

Before the Arbiter for Financial Services

Case ASF 129/2022

DH

(The Complainant)

vs

Foris DAX MT Limited (C 88392)

(The Service Provider/Foris DAX)

Sitting of 25 August 2023

The Arbiter,

Having seen **the Complaint** dated 28 October 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 payment allegedly consisted of crypto assets as follows, but the fiat currency equivalent thereof was not disclosed:

USDT 39642.96 (USDT is Tether, an asset backed by US\$ or stable coin)

USDC 86582.15 (USDC is USD Coin, an asset backed by US\$ or Treasuries)

BTC 0.75 (BTC is Bitcoin)

¹ P. 1 - 46

The Complaint

The Complainant, through his representative, Legal Services Agency of Sofia Bulgaria, contacted Service Provider on 08 August 2022² explaining that in 2021, the Complainant fell victim to a fraud scheme orchestrated by an entity referred to as “**www.bitsbear.com**” who fraudulently pretended to be licensed as regulated financial brokers.

As the Complainant had no special knowledge in the financial markets, he was deceived into believing he was making sound investment and, at the explicit request of the fraudsters, all payments were made in crypto assets after he was instructed to purchase them using fiat currency on www.crypto.com.

Unlike normal cases referred to the Arbiter, in this case, the Complainant was not pretending recovery of the loss incurred or release of assets from the Service Provider but was demanding information to enable him to trace the fraudulent merchant and seek to recover his loss from its main source.

In particular, the Complainant was seeking information from the Service Provider and requested the Arbiter to order Foris DAX MT:

- 1) To disclose at least the following information about the crypto transfers made to the fraudulent merchant’s beneficiary wallets, as indicated in their letter of demand dated 08 August 2022,³ namely:
 - a) whether the beneficiary wallets were hosted or unhosted;
 - b) if hosted, which exchanges were hosting the beneficiary’s wallets;
 - c) if known to the Service Provider, who are the persons holding the beneficiary wallets.
- 2) To contact the relevant exchanges hosting the beneficiary’s wallets (if the Service Provider is not in possession of the above-mentioned information) and request such information. The said information should then be forwarded to the Complainant as allowed by law.

² P. 7 - 11

³ *Ibid.*

- 3) To indicate to the Complainant the precise legal grounds that prevail over the EU Directives and/or FATF Recommendations, in case of refusal.

Although no quantitative remedy was demanded in the Complaint, the Complainant expected the above information on the basis of the obligation emanating from FATF Recommendation 16 which stipulates that:

“CROSS-BORDER QUALIFYING WIRE TRANSFERS

6. Information accompanying all qualifying wire transfers should always contain:

(a) the name of the originator;

(b) the originator account number where such an account is used to process the transaction;

(c) the originator’s address, or national identity number, or customer identification number, or date and place of birth;

(d) the name of the beneficiary; and

(e) the beneficiary account number where such an account is used to process the transaction.”

As part of the documents attached to his Complaint filed with the Office of the Arbiter for Financial Services (“OAFS”), the Complainant attached a copy of the reply received to his formal complaint with the Service Provider.

The said reply from the Group General Counsel of *Crypto.com* dated August 22, 2022, stating:

“We have reviewed your claim and any documentation you have provided. While we are sympathetic to your Client’s alleged loss, it is clear from our records, and as admitted in your letter, that your Client has, at all material times, maintained control over their account and that all transactions were made from their account were made at your Client’s discretion. As you may know, all blockchain transactions are irreversible, and, as such, it is not possible for Crypto.com to revoke or reverse such transactions.

We are not in a position to provide you with the information you seek. It appears that your Client has been defrauded by a third party. We urge you to notify your local authorities regarding this matter so that they can fully investigate and seek

return of your Client's funds from this third party. For any such investigation, we will act upon being served with a proper court order or subpoena from a court of competent jurisdiction addressed to Foris DAX, Inc. and sent to our Law Enforcement Liaison Team at lawenforcementglobal@crypto.com. For all other information directly related to your Client's account, your Client can log into his Application and retrieve available data, or contact contact@crypto.com for more information.

*Please direct all future correspondence to contactlegal@crypto.com. Nothing herein shall be construed as an admission or waiver of any rights by Crypto.com all of which are expressly reserved."*⁴

The Complaint was filed by Complainant with the Office of the Arbiter for Financial Services (OAFS) on 28 October 2022, basically, repeating the same issues made in the original complaint to the Service Provider and accusing the Service Provider of not living up to their self-declaration that they were FATF compliant.⁵

It is to be noted that in spite of the letter from Group General Counsel of *Crypto.com* dated August 22, 2022, above referred to where the Complainant was instructed to address his Complaint to Foris DAX, Inc., the Complainant asked through emails dated 19 September 2022 and 07 October 2022⁶ for guidance from complaints@crypto.com about which jurisdiction his complaint should be addressed to:

*"Malta, or is it another jurisdiction, e.g. the United States? Which is the competent authority?"*⁷

In the absence of what seems a clear reply about which jurisdiction is applicable (although the above-mentioned letter of 08 August 2022 was indicative enough), the Complaint was filed with the OAFS.

Service Provider's reply

The Service Provider's official reply was received on 16 November 2022⁸ stating that:

⁴ P. 12

⁵ P. 23

⁶ P. 42

⁷ P. 43

⁸ P. 52 - 54

- *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.*
- *(The Complainant) ... Is currently as customer of Foris DAX Inc a sister company ... incorporated in the United States, and at the material time of August – December 2021 a customer of Foris DAX Global, a sister company ... incorporated in Ireland.”⁹*

In view of the above, the Service Provider maintained that the Complaint should be addressed to the relevant authorities in the Complainant’s home country or that of the US Entity and not to the Office of the Arbiter for Financial Services in Malta (OAFS) who 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. They maintained that they never provided the Complainant with Crypto.com App services and, consequently, cannot give the information sought in the Complaint. They maintained that the Complainant is not an eligible customer in respect of hearings before the OAFS.

The Hearing

A hearing was held on 20 June 2023. The Arbiter referred to the preliminary plea raised by the Service Provider claiming that the Complainant is not an “*eligible customer*” as defined by Chapter 555 of the Laws of Malta and, hence, the Arbiter has no competence to hear this complaint.

The Arbiter asked the Complainant if he can provide any proof that he was an eligible customer of the Service Provider Foris DAX MT Limited.

The Complainant simply replied:

⁹ P. 52

“Crypto or Foris DAX Malta or Foris DAX United States”.¹⁰

The Service Provider replied:

“As a US resident, the service was provided to you by the Irish entity which is Foris DAX Global or Foris DAX Inc. which is based in the United States.”¹¹

The Arbiter requested Complainant to submit proof of his eligibility to make this Complaint before the OAFS with a right of reply by the Service Provider.

In their submission of 31 July 2023, the Complainant and his representative claimed that as the Service Provider has participated actively in this Complaint, that makes the Complainant eligible to make this Complaint before the OAFS.

They ask if:

“Foris DAX MT Limited claims that it has not been servicing the accounts, then why take so long to inform us of the fact?”¹²

The submission also included extensive comments on the merits of the case which will only be taken into consideration if the preliminary plea on the Arbiter’s competence to hear this Complaint is rejected.

In the counter reply of 11 August 2023, the Service Provider make the same arguments of the Complainant not being an eligible customer in terms of Chapter 555. Regarding the argument that their participation in this Complaint renders the Complainant an eligible customer, they state:

“On 31 July 2023, through his legal representatives, the Complainant filed a document titled Legal Considerations and Additional Comments (the “Document”).

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 other than to make serious and false allegations of the Respondent of having played a part in misleading the Complainant throughout the compliant procedure.

¹⁰ P. 55

¹¹ P. 55

¹² P. 61

The Respondent would like for it to be put on record that this is not the first occasion in which the Complainant's legal representatives have assisted customers of Foris DAX, Inc. in lodging complaints with the OAFS. The Complainant's legal representatives have also attended a number of hearings before the Arbiter and his predecessor, Dr Reno Borg, to be fully aware of the fact that 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), Foris DAX Global and Foris DAX, Inc. These entities are all separate legal entities, operating in different jurisdictions and serving different customers based on their registered jurisdiction. Each entity has its own unique set of Terms and Conditions to which the users must accept and agree to.

The Respondent also submits that the Complainant's legal representatives are fully aware that the relevant Terms and Conditions are readily available in the Crypto.com App under the 'Settings' menu and that if the Complainant were to check his relevant Terms and Conditions, the Terms and Conditions would clearly name Foris DAX, Inc. as the current service provider of the Complainant's Crypto.com App account.

Having said so, the Complainant's legal representatives have failed to acknowledge this fact and instead, have drawn the focus to the alleged misconduct of the Respondent.

*The Respondent would like to highlight that, according to the Complaint filed by the Complainant on 28 October 2022, the Complainant's legal representatives first wrote to the Respondent through contact@crypto.com on 8 August 2022 (the "**Complaint Letter**"). The email address contact@crypto.com is a general inbox whereby mail is received and then passed on to the relevant departments of different entities. As the Complaint Letter was related to a customer of the United States, the Complaint Letter was passed on to Foris DAX, Inc.*

*It is evident from the reply on Crypto.com letterhead dated 22 August 2022 (the "**Reply**"), which the Complainant's legal representatives have included three times in the Complaint on pages 012, 031 and 044, that the entity responding was Foris DAX, Inc.:*

*“For any such investigation, we will act upon being served with a proper court order or subpoena from a court of competent jurisdiction addressed to **Foris Dax, Inc.** ... (emphasis added).*

For reasons that escape the Respondent, the Complainant’s legal representatives elected to ignore the information provided in the Reply and proceeded with filing this Complaint two months later.

The Respondent finds it even more baffling as to why the Complainant’s legal representatives are questioning why the Respondent is taking part in these proceedings before the OAFS and have accused the Respondent of hurting the Complainant by doing so. The Respondent submits that it takes all complaints seriously and wishes to help resolve all complaints, whether rightly or wrongly made against the Respondent. As such, the Respondent’s reply to the Complaint filed with the OAFS clearly sets out the facts and entities which service/had serviced the Complainant’s Crypto.com App account. Nevertheless, once again, the Complainant’s legal representatives elected to continue to arbitration before the OAFS. As such, the Respondent has had no choice but to take part in such proceedings.

For the above-mentioned reasons, the Company respectfully requests that the Complaint be rejected in its entirety, with costs ordered against the Complainant.”¹³

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 Arbiter’s procedure:

“(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*”:

¹³ P. 70- 71

“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 ...”.¹⁴

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.

In the submissions filed on 31 July 2023, the Complainant claimed eligibility on the basis of Service Provider’s participation in this Complaint and their being misguided to make the Complaint at the wrong jurisdiction.

The Arbiter finds the claims unrealistic and irrelevant for determining whether Complainant is an eligible customer as defined in Chapter 555. The Service Provider raised the preliminary plea of ineligibility in their first formal reply to the Complaint filed with the OAFS.¹⁵

Any claims for misguidedness should be addressed to the Group General Council of Crypto.com as directed in their letter of 22 August 2022 which does not in any way indicate that the Service Provider has jurisdiction to answer the Complaint.

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**.

¹⁴ Art. 2 of Chapter 555

¹⁵ P. 53

“Eligible customer” is defined as follows:¹⁶

“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:¹⁷

*“‘financial services provider’ means a provider of financial services **which is or has been licensed or otherwise authorized by the Malta Financial Services Authority**¹⁸ 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 is 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.

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

¹⁶ Article 2, definitions

¹⁷ *Ibid.*

¹⁸ Emphasis added by the Arbiter