purchase and the subsequent transfer.²⁸

The transactions were successfully executed and a withdrawal transaction fee of 25 USDT was debited from his Wallet, as per the screenshot provided.

- e) 22 October 2021 – The Complainant sent the *Crypto.com* Customer Service team, a demand letter reporting that he has been the victim of a scam and was coerced by the latter to send the above mentioned USDT amounts to the scammer's external wallet. The Complainant requested a full refund of the 59,999.99 Euro spent through the *Crypto.com* app.

The Service Provider provided a copy of the demand letter.²⁹

It was noted that the Complainant's case was forwarded to the *Crypto.com* Complaints team, who acknowledged receipt of the complaint on the 26 October 2021.

- f) 8 November 2021 – The *Crypto.com* Complaints team officially addressed the Complainant's complaint.

The said reply confirmed that Foris DAX was taking the stance that it cannot offer a reimbursement of the transfers the Complainant executed himself from his Wallet to an external wallet address. Whilst it empathised with the Complainant, and it understood that he may have been coerced into sending his funds to an alleged scammer, it pointed out that *Crypto.com* cannot revoke any virtual asset withdrawals as transactions done on the blockchain were immediate and immutable.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ P. 161-172

The Complainant was advised that Foris DAX cannot be held responsible for the Complainant's actions, which led to the unfortunate event of him transferring his virtual asset holdings to a third party.

The Service Provider submitted that the Complainant is solely responsible for the security and authenticity of all instructions submitted through his Wallet and the *Crypto.com* App as outlined in its Terms of Use, an extract of which was provided as follows:

"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".

A copy of the communication between the *Crypto.com* Complaints Team and the Complainant was provided.³⁰

The Service Provider submitted that, in summary, the Complainant has been the victim of an alleged scam and has voluntarily, according to his statements, transferred his USDT virtual asset holdings from his *Crypto.com* Wallet to an external wallet address he has no access to. The alleged owner of the said external wallet address has allegedly refused to cooperate with the Complainant and return his crypto assets. As outlined in Foris DAX Terms of Use, the Complainant is solely responsible for the security and authenticity of all instructions submitted through the *Crypto.com* app.

³⁰ P. 201-204

The Service Provider further noted that it is unable to reverse any of the transactions performed through the Complainant's Wallet since transactions done on the blockchain are immediate and immutable.

Having heard the parties and seen all the documents and submissions made,

Further Considers:

The Merits of the Case

The Arbiter is considering the complaint and all pleas raised by the Service Provider relating to the merits of the case together to avoid repetition and to expedite the decision as he is obliged to do in terms of Chapter 555³¹ which stipulates that he should deal with complaints in '*an economical and expeditious manner*'.

The Complainant and his crypto account

The Complainant, who is resident in Vienna, became a customer of Foris DAX on 14 September 2021 through the *Crypto.com App*, as confirmed by the Service Provider.³²

On 15 September 2021, this being a day after the opening of his account with *Crypto.com*, the Complainant deposited Eur10,000.³³ The day after, on 16 September 2021, he converted Eur9,999.91 into the crypto USDT³⁴ (resulting in total 11.510,69 USDT). Later, on the same day, 16 September 2021, a withdrawal was made of the amount held in USDT, with 11.485,69 USDT sent to an external wallet.^{35, 36}

On the following day, the 17 September 2021, the Complainant deposited a further Eur50,000.³⁷ The amount of Eur50,000 was then exchanged on 18 September 2021, into USDT (resulting in total 57.388,96 USDT).³⁸

³¹ Art. 19(3)(d)

³² P. 157 & 279

³³ P. 21, 23 & 157

³⁴ P. 21, 24-25 & 158

³⁵ P. 27, 29 & 158

³⁶ A transaction fee of 25,00 USDT applied by *Crypto.com* was deducted. (11.485,69 USDT + 25,00 USDT= in total 11,510.69 USDT)

³⁷ P. 21, 22 & 158

³⁸ P. 21, 26 & 158

Later, on the same day, on 18 September 2021, a withdrawal was made of the amount held in USDT, with 57.363,96 USDT sent to an external address.^{39, 40}

The disputed transactions were done by the Complainant himself.

During the hearing of 29 March 2022, the Complainant confirmed *inter alia* that:

'I transferred my money from my bank account to Crypto.com and in Crypto.com I changed the money from Euros to USDT. Then I transferred these USDT from Crypto.com to this fake platform'.⁴¹

He further testified during the same hearing that:

'I confirm that I was the one who did these transactions'.⁴²

During the same hearing of 29 March 2022, the Complainant confirmed that he *'created another account on this fake platform [i.e., the platform of the third party scammer] to start trading there but for that I needed to transfer USDT from Crypto.com to this platform ... The name of this platform is Cigna Limited'.⁴³*

The Service Provider

Foris DAX MT Limited ('Foris DAX' or 'the Service Provider') is a company registered in Malta on 19 September 2018 with Company Registration Number C 88392 as per the records held with the Malta Business Registry.⁴⁴

Foris DAX is licensed by the Malta Financial Services Authority ('MFSA') as a VFA Service Provider as per the MFSA's Financial Services Register.⁴⁵ It holds a Class 3 VFAA licence granted, on 16 April 2021, by the MFSA pursuant to Article 15 of the Virtual Financial Assets Act, 2018 ('VFAA').

As per the unofficial extract of its licence posted on the MFSA's website, the Class 3 VFAA Licence authorises Foris DAX to provide the following VFA Services: (i)

³⁹ P. 28, 29 & 158

⁴⁰ A transaction fee of 25,00 USDT applied by *Crypto.com* was deducted. (57.363,96 USDT + 25,00 USDT= in total 57,388,96 USDT)

⁴¹ P. 205

⁴² P. 208

⁴³ P. 207

⁴⁴ <https://registry.mbr.mt/ROC/index.jsp#/ROC/companiesReport.do?action=companyDetails&fKey=ab2b4261-837f-4d91-8547-e97ed3935ef2>

⁴⁵ <https://www.mfsa.mt/financial-services-register/>

Execution of orders on behalf of other persons (ii) Dealing on own account and (iii) Custodian or Nominee Services to Experienced and Non-Experienced investors.⁴⁶

As outlined in the disclaimer section of the *Crypto.com* website, Foris DAX is 'trading under the name 'Crypto.com' via the *Crypto.com* app'.⁴⁷

The Application

The *Crypto.com* App is a 'mobile application software developed, owned and released by *Crypto.com* and available for download for Android or Apple iOS...'.⁴⁸

It offers the account holder 'a crypto custodial wallet' and 'the purchase and sale of digital assets on own account'.⁴⁹

Observations & Conclusion

Summary of main aspects

The Complainant made a transfer of his digital asset (USDT) using the *Crypto.com* app. The said transfer was made to an external wallet address allegedly used by a fraudster. The transfer was in respect of a fake trading platform which the Complainant claimed was a scam as testified during the hearing of 29 March 2022.⁵⁰

The Complainant realised that the third-party trading platform was a scam when he tried to withdraw money and was not allowed, as further explained during the same hearing.⁵¹

In essence, the Complainant is seeking reimbursement from Foris DAX for the Service Provider's failure to prevent, stop or reverse the payment he made to the fraudster.

The Complainant *inter alia* claimed that the services provided by Foris DAX were not correct given that it transferred the funds but '*failed to warn [him] of possible*

⁴⁶ <https://www.mfsa.mt/financial-services-register/>

⁴⁷ <https://crypto.com/eea/about>

⁴⁸ P. 212

⁴⁹ P. 157

⁵⁰ P. 205-208

⁵¹ P. 208

fraud'.⁵² He pointed out that the amounts he transferred from *Crypto.com* to the fraudulent party were '*big amounts*' and the Service Provider '*did not protect [him] from fraudulent operations*'.⁵³

On its part, the Service Provider is, in essence, claiming that it has no responsibility for the payment done by the Complainant as he himself had to verify the transaction information (as per the provisions of the *Crypto.com App Terms of Use*) and that it was not possible for Foris DAX to revoke or reverse the crypto withdrawal once the transaction was done on the blockchain.

As also testified by an official of the Service Provider during the hearing of 25 April 2022:

'in the world of crypto currency, Crypto.com can only verify the authenticity or the registration details of accounts which are registered with them'.⁵⁴

The Service Provider also stated during the same hearing that:

'When a third-party wallet is elected by our users for monies to be sent out, there is no way for us to identify or verify that these transactions are proper save for the fact that the complainants themselves are the ones who asked us to transact these transactions. Cryptocurrency can be tracked and can reveal digital wallets addresses to which monies went to. But we cannot identify the background identification as to who holds the wallet addresses themselves ...'.⁵⁵

Applicable Regulatory Framework

As outlined above, Foris DAX is the holder of a Class 3 VFAA licence granted by the Malta Financial Services Authority ('MFSA') under the Virtual Financial Assets Act, 2018 ('VFAA').

Apart from the relevant provisions under the VFAA, and the *Virtual Financial Assets Regulations, 2018 (L.N. 357 of 2018)* issued under the same act, Foris DAX is also subject to the rules outlined in the Virtual Financial Assets Rulebook ('the

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ P. 280

⁵⁵ *Ibid.*

VFA Rulebook') issued by the MFSA. The said rulebook complements the VFAA 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*'⁵⁶ applicable to its licence holders (including under the Virtual Financial Assets) titled '*Guidance on 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 an external wallet from his crypto account.

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 payment made by the Complainant from his account held with Foris DAX, to an allegedly fraudulent external trading platform which was fake as outlined in further detail during the hearing of 29 March 2022.⁵⁷

The Complainant expected the Service Provider to prevent or stop his transactions. He claimed that the Service Provider '*failed to warn [him] of possible fraud*'.⁵⁸

⁵⁶ Guidance 1.1.2, Title 1, '*Scope and Application*' of the '*Guidance on Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements*'.

⁵⁷ P. 2-3 & 205-208

⁵⁸ P. 208

The Complainant pointed out that the transactions involved '*big amounts*' and submitted that the Service Provider '*did not protect [him] from fraudulent operations*'.⁵⁹

The Arbitrator 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 is also given the nature of the transaction 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 22 October 2021,⁶⁰ this being around a month after the disputed transactions,⁶¹ by which time the transactions had long been completed and finalised.⁶²**

Once finalised, the crypto cannot be transferred or reversed as specified in the Service Provider's Terms and Conditions of Use⁶³ (and as typically indicated on various other internet sites).⁶⁴

⁵⁹ *Ibid.*

⁶⁰ P. 7 & 201

⁶¹ The withdrawals in USDT to the external wallet undertaken on 16 and 18 September 2021.

⁶² 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).

⁶³ Clause 7.2(b) of the *Crypto.com* App Terms & Conditions - P. 225

⁶⁴ E.G. <https://www.chargebackgurus.com/blog/chargebacks-more-volatile-complex-than-cryptocurrency>

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.⁶⁵

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 ...'.*⁶⁶

It is also noted that Clause 7.2(d) of the said Terms and Conditions which deals with 'Digital Asset Transfers' further warns a customer about the following:⁶⁷

'We have no control over, or liability for, the delivery, quality, safety, legality or any other aspect of any goods or services that you may purchase or sell to or from a third party. We are not responsible for ensuring that a third-party buyer or seller you transact with will complete the transaction or is authorised to do so. If you experience a problem with any goods or services purchased from, or sold to, a third party using Digital Assets transferred from your Digital Asset Wallet, or if you have a dispute with such third party, you should resolve the dispute directly with that third party'.

On the basis of the facts presented during the case, the Arbitrator 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.

⁶⁵ Clause 3.1 and Clause 7.2(b) of the Terms and Conditions on the use of the Crypto.com App Services (P. 217 - 225).

⁶⁶ P. 225

⁶⁷ P. 225-226

It is noted that in his formal complaint to the Service Provider, the Complainant only referred in a general manner to the regulations and standards applicable to Foris DAX '*as a licensed and regulated financial institution*'.⁶⁸ In the said formal complaint reference was also made to '*The Federal Trade Commission (FTC) Act, 15 U.S.C.*',⁶⁹ enacted in the USA.

However, these are not considered applicable also given that the Service Provider is not '*a licensed and regulated financial institution*'. Foris DAX is only regulated and licensed as a VFA Service Provider based in Malta as outlined above.

The regulatory regime applicable to a VFA Service Provider is indeed a different one and does not necessarily reflect the requirements and consumer protection measures applicable to a financial institution falling under EU regulatory regimes.⁷⁰

It is further noted that in his final submissions, the Complainant again referred to the Service Provider being '*a financial institution*' and '*registered and licensed Payment Service Provider*'.⁷¹

In the said submissions, the Complainant referred to the *Prevention of Money Laundering Act* (Chapter 373 of the Laws of Malta) and various provisions of the *Prevention of Money Laundering and Funding of Terrorism Regulations* (Subsidiary Legislation 373.01) and *Part I and II of the Implementing Procedures* issued by the Financial Intelligence Analysis Unit ('FIAU') applicable to such institutions.⁷²

The Complainant, in essence, claimed in his final submissions that the Service Provider should have undertaken the necessary due diligence and followed the requirements under the anti-money laundering ('AML') framework.

⁶⁸ P. 12

⁶⁹ P. 18

⁷⁰ Financial institutions based in Malta are regulated under a separate and distinct regulatory framework, namely that provided for under the Financial Institutions Act (Cap. 376) which also covers the Payment Services Directive (PSD2), (Directive EU 2015/2366 on payment services in the internal market).

⁷¹ P. 286

⁷² P. 285-289

The Arbiter considers that the AML provisions referred to by the Complainant however do not support his claims for compensation under Chapter 555 of the Laws of Malta.

As outlined above, it has not been demonstrated or emerged that the transfer was made to another *Crypto.com App* user and hence the context of the quoted AML requirements is inapplicable.

The Complainant attached copies of communications exchanged with the alleged fraudster.⁷³

As testified during the sitting of 29 March 2022, the Complainant created an account on a third-party platform of Cigna Limited to undertake trades on this platform. The platform of Cigna Limited however turned out to be a '*fake platform*', as he was not able to withdraw any money.⁷⁴

It is clear that the Complainant has unfortunately fallen victim of a scam done by a third party unrelated 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. A regulatory framework is still yet to be implemented for the first time in this field within the EU.⁷⁵

⁷³ P. 32-46

⁷⁴ P. 205-208

⁷⁵ 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 is expected to enter into force in 2023 / 2024 – <https://www.financemagnates.com/cryptocurrency/can-mica-take-europe-to-the-crypto-promised-land/>

Whilst this area of business remains 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.

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 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.⁷⁶

Decision

The Arbiter sympathises with the Complainant for the ordeal he 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.

However, since cryptocurrency is a new area in the financial services sector, the Arbiter would like to make a few observations.

Apart from the high risks and speculative nature commonly associated in trading with crypto, a consumer venturing in this area needs to be conscious and aware of the additional risks being taken, also, due to other factors including the risks associated with the infancy of the regulatory regime applicable, if at all, to this sector in general, which may not provide the same safeguards and protection normally expected and associated with other well-regulated sectors of the financial services sector.

⁷⁶ https://www.eiopa.europa.eu/document-library/other-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

Moreover, given the increasing and alarming volume of scams and fraud existing in the crypto field, retail consumers need to, more than ever, be vigilant and take appropriate and increased measures to safeguard themselves as much as possible to minimise and avoid the risk of falling victim for scams and fraud.

The Arbiter cannot help but notice the lack of or inadequate knowledge that many retail consumers have with respect to the various risks applicable to this area and on how to better protect themselves, despite the rush by many to join and participate into this sector.

The Arbiter considers that much more needs to be done on this front, apart from in other areas, to better protect consumers. Genuine service providers operating in this field need to also do their part and actively work to improve the much-needed knowledge for consumers who opt to venture into this field.

Given the particular circumstances and novel nature of this case, each party is to bear its own legal costs of these proceedings.

Dr Reno Borg
Arbiter for Financial Services