

## **Before the Arbiter for Financial Services**

**Case ASF 130/2022**

**PE**

**(the Complainant)**

**vs**

**Foris DAX MT Limited (C 88392)**

**(The Service Provider/Foris DAX)**

### **Sitting of 8 May 2023**

**The Arbiter,**

**Having seen the complaint** filed by the Complainant through his attorneys Petrova Law Firm ('LSA') based in Sofia Bulgaria, whereby they expect that the Service Provider gives more information about a loss incurred by the Complainant following the transfer of his digital assets from his e-wallet held with *www.crypto.com*<sup>1</sup> to what resulted to be a fraudulent merchant.

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:

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<sup>1</sup> This being a brand used by the Group which the Service Provider forms part of.

- 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 22.07.2022,<sup>2</sup> 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.
- 3) To indicate to the Complainant the precise legal grounds that prevail over the EU Directives and/or FATF Recommendations, in case of refusal.

As part of the documents attached to his Complaint filed with the Office of the Arbitrator for Financial Services ('OAFS'), the Complainant attached a copy of the reply received to his formal complaint.

The said reply from the Group General Counsel of *Crypto.com* dated August 22, 2022, stated that they were unable to give the said information but would cooperate with any investigation *'upon being served with a proper court order or subpoena from a court of competent jurisdiction addressed to Foris Dax Inc.'*<sup>3</sup>

**Having seen the reply to the OAFS filed by the Service Provider which, in essence, states that:**

The Service Provider never onboarded the Complainant as a customer and thus it never provided any services to him.

The Service Provider further submitted that *'Instead, the transactions reported ... occurring between August – October 2021, were executed while he was a customer of Foris Dax Inc., a sister company of the Company'*.<sup>4</sup>

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<sup>2</sup> Page (P.) 7-9

<sup>3</sup> P. 11

<sup>4</sup> P. 48

Furthermore, the Service Provider advised that the complaint should be addressed to the relevant authorities in the Complainant's home country, and not to the OAFS in Malta.

### **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':

*'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 ...'.*

The Service Provider raised the plea that irrespective of the time when the transactions complained of occurred, the Complainant was never on-boarded *'and in fact has never been a customer of'* Foris DAX MT Limited.<sup>5</sup>

In the hearing held on 27.03.2023, the Complainant answered negatively to the question if he was aware that the Terms and Conditions by which he was onboarded as a client of *www.crypto.com* point to the fact that Foris Dax Inc (a Delaware registered corporation) was the entity providing him with the services he engaged for.

It is further noted that during the hearing of 17 April 2023,<sup>6</sup> it was *inter alia* declared by the Service Provider that:

*'From the records we can see that [the Complainant] became a customer of Foris DAX Global Limited using the Crypto.com App on 5 June 2021. As we have*

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<sup>5</sup> *Ibid.*

<sup>6</sup> P. 52

*explained before, the Foris DAX Global Limited entity is an Irish entity and is not subject to the auspices of the OAFS or these arbitral proceedings.*

*On 9 June 2021, [the Complainant] ceased to be a customer of Foris DAX Global Limited and then became a customer of Foris DAX Inc. by accepting the terms and conditions supplied to him through the App.*

*Foris DAX Inc is a US entity which is also not under the auspices of the OAFS or the Maltese regulator.*

*[The Complainant] is a user based in the US. His transactions were first conducted through an Irish entity and later through a US entity and, as such, he has never been onboarded or serviced by the service provider who is today part of these proceedings.'*

### **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:<sup>7</sup>

*'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 ...'.*

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<sup>7</sup> Article 2, definitions

Then, **financial services provider** is described as follows:<sup>8</sup>

*“financial services provider” means a provider of financial services **which is or has been licensed or otherwise authorized by the Malta Financial Services Authority**<sup>9</sup> 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 was 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.**

**Due to the novelty and special circumstances of this case, and also because 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**

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<sup>8</sup> *Ibid.*

<sup>9</sup> Emphasis added by the Arbiter