

Before the Arbiter for Financial Services

Case ASF 111/2022

PM ('the Complainant')

vs

Foris DAX MT Limited (C 88392)

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

Sitting of the 27 July 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 19,500 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 26 July 2021, he fell victim to a multi-layered scam operation orchestrated by an entity referred to as "**Capital Trade**". He explained that the equivalent of GBP 19,500 was transferred from his wallet, utilizing the services of *Crypto.com*, to this scammer.

The Complainant filed an elaborate multi-page complaint letter dated 03 August 2022 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. 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 possible 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 2.¹

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”***.²

The Complaint was filed by Complainant with the Office of the Arbiter for Financial Services (OAFS) on 20 September 2022, basically repeating the same issues made in the original complaint to the Service Provider but adding:

“In providing its services to a customer, a financial institution is required by law to exercise the care and skill of a diligent, prudent organization. In this case, this means that the payment service provider should not turn a ‘blind eye’ to known facts pointing to a real possibility that their customer is being scammed. In other words, Crypto.com must have had special knowledge of what was occurring or been alerted to a real possibility of fraud taking place. The financial institution

¹ EU 2015/2366 that entered into force 12 01 2016

² P. 22

must have known or reasonably ought to have known that I was dealing with a scammer.

Granted, there is room for diversity of view insofar as reasonableness is concerned. Indeed, there is a sense in which the standard of care of the reasonable person involves in its application a subjective element.

However, it must be remembered that the correct test is always reasonable care in all circumstances, not average care. The fact that most people behave in a certain way may be good evidence that the conduct is reasonable, but this is not necessarily the case. Although reasonableness is a very fluid concept, all of the evidence suggests that Crypto.com did not foresee the fraud and disregarded even the most obvious dangers in this respect.”³

Service Provider’s reply

The Service Provider’s official reply was received on 12 October 2022⁴ stating that:

Foris DAX MT Limited (‘Foris DAX’ or ‘the Service Provider’) 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;

the Complainant became a customer of Foris DAX through the *Crypto.com* App on the 21 July 2021.

The following timeline was provided by the Service Provider:

- a) 23 July 2021 – The Complainant purchased 0.021 Bitcoin for approximate value of GBP 500 using his personal debit/credit card. Shortly after on same day, these Bitcoin were transferred (less transfer charges) from his wallet to an unknown external wallet as instructed by the Complainant.
- b) 27 July 2021 – The Complainant funded his account with GBP 2000 and purchased the total amount of GBP 1927.32 in 0.0691105 Bitcoin (BTC) and these together with 0.00260096 BTC which were earlier transferred to his

³ P. 3

⁴ P. 105 - 134

wallet from an unknown external wallet, were transferred out on same day to an unknown external wallet.

c) The same procedure was adopted for transfers of:

GBP 3000 on 05 August 2021

GBP 2000 on 06 August 2021

GBP 2000 on 12 August 2021

GBP 5000 on 20 August 2021

GBP 5000 on 23 August 2021

In all, client transferred GBP 19,500⁵ which were all converted in BTC and quickly transferred out to an unknown external wallet (which seems to have been the beneficiary of the scam) always in accordance with authenticated instructions from the Complainant. Screenshots were provided for all these transactions.

d) ***'17 September 2021⁶ – The Complainant contacted Crypto.com's Customer Support team via email, providing a letter regarding his issue and reporting that he had been the victim of a scam, having been coerced or induced to send the Bitcoin (BTC) amounts outlined earlier in our letter to various external wallet addresses reportedly belonging to the alleged scammers, which he further went to describe went by the entity name "Capital Trade".***

e) ***20 September 2021 – A Complaints Officer reviewed the matter raised by the Complainant fully and independently before preparing a final response detailing the outcome of the internal investigation and providing further information regarding the decision to refuse reimbursement of the losses incurred by the Complainant.***

The response indicated that the Company refused to honour the refund request based on the facts that the reported transfers were clearly made by the Complainant himself, where he purposefully funded his Wallet and

⁵ This corresponds to the loss claimed by Complainant. On page 114, Service Provider (erroneously?) indicate loss as amounting to €11976.85 based on BTC market value as at 28 September 2022

⁶ P. 9 Complaint letter is dated 03 August 2022

executed the transfers in his own volition, possibly to seek gains promised by the alleged scammers.

While we sympathize with the Complainant and recognise that he 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. We must also emphasize that Crypto.com cannot revoke any virtual asset withdrawals because blockchain transactions are fast and immutable.

While this is an unpleasant scenario, the Company cannot be held liable for the Complainant's conduct, which resulted in him moving his 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, he 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'

A copy of the communication between the *Crypto.com* Complaints Team and the Complainant was provided.⁷

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 04 April 2023, but Complainant failed to show up and efforts to contact him to urge his virtual presence proved fruitless.⁸

A second hearing was held on 18 April 2023 but yet again the Complainant failed to connect so the Arbiter authorised the Service provider to submit their proofs and final submissions within one month.⁹

Proofs were submitted on 18 May 2023¹⁰ where Service Provided repeated what they had explained in their reply above referred to but added:

⁷ P. 79 - 80

⁸ P. 135

⁹ P. 136

¹⁰ P. 139- 140

- ***'In fact, the Respondent requires users to add new withdrawal addresses in a separate procedure in the App called whitelisting (the user needs to confirm the addition with the passcode) before transfers can be made to add an extra layer of protection for the users to help ensure that the transaction details are correct before the user clicks the send button.***
- ***It is also important to note that although the Complainant alleges he does not have access to the "third-party wallet" to which he sent the BTC, there is no way for us to prove this. The ability to anonymously operate is an important element of cryptocurrency. Although cryptocurrency can be tracked, all that it reveals may be a digital wallet address without any identification as to who holds the wallet address. One person can hold multiple addresses without any link between the addresses or indication of who owns them.'***

And finally summarised their position:

- ***'On the balance of the foregoing, it is the Respondent's case that the Complainant should be responsible for any losses which occurred out of his own gross negligence. While the Complainant appears to have fallen victim to a scam, there is no dispute that he himself had personally authorized the BTC withdrawals and the Service Provider has merely carried out his express instructions. In summary, the Respondent would submit that the Fraudulent Transactions were carried out by the Complainant, and it was the direct result of the gross negligence of the Complainant.'***

Service Provider filed in support of the proofs:

- Terms and Conditions¹¹
- Complainant's Transaction History¹²

¹¹ P. 142 - 166

¹² P. 167

Final submissions¹³ were also submitted on 18 May 2023 but these repeat what was already in their reply and the proofs.

In the meantime, there was no communication whatsoever from the Complainant even though he was sent copies of all evidence of the hearings he failed to attend, and of all submissions subsequently made by the Service Provider. It is possible that the Complainant is no longer interested in pursuing his case.

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 555¹⁴ which stipulates that he should deal with complaints in *'an economical and expeditious manner'*.

The Service Provider

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

As per the unofficial extract of its licence posted on the MFSA's website, the Class 3 VFSA 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.¹⁶

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'*.¹⁷

¹³ P. 168

¹⁴ Art. 19(3)(d)

¹⁵ <https://www.mfsa.mt/financial-services-register/>

¹⁶ <https://www.mfsa.mt/financial-services-register/>

¹⁷ <https://crypto.com/eea/about>

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 ...’.¹⁸

It offers the account holder ‘a crypto custodial wallet’ and ‘the purchase and sale of digital assets on own account’.¹⁹

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.

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’).

¹⁸ P. 142

¹⁹ P. 105

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*'²⁰ 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.

At no stage has the Complainant raised any doubt as to his having authenticated the transactions personally. The fact that he did not attend the two hearings did not help to make a proper case for his Complaint.

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 series of payments made by the Complainant from his account held with Foris DAX to an allegedly fraudulent external trading platform causing a loss to the Complainant of GBP 19,500.

²⁰ Guidance 1.1.2, Title 1, '*Scope and Application*' of the '*Guidance on Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements*'.

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 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. 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 17 September 2021, nearly one month after the disputed transactions,²¹ by which time the transactions had long been completed and finalised.²²

Once finalised, the crypto cannot be transferred or reversed as specified in the Service Provider's Terms and Conditions of Use²³ (and as typically indicated on various other internet sites).²⁴

²¹ The last withdrawal to the external wallet undertaken on 23 August 2021

²² 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).

²³ Clause 7.2(b) of the *Crypto.com* App Terms & Conditions - P. 155

²⁴ 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.²⁵

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 ...'*²⁶

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:²⁷

'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.

It is noted that in his formal complaint to the Service Provider, the Complainant only referred in a general manner to the regulations and

²⁵ Clause 3.1 and Clause 7.2(b) of the Terms and Conditions on the use of the Crypto.com App Services (P. 147; 155)

²⁶ P. 155

²⁷ P. *Ibid.*

standards applicable to Foris DAX '*as a licensed and regulated financial institution*'.²⁸ In the said formal complaint reference was also made to '*The Federal Trade Commission (FTC) Act, 15 U.S.C.*',²⁹ 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.^{30 31}

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 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**

²⁸ P. 11; 14

²⁹ P. 11; 18

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 It is not clear whether Complainant explored possible protection under the EU Payments Directive PSD 2 (EU 2015/2366) from his bank through whom the Complainant made frequent transfers in a short span of time and who must have more KYC obligations than the Service Provider with whom the Complainant had just started his account relationship.

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 mentioned. The Arbiter is accordingly rejecting the Complaint.

However, since trading and investing in crypto assets 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

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

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 for 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