

## Before the Arbiter for Financial Services

Case ASF 122/2022

WH ('the Complainant')

vs

Foris DAX MT Limited (C 88392)

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

Sitting of 15 September 2023

The Arbiter,

Having seen **the Complaint** dated 14 October 2022<sup>1</sup> relating to the Service Provider's alleged failure to prevent, stop or reverse the payment in crypto with a value equivalent to €60,000 made by the Complainant from her account held with *Crypto.com* to a third party who was allegedly a fraudster.

### **The Complaint**

The Complainant explained that she:

*'was introduced to a trading platform named 'Tidex'. When I wanted to withdraw they ask for tax payment first, which will go in my account just to verify my legit to withdraw, then they ask for risk relief fee because I didn't do any transactions within 14 days saying that my account was suspicious, finally, they ask, for payment because I got helped from a third party to pay the previous fee, saying I was suspected of laundering for others. This is where I stopped. This is where I lost all my money and savings.'*<sup>2</sup>

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<sup>1</sup> Pages (P.) 1 - 84

<sup>2</sup> P. 2

In attachment, she sent a 12-page letter dated 21 February 2022 in the French language addressed to Crypto.com. No English translation was provided.

Also attached was a letter originally sent on 12 July 2022<sup>3</sup> to the Office of the Arbiter for Financial Services (OAFS) which is taken to contain the original complaint in French sent to the Service Provider referred to above.

The Complainant repeats that on or around 21 December 2021, she fell victim to a multi-layered scam operation run by TIDEX which coerced her to make deposits for a total of €60,000 from her Crypto.com account to the fraudsters.

In this elaborate 8-page (plus attachments) complaint letter dated 12 July 2022, she sought full refund of her loss from the Service Provider as she maintains that they are responsibilities for her 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
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.

It concludes by stating:

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<sup>3</sup> P. 21 - 28

*'Based on my analysis, and as confirmed by various authorities concerned with such matters, there is abundant evidence that forward-thinking financial institutions ought to take reasonable steps to forestall fraud, or at least mitigate its risk by using an effective risk management system, demonstrating their undisputed ability to responsibly and pre-emptively respond to questionable transactions in the digital arena. The use of such systems, largely based on newly adopted technologies aimed at effectively navigating the evolving threat landscape, is only one of a number of possible endeavours undertaken in this connection, alongside the application of past knowledge and experience related to popular fraudulent practices.*

*Astonishingly, I am pondering how it is that despite being shown that Crypto.com's business conduct was insufficient insofar as background checks are concerned, they keep refuting their indisputable role and responsibility in connection with the matter herein discussed. The points that I have hitherto made are too crucial to be taken lightly. Crypto.com's non-observance of the fundamental principles of justice – that is, to completely overlook and not even remotely try to mitigate the suffering of vulnerable consumers – is inexcusable given the size of the establishment and the vast resources at its disposal as the direct result of the patronage of clients like myself.*

*If it was, indeed, solely my responsibility, we must then believe at least one of the following clauses: a) financial institutions have absolutely no role whatsoever in preventing and detecting fraud, b) the fraud in question was not reasonably foreseeable, or c) the transactions in question were not sufficiently alarming. It is extremely unfortunate that Crypto.com pushes quite hard for me to believe all three of these things – despite evidence to the contrary.*

*In summary, I respectively ask your organization to consider my points, given your personal and companywide obligation to provide a fair and reasonable investigation into the complaint.<sup>4</sup>*

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.<sup>5</sup>

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<sup>4</sup> P. 28

<sup>5</sup> EU 2015/2366 that entered into force 12.01.2016

### **Service Provider's reply**

The Service Provider had replied to the Complainant on 01 March 2022 refuting all claims made on the basis that they simply executed her fully authenticated instruction and quoting article 7.2 of their Terms and Conditions. They state that transactions through blockchain are immediate and irreversible and therefore they are unable to revoke any previously completed withdrawals.<sup>6</sup>

In their official reply to the OAFS dated 28 October 2022 they stated:

- *'Foris DAX MT Limited ("the **Company**") offers the following services: a crypto custodial wallet ("the **Wallet**") and the purchase and sale of digital assets on own account, and a single-purpose wallet (the "**Fiat Wallet**"), which allows customers to top up and withdraw fiat currencies from and to their personal bank account(s) for the purposes of investing in crypto assets. Services are offered through the Crypto.com App (the "**App**"). The Wallet is only accessible through the App, and the latter is only accessible via a mobile device.*
- *(The Complainant) ... became a customer of Foris MT Limited through the Crypto.com App and was approved to use the Wallet on November 7<sup>th</sup>, 2021.'*<sup>7</sup>

A timeline of transactions operated by Complainant on her wallet and her fiat currency accounts was provided which mirrored the transaction sheets annexed to the Complaint.<sup>8</sup>

The Service Provider concluded that:

*'In summary, (Complainant) has withdrawn the total of 7.382282376298646 ETH (approximately 10,045.51 EUR based on market conditions as of October 24, 2022) and 43332.08 USDT (approximately 43,765.40 EUR based on market conditions as of October 24, 2022) from her Crypto.com Wallet towards external wallet addresses (insert wallet addresses) between December 20, 2021 - February 08, 2022.'*<sup>9</sup>

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<sup>6</sup> P. 47

<sup>7</sup> P. 90

<sup>8</sup> P. 81 - 84

<sup>9</sup> P.99

The Service Provider submitted that it refuses to agree to refund request:

*'... based on the facts that the reported transfers were clearly made by the Complainant herself. All of the transactions outlined earlier in the response were executed using (the Complainant's) personal login credentials with two factor authentication (2FA) active. Furthermore, there were no changes to the Complainant's personal passcode, which is used to login to her Wallet, in the period between December 20, 2021 – February 8, 2022. This leads us to conclude that the Complainant purposefully funded her Wallet and executed the transfers in her own volition, possibly to seek gains promised by the alleged scammers.*

*While we sympathize with the Complainant and recognize that she may have been misled or induced into transferring funds to an alleged fraudster, it is important to note that these transfers were made solely at the Complainant's request and Foris DAX MT merely executed the instructions provided by the Wallet holder herself. We must also emphasize that Crypto.com cannot revoke any virtual asset withdrawals because blockchain transactions are fast and irrevocable.*

*While this is an unpleasant scenario, the Company cannot be held liable for the Complainant's conduct, which resulted in her moving her virtual asset holdings to a third party.*

*As outlined in the Foris DAX MT Limited Terms of Use, which the Complainant has agreed to upon registering an account with Crypto.com, she is solely responsible for the security and authenticity of all instructions submitted through the Crypto.com app, and as such, the Company cannot accept liability for the veracity of any third party or for the instructions received from the Complainant themselves.*

*Please see the relevant section of the Terms of Use accepted by the Complainant for your reference:*

*"QUOTE*

*7. TOP-UPS TO DIGITAL ASSET WALLET AND DIGITAL ASSET TRANSFERS*

*...*

*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.*

...”

UNQUOTE

*In summary, it seems conceivable that the Complainant has been the victim of an alleged scam. While we fully empathize with (the Complainant) in this regard, it cannot be overlooked that she had willingly, according to her statements and to the information available on our platform, transferred her ETH and USDT virtual asset holdings from her Crypto.com Wallet to external wallet addresses which she had no access to.*

*We remain at your disposal for any further information you may require pertaining tto the above case.’<sup>10</sup>*

### **The hearing process**

The first hearing was scheduled for 28 March 2023, but Complainant excused herself citing a language problem.

The Arbiter gave the Complainant an opportunity to make a statement in writing about her case instead of giving oral evidence. It allowed the Service Provider three weeks from receipt of the Complainant’s written statement to make cross-examination questions in writing.

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<sup>10</sup> P. 100 - 101

The Arbiter warned that if Complainant does not submit a written statement, he will dismiss the case.<sup>11</sup>

### **Decree**

As no reply was received from the Complainant, the Arbiter issued a Decree on 18 July 2023 giving a last chance to Complainant to submit her written statement by 18 August 2023.<sup>12</sup>

As no reply was received, the OAFS sent an email reminder on 21 August 2023<sup>13</sup> extending the deadline for submission till 31 August 2023 in view of the holiday period. Complainant was again warned that failure to make submission will lead to case dismissal.

Yet again there were no submissions from the Complainant.

### **Decision**

As Complainant has failed to make submissions as requested in the hearing of 28 March 2023, and yet again failed to reply to the Decree of 18 July 2023 and the email reminder of 21 August 2023, the Arbiter is dismissing this Complaint in terms of Article 22(4) of Chapter 555 of the Laws of Malta which states:

*‘the Arbiter may decide not to continue to deal with the complaint if the complainant fails to comply with a request for further information within a specified period of time’.*

Each party is to bear its own costs of these proceedings.

Alfred Mifsud  
**Arbiter for Financial Services**

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<sup>11</sup> P. 146

<sup>12</sup> P. 148

<sup>13</sup> P. 149