

Before the Arbiter for Financial Services

Case ASF 102/2022

HL (The Complainant)

vs

Foris DAX MT Limited (C 88392)

(The Service Provider/Foris DAX)

Sitting of 07 September 2023

The Arbiter,

Having seen **the Complaint** dated 10 August 2022¹ relating to the Service Provider's alleged failure to prevent, stop or reverse the payment in crypto assets made by the Complainant from his account held with *Crypto.com* to a third party who was allegedly a fraudster.

The Complaint

The Complainant stated that on or around 22 November 2021, he fell victim to a multi-layered scam operation orchestrated by 'RedFX Trading' (the 'Fraudsters') that offered attractive investment services with the goal of defrauding clients which resulted in his transferring from his wallet with Crypto.com 0.82453 BITCOIN (BTC) to the gain of the fraudsters.

Complainant contends that Crypto.com is responsible for false/inaccurate/misleading statements of material facts concerning the services they offered Complainant.

¹ Page (p.) 1 - 60

He alleged that their manoeuvres, whether premeditated or not, despite the fact that they were expressly established to promote fairness and customer confidence, are actually used to blind their customers, thereby, depriving them of disclosures regarding the involved risk factors, potential threats and other information required by law.²

By way of compensation, he was seeking an amount of US\$ 49,956.74. Although not specifically explained, this seems to be the cost of acquisition of the said BTC which at the time was trading at about US\$ 58,000 per unit.³

In reply to the Service Provider's rebuttal of responsibility dated 21 February 2022,⁴ the Complainant filed a reply dated 18 March 2022⁵ in which he sought full refund of his loss from the Service Provider as he maintains that they are responsible for his loss, *inter alia*, for reasons that the Service Provider:

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 onboarding 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.

² P. 2

³ In their reply, (p. 84) Service Provider says that market value was €19,789.50 as at 15 August 2022 when BTC was trading at about US\$ 22,000 per unit.

⁴ P. 52

⁵ P. 6 - 13

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 2.⁶

The Complainant concluded that:

'I hereby contend that even given lack of statutory or regulatory obligation on your part to safeguard customers and their funds to the best of your ability, your view nevertheless faces a number of concrete objections:

- 1. Your account of the subject matter seems rather incomprehensive as it reprehensibly standardizes (and thus deliberately chooses not to engage) alarmingly unusual conditions; homing in on that which is absolutely indispensable to protect consumers and enhance the integrity of financial systems.***
- 2. Suppose I grant, for the sake of argument, that there is no such obligation under the law in any way, shape or form – then your retort would seem quite out of place, given (i) the ease with which you could have forestalled the fraudulent activities depicted herein; and (ii) the increasingly individualized approach that is newly being offered to consumers in view of best industry standards aiming at minimizing financial crime and fraud.***
- 3. Your understanding of the role of financial institutions in society is seriously flawed. It certainly does not help to solve the rising problem of online fraud and financial threats that unfortunately go unheeded and unchecked, nor does it show any readiness or willingness to ward off such unlawful activities.***

⁶ EU 2015/2366 that entered into force 12.01.2016

As one who responsibly approaches this subject with the utmost gravity and objectivity, I am resoundingly confident that there is no available sound foundation for, let alone a persuasive argument, in support of your position.

If despite these objections, my concerns are not appropriately taken into consideration and are instead simply dismissed, you can be assured that alternative action will be taken, and I will make it a point to share our exchanges with the public so that at least pre-emptive action can be taken by other potential clients to avoid any dealings with organizations where customer security is not a priority.⁷

The Complaint was filed by Complainant with the Office of the Arbiter for Financial Services (OAFS) on 10 August 2022, basically, repeating the same issues made in the original complaint to the Service Provider.

Service Provider's reply

The Service Provider's official reply was received on 19 August 2022,⁸ stating that:

- *Foris DAX MT Limited ('the **Service Provider**') 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.*
- *Foris DAX Global Limited, a sister company (of the Service Provider) located in Ireland, offers the above-mentioned services to residents of the US.*
- *(The Complainant) is not and was never a customer of Foris DAX MT Ltd. Instead, the Complainant was serviced by Foris DAX Global Limited and the transactions complained of were executed while he was a customer of the latter sister company.*

In view of the above, the Service Provider maintained that the Complaint should be addressed to the relevant authorities in the Complainant's home

⁷ P. 13

⁸ P. 66 - 86

country and not to the Office of the Arbiter for Financial Services in Malta (OAFS) which only has jurisdiction over complaints directed against a service provider licensed or otherwise authorised by the Malta Financial Services Authority (MFSA).

Consequently, the Service Provider raised a preliminary plea on the competence of the Arbiter to hear this case as they maintain that the Complainant was not an eligible customer in terms of Chapter 555 of the Laws of Malta. They maintained that they never provided the Complainant with Crypto.com App services and that the transactions reported within the Complaint submitted before the OAFS would have been executed by Complainant while he was a customer of their Irish sister Company.

This notwithstanding, the Service Provider gave a detailed account of the transactions executed on the Crypto.com App between 22 November 2021 and 23 January 2022, consisting of a series of fiat currency deposits which were used to fund acquisition of BTC which were later transferred to an unknown external wallet.

There was also a series on deposits of BTC from an unknown external wallet to his Crypto.com wallet but, in the end, the Complainant had transferred in total BTC 0.83868535 from his Crypto.com wallet to an unknown external wallet.

They concluded by stating that:

'In summary, it seems conceivable that the Complainant has been the victim of an alleged scam. Whilst we fully empathize with (Complainant) in this regard, it cannot be overlooked that he had willingly, according to his statements, transferred his Bitcoin (BTC) virtual asset holdings from his Crypto.com Wallet to external wallet addresses which he has no access to.

As outlined above in the Foris DAX Global Limited Terms of Use, the Complainant is solely responsible for the security and authenticity of all instructions submitted through the Crypto.com app, and as such the Company cannot accept the liability for the veracity of any third party or for the instructions received from the Complainant themselves.

While the above presents the current chain of events involving (Complainant) and his 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. As such the Company is of the view that the complaint should be addressed to the relevant authorities in (Complainant's)home country and not to the Arbiter for Financial Services in Malta.'⁹

The Hearings

A hearing was held on 04 April 2023.¹⁰

The Complainant stated:

'I say that what happened is that I was involved in a crypto investment using the Crypto.com platform. I guess I was coerced into using the Crypto.com platform. And there were no safeguards in place with the Crypto.com platform.

I say that I have seen many more safeguards in other crypto platforms that protect the user. This was a misstep from Crypto.com which I attempted to point out in an email communication to which there was little to no feedback regarding that aspect.

I say this because I attempted to send funds to a crypto wallet through Crypto.com. There was no restriction at the time, and I have not visited Crypto.com since then. Now, if you were to use a similar platform, Coinbase, to send funds to the same wallet, you will receive a warning and your account will be flagged and you will not be able to send funds because this wallet would be deemed a scam, fraud scam, etc.

There are red flags with the Coinbase platform but not with the Crypto.com platform.

As regards to the scam, it was initiated through an MSG App, and from there I was coerced to open a Crypto.com account and I proceeded from there to open an investment account with an unregistered firm (I did not know that it was unregistered at the time).

And I believe that they could have stopped the transfer.'¹¹

⁹ P. 86

¹⁰ P. 178 - 180

¹¹ P. 178 - 179

On being cross-examined, the Complainant stated:

'I am being referred to my testimony where I stated that Coinbase would have stopped those same transactions which I made on Crypto.com and asked whether these restrictions were in place in Coinbase at the time that I made the transactions with Crypto.com dating to sometime in 2021, I say, yes. I know this because I have email proof.

Asked whether I tried to make the same transactions on Coinbase at the same material time that I tried to carry out the same transactions on Crypto.com, I say yes. Asked why I proceeded with the transactions on Crypto.com knowing that Coinbase had flagged these accounts or these addresses that I now say to be ones related to a scam, I say that at that point in time, it was my first time investing so I am heavily reliant upon the scammer at that point in time. These messages are very common on Coinbase, like, don't worry about it. Just go to Crypto.com and let the transactions go through. You should not have a problem. And, if you see emails like this, don't worry about it because we have seen this before.

It is being said that in spite of the warnings I received on Coinbase, I was happy to carry out these transactions on Crypto.com. Asked if this is correct, I would not say that I was happy to carry them out. I was coerced to play the game of the scammer at this point.

It is being said that there was a third-party, not related to Crypto.com, that I was investing with, I say that is correct.¹²

A second hearing was held on 18 April 2023 where, this time, the Service Provider defended their case where, again, they raised the preliminary plea that they were the wrong defendants as the transactions complained of were executed by Complainant with Foris DAX Global in Ireland not with the Service Provider in Malta.

On the merits of the case, they stated that Complainant only put in his first complaint on 19 February 2022, almost a month after the last transaction complained of.

They further stated:

¹² Page 179 - 180

'We believe that (Complainant) is himself responsible for these transactions. He has not verified or allegedly not verified the person who was supposed to receive the money and has therefore committed gross negligence under the terms and conditions that he was governed by at the time.'

We have followed the Arbitral tribunal nonetheless, but our primary case is that this should not apply to Foris DAX MT in any circumstances.'

To summarise, (Complainant) is not a customer of the service provider. And, even if he were a customer of the service provider, they would have failed under the gross negligence responsibilities and transactions as set out in the terms and conditions relevant at the time of the transactions.'¹³

Decree

The Arbiter issued a Decree on 22 June 2023 stating that the preliminary plea over his competence to adjudicate this Complaint has not been properly addressed during the proceedings. In terms of Article 22(2) of the Act, Chapter 555:

'Upon receipt of a complaint the Arbiter shall determine whether the complaint falls within his competence'.

Furthermore, the Act, Chapter 555 provides in Article 11(1)(a) and, again, in Article 19(1) that the primary function of the Arbiter is to deal with complaints filed by eligible customers.

The Arbiter therefore feels it is obligatory to decide the preliminary plea raised by the Service Provider that the Complainant is not their eligible customer before deciding on the merits of the case. If it results that the Complainant does not qualify as an eligible customer of the Service Provider, then the Arbiter would have no competence to adjudge this Complaint.

The preliminary plea has to be decided upon before entering into the merits of the case for two particular reasons:

1. If the Arbiter has no competence to adjudge this case, then the Complainant should know this in order to consider taking their case before a competent court or tribunal.

¹³ P. 233

2. If the Arbiter has no competence to adjudge this case, it is prudent not to express an opinion on the merits of the case so as not to prejudice the opinion of another competent court or tribunal.

Consequently, in the Decree, the Arbiter gave the Complainant until the end of July 2023 to submit proof or evidence that he is an eligible client in terms of Act Chapter 555.

In his reply of 31 July 2023, the Complainant stated that:

'according to section 1.1. of section one of the Crypto.com terms and conditions agreement; "The Crypto.com App Services are provided to you by Foris DAX, Inc., a Delaware corporation and registered money services business (together with its Affiliates "Crypto.com") and/or relevant Affiliates(s) providing services in your area for the particular service or services you access'.¹⁴

The reply of the Service Provider dated 31 August 2023, stated:

'Foris DAX MT Limited (the "Respondent") respectfully submits that the Complainant is not an "eligible customer" in terms of Chapter 555 of the Laws of Malta (the 'Act'), nor is the Complainant a customer of the Respondent and therefore, the Respondent is not the proper defendant in these proceedings.

In the hearing before the Arbiter on 18 June 2023, the Complainant was directed to file written submissions together with relevant documents to prove that he is an eligible client of the Respondent.

On 31 July 2023, the Complainant provided by email an attachment (the 'Attachment') which contains what appears to be a screenshot of the Complainant's Crypto.com App Terms and Conditions. The Complainant has also helpfully highlighted the fact that his Crypto.com App services are provided to him by Foris DAX Inc., a corporation registered in Delaware, USA.

As such, the Respondent respectfully submits that the Complainant has failed to establish that he is an eligible customer of the Respondent or that he has any contractual relationship with the Respondent.

¹⁴ P. 246

For the avoidance of any doubt, the Respondent submits that the Complainant is not, and was never a customer of the Respondent nor did the Complainant have a contractual relationship with the Respondent. As such, the Complainant has no standing before the OAFS in respect of their current complaint.

The name “Crypto.com” is not a legal entity and is merely the brand or trade name for several affiliated, legal entities, including but not limited to Foris DAX MT Limited (Respondent) and Foris DAX, Inc. These entities are all separate legal entities operating in different jurisdictions and serving different customers based on their registered jurisdiction. Foris DAX, Inc. services customers who are residents of the United States and Canada. Each entity has its own unique set of Terms and Conditions to which the users must accept and agree to. The relevant Terms and Conditions are readily available in the Crypto.com App under the “Settings” menu.

The Respondent would like to highlight that the Complainant resides in the United States. This information was provided by the Complainant on page one (001) of the Complaint.

To summarize, the Complainant is not an “eligible customer” and accordingly, the Respondent is non-suited to answer to the claim of the Complainant due to the lack of contractual or service provider – customer relationship with the Respondent.

For the above-mentioned reasons, the Company respectfully requests that the Complaint be rejected in its entirety, with costs ordered against the Complainant.’¹⁵

Analysis on preliminary plea

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 Arbitrator’s procedure:

¹⁵ P. 249

'(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 ...'.¹⁶

The Service Provider raised the plea that the Complainant was never onboarded *'and in fact has never been a customer of'* Foris DAX MT Limited.

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.'*

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

'Eligible customer' is defined as follows:¹⁷

'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:¹⁸

¹⁶ Art. 2 of Chapter 555

¹⁷ Article 2, definitions

¹⁸ *Ibid.*

*“financial services provider” means a provider of financial services **which is or has been licensed or otherwise authorized by the Malta Financial Services Authority**¹⁹ in terms of the Malta Financial Services Authority Act or any other financial services law’.*

As already mentioned above in this decision, the service and transactions subject to this Complaint were not provided by the Service Provider but rendered by a company that has no licence or other authority from the MFSA.

Decision

The Arbiter sympathises with the Complainant who appears to be an innocent victim of a scam. However, for the reason mentioned, the Arbiter does not have the jurisdiction to deal with the merits of the case, and hereby dismisses it.

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

As the case has been decided on a procedural issue, each party is to pay its own costs of these proceedings.

**ALFRED MIFSUD
Arbiter for Financial Services**

¹⁹ Emphasis added by the Arbiter