

Before the Arbiter for Financial Services

Case ASF 053/2022

SB

(‘the Complainant’)

vs

Foris DAX MT Limited (C 88392)

(‘Foris DAX’ or ‘the Service Provider’)

Sitting of the 26 May 2023

The Arbiter,

Having seen **the Complaint** relating to the Service Provider’s alleged failure to prevent, stop or reverse the payment in crypto with a value equivalent to GBP 60745.13 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 or about 20 September 2021, he fell victim to a multi-layered scam operation orchestrated by Apexpay Trading. He explained that the equivalent of GBP 60745.13 was transferred from his wallet, utilizing the services of *Crypto.com*, to this scammer.

The Complainant filed an elaborate multi-page complaint letter dated 20 December 2021¹ with the Service provider in which he sought full refund of his loss from the Service Provider as he maintains that they are responsibilities for his loss *inter alia* for reasons that the Service Provider:

¹ Page (P.) 7

1. Made his infrastructure available to fraudsters
2. Failed to prevent the illicit transfer of wealth caused by the alleged fraud
3. Failed to perform adequate Anti-Money Laundering (AML) and Know Your Customer (KYC) procedures resulting in on-boarding of fraudsters
4. Failed to notice clear signals that the transfer effected by the Complainant to the fraudsters were suspicious and therefore had a duty to warn the Complainant that he was making himself vulnerable to a fraudulent scheme.
5. Failed to have monitoring systems to distinguish between normal activity and other activities which are not normal and suggest an illegal enterprise.
6. Made negligent misrepresentations about the security of their systems.
7. Aided and abetted, knowingly or with severe recklessness, the execution of fraudulent transactions as suffered by the Complainant possibly enriching themselves unjustly in the process.

In the Complaint, the Service Provider is often referred to as a Financial Institution and there is an expectation that it should have adopted transaction monitoring systems as required by the EU Payment Services Directive 2 – PSD 2.²

The Service provider replied denying their responsibility and refusing to refund claiming that all transactions were executed ***“per your specific instructions and fully in line with our Terms of Use and all applicable regulatory requirements”***.³

The Complaint was filed by Mr Steele with the Office of the Arbiter for Financial Services (OAFS) on 06 May 2022 basically repeating the same issues made in the original complaint to the Service Provider.

² EU 2015/2366 that entered into force 12 01 2016

³ P. 49

The Service Provider's official reply was received on 21 May 2022⁴ stating 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 20 September 2021.

The following timeline was provided by the Service Provider:

- a) 20 September 2021 – The Complainant deposited the amount of GBP 5030 (split in 2 parts GBP 1 and GBP 5029) to his Wallet via his personal bank account. A screenshot was provided of the said deposit.⁵
- b) 20 September 2021 – The Complainant purchased the total amount of GBP 5029.52 in 0.1541 Bitcoin (BTC) and these were transferred (less transfer charges) from his Wallet on 22 September 2021 to an unknown external wallet as instructed by the Complainant. A screenshot was provided of the purchases and the subsequent transfer.⁶
- c) The same procedure was adopted for transfers of:
 - GBP 2500 on 22 September 2021
 - GBP 2113.72 on 30 September 2021
 - GBP 51038 in 3 separate bank transfers between 05 and 07 October 2021.

All funds were converted to BTC and transferred to the same unknown external wallet, always in accordance with authenticated instructions from the Complainant. Screenshots were provided for all these transactions.

⁴ P. 55 - 83

⁵ P. 61

⁶ P. 62

- d) 20 December 2021 – The Complainant sent the *Crypto.com* Customer Service team, a demand letter above reported, stating that he has been the victim of a scam and was coerced by the latter to send the above-mentioned transfer to the scammer’s external wallet. The Complainant requested a full refund of GBP 60745.13 spent through the *Crypto.com* app.

The Service Provider provided a copy of the demand letter.⁷

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.

- e) The *Crypto.com* Complaints team officially addressed the Complainant’s complaint through an undated email referred to above.⁸

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.

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

...

⁷ P. 65 - 74

⁸ P. 49

(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.⁹

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 BTC 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.

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.

The Hearing Process

The first hearing was held on 19 September 2022 but was adjourned to 11 October 2022 at the request of the Complainant due to the unavailability of his advisor.

⁹ P. 49; 79 - 83

At the latter meeting, the Complainant appeared unassisted and confirmed that while he never gambled in unusual investments, he was introduced to a platform that seemed to give good returns on investments.

“So, I took out loans and used credit cards to fund this investment which I thought would be short term, and I opened an account with this Apex Trading company to invest some currency”.¹⁰

After discovering that Apex was a scam, the Complainant reported the scam to Crypto and requested a refund, which was rejected, because he felt that Crypto should have flagged that ***“my activity was suspicious”***. ***“I see myself as a victim in this particular scam. Crypto.com are clearly far better equipped to establish those sort of risks”.***¹¹

Under cross-examination, the Complainant confirmed that he was introduced to Apex by a person whom he knew (and presumably trusted) from many years ago but even that eventually proved to be a fake profile. Apex led him to open an account with Crypto.com.

He confirmed having reported the fraudulent scam to the police in UK, but his Complaint is now against the Service Provider for alleged misconduct. When asked if he was expecting the Service Provider to pay for his own actions, the Complainant said:

“Crypto.com have some responsibility. Can you share how my transactions were treated? Did they fall within or outside Crypto.com risk appetite?”¹²

Following this hearing, the Service Provider filed

- Crypto.com App Terms and Conditions¹³
- Complainant’s Transaction History¹⁴
- Complainant’s Communication History.¹⁵

¹⁰ P. 85

¹¹ P. 86

¹² *Ibid.*

¹³ P. 90 - 114

¹⁴ P. 115

¹⁵ P. 116 - 117

This last document features the transcript of tele-conversations of 23 November 2021 and 26 November 2021, where the Complainant is seeking ways how to lodge his request for refund. In the first call, he is quoted as saying:

“I’ve been foolish and a victim of a scam where I have transferred BTC to an investment platform scam.”

A second hearing was held on 14 November 2022, where the Service provider reiterated their case as presented in the official reply to the complaint with the addition that:

- the Service Provider does not have any connection with Apex Trading or Apexpay Trading;
- there is no doubt that the Complainant carried out the disputed transactions himself as he admitted doing so;
- according to system procedures, the Complainant had ‘whitelisted’ with his passcode the new address of the unknown external warrant thus confirming his authority to send assets to this address.

Upon cross-examination, the Service Provider was asked ***“whether within the period of three weeks, three transactions to an external wallet of GBP 60,000 from a new customer does not trigger suspicious activity as far as crypto controls are in place”***.

The Service Provider replied that ***“people send cryptocurrency to different wallets all the time; people can also send cryptocurrency to their own cold storage wallet, for example, after purchasing cryptocurrency on the trading platform. ... GBP 60,000 in terms of cryptocurrency, is an insignificant amount. We have large trading volumes every day.”***¹⁶

The Complainant then made reference to the obligation of financial institutions under EBA’s PSD Directive 2 which gives the right to financial institutions to block payment instruments if they suspect fraud.

¹⁶ P. 121

In his final written submissions, the Complainant made a plea for his financial predicament as a result of the fraud to be taken into consideration by the Arbitrator in arriving at a decision on his complaint.

The Service Provider re-stated their position and emphasized that:

“Cryptocurrency transactions and the technology on which it works is very different from the traditional forms of security and banking. Cryptocurrency transactions are designed to be irreversible and the Respondent has no control over them”.¹⁷

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

Further Considers:

The Merits of the Case

The Arbitrator 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 555¹⁸ which stipulates that he should deal with complaints in ‘*an economical and expeditious manner*’.

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.¹⁹

Foris DAX is licensed by the Malta Financial Services Authority (‘MFSA’) as a VFA Service Provider as per the MFSA’s Financial Services Register.²⁰ 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’).

¹⁷ P. 132

¹⁸ Art. 19(3)(d)

¹⁹ <https://registry.mbr.mt/ROC/index.jsp#/ROC/companiesReport.do?action=companyDetails&fKey=ab2b4261-837f-4d91-8547-e97ed3935ef2>

²⁰ <https://www.mfsa.mt/financial-services-register/>

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) 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.²¹

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'.²²

Observations & Conclusion

Summary of main aspects

The Complainant made a transfer of his digital assets (BTC) 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.

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 protect him from fraud and allowed their infrastructure to be used for fraudulent purposes.

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.

²¹ <https://www.mfsa.mt/financial-services-register/>

²² <https://crypto.com/eea/about>

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 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*²³ 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, the 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

²³ Guidance 1.1.2, Title 1, '*Scope and Application*' of the '*Guidance on Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements*'.

platform which was fake as outlined in further detail during the hearing of 11 October 2022.²⁴

The Complainant expected the Service Provider to prevent or stop his transactions. He claimed that the Service Provider had an obligation to warn him of potential fraud.

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 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. Furthermore, the Complainant himself had 'whitelisted' the address giving the all clear signal for the transfer to be executed.**
- **The Complainant seems to have only contacted the Service Provider on 20 December 2021²⁵ this being more than 2 months after the disputed transactions,²⁶ by which time the transactions had long been completed and finalised.²⁷**

²⁴ P.85-86

²⁵ P. 7 & P. 21-25

²⁶ The withdrawals to the external wallet undertaken on towards late September 2021.

²⁷ 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).

Once finalised, the crypto cannot be transferred or reversed as specified in the Service Provider's Terms and Conditions of Use²⁸ (and as typically indicated on various other internet sites).²⁹

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.³⁰

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 ...”.*³¹

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:³²

“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”.

²⁸ Clause 7.2(b) of the *Crypto.com* App Terms & Conditions - P. 103

²⁹ E.G. <https://www.chargebackgurus.com/blog/chargebacks-more-volatile-complex-than-cryptocurrency>

³⁰ Clause 3.1 and Clause 7.2(b) of the Terms and Conditions on the use of the Crypto.com App Services (P. 95; 103)

³¹ P. 103

³² *Ibid.*

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.

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”.³³ In the said formal complaint reference was also made to ‘The Federal Trade Commission (FTC) Act, 15 U.S.C.’,³⁴ 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.³⁵

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.

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.

³³ p. 27

³⁴ p. 36

³⁵ 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).

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.

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. A regulatory framework is still yet to be implemented for the first time in this field within the EU.³⁶

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.

³⁶ 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/>

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.³⁷

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.

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 to scams and fraud. Retail unsophisticated investors would do well if before parting with their

³⁷ 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

money they bear in mind the maxim that if an offer is too good to be true than in all probability it is not true.

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. Service providers operating in this field need to also do their part and actively work to improve their on-boarding process by evaluating the much-needed knowledge of benefits and risks 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.

Alfred Mifsud
Arbiter for Financial Services