

Before the Arbiter for Financial Services

Case ASF 106/2022

FD

(‘the Complainant’)

vs

Foris DAX MT Limited (C 88392)

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

Sitting of 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 EUR 60,600 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 between 04 April 2022 and 21 April 2022, he fell victim to a multi-layered scam operation orchestrated by a presumed fraudster named ZC Markets via *Crypto.com*.

He explained that *“despite making some significant profits, I have never been allowed to make a withdrawal from ZC Markets and I have since found out that this is a scam entity. My checks online suggest Crypto.com continue to transfer funds to ZC Markets, despite being a scam entity. Crypto.com have a fiduciary duty of care to its clients, which I believe they have breached significantly”*.¹

¹ P.2

During the complaint process the Complainant was assisted by UK firm of Solicitors known as Bridge Law who expanded the complaint stating that²:

1. Complainant had reason to believe that the third party (ZC Markets) was a “Crypto Partner”.
2. The Service Provider had not made due diligence on ZC Markets which would have exposed that it was a scam entity.
3. The Service Provider should not have onboarded the Complainant who was a Dutch citizen and resident as the Service Provider had no licence from Dutch authorities for such onboarding as required by Dutch law.
4. The Service Provider had a duty of care in relation to transactions being made on its platform which would have made it extremely obvious that the Complainant was being defrauded.
5. The Crypto.com website gives misleading information in stating that Crypto.com ensures withdrawal protection and that whitelisting external email addresses through email verification is mandatory.
6. The Service Provider breached its fiduciary duties to the Complainant by failing to exercise the diligence required in the performance of its obligations, resulting in a significant loss to the Complainant.

In the Complaint, the Service Provider is often referred to as a Financial Institution³ and there is an expectation that it should have adopted transaction monitoring systems as required by the EU Payment Services Directive 2 – PSD 2.⁴

The Service Provider initially replied on 24 May 2022 seeking unique identification information from the Complainant but making it clear Crypto.com does not have any affiliation with ZC Markets.⁵

Later on, (probably on 30 June 2022), the Service Provider replied refuting the Complainant’s claim for refund and referred client to the Office of the Arbiter for Financial Services (OAFS) in case he wished to follow up his complaint.

² P. 237 - 240

³ P.239

⁴ EU 2015/2366 that entered into force on 12.01.2016

⁵ P. 69

The Complaint was filed by Mr FD with the OAFS on 02 September 2022 basically repeating the same issues made in the original complaint to the Service Provider.

The Service Provider's official reply was received on 21 September 2022⁶ stating:

- 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 28 March 2022.
- That through a series of seven transactions that were affected between 04 and 27 April 2022, the Complainant transferred 78,047.24 USDT (digital asset known as Stablecoin) to an unknown external wallet address. These had an approximate market value of EUR 77,000 at the time of the transfer. These assets were funded through a series of eight transfers amounting to EUR 60,600 from his ING bank account and two transfers of USDT 14,592.31 from an unknown external wallet to his *Crypto.com* wallet.

It is to be noted that whereas in his official complaint to the OAFS the Complainant is requesting refund of the EUR60,600 transferred from his bank account, his lawyers in their letter of 09 May 2022 to *Crypto.com* claim refund of US\$88,247.00.⁷

The Service Provider expressed their sympathy with the Complainant and recognized that he may have been misled or induced into transferring funds to an alleged fraudster, they stressed that these transfers were made solely at the Complainant's request and that they cannot revoke any virtual asset withdrawal because blockchain transactions are fast and immutable.⁸

It should be noted that from the date of the last fraudulent transaction on 27 April 2022 and the first contact reporting the fraud to *Crypto* on 09 May 2022, there was a gap of nearly two weeks.

⁶ P. 54 - 72

⁷ P.7

⁸⁸ P.178

The Hearing Process

A first hearing was held on 22 November 2022 where the Complainant, assisted by his advisors, made his case. He explained he was introduced to ZC Markets by a friend who informed him that he has to open an account with Crypto.com.

“Every time I tried to take out money, there were problems. And every time there problems come it is Euro 50,000, Euro 20,000. I want the money back. I take loans with people and now eight months later, I have nothing ... I thought Crypto.com is a renowned company and that they could help me, but they did not help me. They said ‘no we cannot help you. We can do nothing.’... I lost all my money; I have children, and I lost all my money. I am not a guy who likes to spend money. I thought Crypto.com was OK but it was not OK. Crypto.com knew what ZC Markets had done but Crypto did nothing. They took more than Euro 60,000.”⁹

Under cross-examination, the Complainant said he does not know the name of the friend who recommended to him ZC markets, but the friend also told him ***“to go to Crypto.com and make an account with Crypto.com and then go to ZC Markets”***.

The Complainant also confirmed that he supplied to Crypto.com the addresses to send the assets to.¹⁰

“I confirm that later I opened a separate account with ZC Markets. Then I transferred the monies, approximately €60,000 in various transactions to the account I opened with ZC Markets. I was transferring out money that I held in Crypto.com to my external account with ZC Markets”.¹¹

When asked why he thought that Crypto.com and ZC Markets were partners, the Complainant replied, ***“I say because when I made the connection with them I thought they were partners”***.¹²

A second hearing was held on 10 January 2023. The Service Provider repeated that they had merely executed their customer authenticated instructions. They

⁹ P. 192 - 193

¹⁰ *Ibid.*

¹¹ P. 194

¹² *Ibid.*

reaffirmed that they have no affiliation to ZC Markets and indeed they have no record of who was the owner of the third-party account that the Complainant transferred his digital assets to. They reaffirmed that all transactions were authorised by Mr FD, to which he himself admitted, and that Foris Dax carried out those transactions as instructed and therefore should not be held responsible for any mishaps that have occurred as a result of properly carrying out such instructions.¹³

As to the claim that they had no license to onboard Mr FD, a Dutch national, in the absence of a licence in terms of Dutch law, the Service Provider remarked that:

“no Dutch law expert has been brought in to give evidence on this point. But we have to say this: it is not disputed that we do not have a licence with the DNB (Dutch Central Bank) in the Netherlands but, according to their local laws, we are not required to have a licence to practice in the way we do, offering services in the way we do in the Netherlands.

In a very, very brief manner, the obligation of getting a licence only arises if the crypto services are provided by a company registered in the Netherlands as a Dutch company or in a way which is solicited or directed to the Dutch market. On an anecdotal sort of basis, if you look at the way which Crypto.com does its marketing, we do not carry Dutch language marketing; we do not operate a Dutch website. In fact, in such cases as the Formula One, which we do sponsor around the world on a global basis, you could see that when it comes to the Netherlands, we specifically do not have any advertising activities for that race.

Crypto.com has at no point actively advertised its business to Mr FD, and Mr FD has sought them himself from us.”

On being questioned on the claims made by the Complainant that Foris DAX failed him by not issuing him with timely warnings that his transfers could have been a scam, the Service Provider replied:

¹³ P. 230

“I say the verifications that we conduct is to verify his identity; to verify that the access to his App was correct and proper; that the transactions he carried out are his instructions. Those are our obligations.”¹⁴

In their final submissions, the parties made no new arguments but the Complainant put more emphasis that the Service Provider had breached the Virtual Financial Assets Act under which it was licensed which states that *“the offering of virtual financial assets ... in a country outside Malta shall be subject to the laws of that country”*.¹⁵ Also, that the Service Provider had a duty of care to prevent its clients from undertaking fraudulent transactions as that suffered by the Complainant.

The Service Provider rebutted these claims stating that they did not break any Dutch law by onboarding Mr FD at his own request without any promotion from their side and that the terms of their licence under the VFA Act does not impose the duty of care expected. They stated their relationships with their clients are conditioned by their Terms and Conditions, in particular 7.2(b) and 7.2(d).

“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”.

¹⁴ P. 233

¹⁵ Chapter 590 Article 11

(d) We have no control over, or liability for, the delivery, quality, safety or any aspect of any goods or service that you may purchase or sell to or from a third party. We are not responsible for ensuring that a third-party buyer or a seller that you transact with will complete the transaction or is authorised to do so. If you experience a problem with any goods or service 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.”¹⁶

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 555¹⁷ 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.¹⁸

Foris DAX is licensed by the Malta Financial Services Authority (‘MFSA’) as a VFA Service Provider as per the MFSA’s Financial Services Register.¹⁹ 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)

¹⁶ P. 210-211

¹⁷ Art. 19(3)(d)

¹⁸ <https://registry.mbr.mt/ROC/index.jsp#/ROC/companiesReport.do?action=companyDetails&fKey=ab2b4261-837f-4d91-8547-e97ed3935ef2>

¹⁹ <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.²⁰

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*'.²¹

Observations & Conclusion

Summary of main aspects

The Complainant made a transfer of his digital assets (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.

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.

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').

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

²¹ <https://crypto.com/eea/about>

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*'²² 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 unknown 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 platform.

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.

²² Guidance 1.1.2, Title 1, '*Scope and Application*' of the '*Guidance on Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements*'.

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.
- The Complainant seems to have only contacted the Service Provider on 9th May 2022,²³ this being almost two weeks after the disputed transactions, by which time the transactions had long been completed and finalised.²⁴

Once finalised, the crypto cannot be transferred or reversed as specified in the Service Provider's Terms and Conditions of Use²⁵ (and as typically indicated on various other internet sites).²⁶

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.

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:

²³ p. 7

²⁴ 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).

²⁵ Clause 7.2(b) of the *Crypto.com* App Terms & Conditions - P. 210

²⁶ E.G. <https://www.chargebackgurus.com/blog/chargebacks-more-volatile-complex-than-cryptocurrency>

*“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 ...”*²⁷

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:²⁸

“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 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 seems to have expected the same level of transactions monitoring protection as that imposed on regulated and licenced financial institution operating a payments system under the EU Payment Services Directive 2 -PSD2.²⁹

However, these are not considered applicable also given that the Service Provider is not “*a licensed and regulated financial institution*”. Foris DAX is

²⁷ P. 210

²⁸ P. 211

²⁹ EU 2015/2366 that entered into force 12 01 2016

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.³⁰

As to the argument made by the Complainant that the Service Provider was not licensed to onboard the Complainant who is a Dutch national as they were not licensed to do so under Dutch Law, in the absence of specific licence issued by the Dutch Authorities, the Arbiter feels that the case that the Service Provider needed such a licence has not been proven. On the contrary, the views expressed by the Dutch Authority for the Financial Markets through their email of 08 August 2022,³¹ indicates the contrary when it says *“If Crypto.com actively approaching clients in the Netherlands, they must be registered with ... DNB”*. Foris DAX made a compelling case that they were not actively approaching clients in the Netherlands and certainly they had not approached Mr FD who admitted that he had taken the initiative to approach them. Consequently, also, the claims that the Service Provider broke the VFA rules by onboarding Mr FD also fail.

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.**

³⁰ 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).

³¹ p. 112

- 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.³²

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.³³

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 explained. The Arbiter is accordingly rejecting the Complaint.

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

³² 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/>

³³ 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

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 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 onboarding 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