

Before the Arbiter for Financial Services

Case ASF 132/2022

NF ('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 €35,000¹ 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 '**tocoina.com**'. He explained that the equivalent of €35,000 were transferred from his wallet, utilizing the services of *Crypto.com*, to this scammer.

The Complainant filed an elaborate multi-page (17 pages plus attachments) complaint letter dated 08 April 2022² with the Service Provider in which he sought

¹ The Complaint was registered for €35,000. In the course of the proceedings, it resulted that the actual transfers made in the period of the alleged scam amounted to just short of €50,000. Not clear why the claim was submitted for a lesser amount.

² P. 6 - 95

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 possibly 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 2.³

The Service provider replied definitively on 02 May 2022⁴ stating:

'Firstly, I would also like to express my empathy regarding what happened. I appreciate that a significant amount of virtual asset holdings are concerned. In this case we have acted as per your explicit instructions and fully in line with our Terms of Use and all applicable regulatory requirements.

While we provide financial services, the decision what to do with your funds is always entirely up to you and all crypto currency transfers were initiated on your end after we had satisfied our internal requirements. In light of the above

³ EU 2015/2366 that entered into force on 12.01.2016

⁴ There were earlier exchanges seeking more information from Complainant

and the applicable Terms of Use below we will not be able to offer a refund of the completed BTC withdrawal:

7.2.

Digital Asset Transfers (a) You may transfer any Stored Digital Asset from your Digital Asset Wallet to a specified external address or to another Wallet App user via the Crypto.com Wallet App. (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. 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 Stored Digital Asset.

Finally, I would also like to confirm that transactions done on the blockchain are immediate and irreversible, as such it is not possible for Crypto.com to revoke any BTC withdrawals.’⁵

The Complainant replied to the Service Provider’s refusal by letter on 11 May 2022 raising the same arguments as in the original complaint letter and concluding:⁶

‘I hereby contend that even given lack of statutory or regulatory obligation on your part to safeguard customers and their funds to the best of your ability, your view nevertheless faces a number of concrete objections:

- 1. Your account of the subject matter seems rather incomprehensive as it reprehensibly standardizes (and thus deliberately chooses not to engage) alarmingly unusual conditions; homing in on that which is absolutely indispensable to protect consumers and enhance the integrity of financial systems.**

⁵ P. 38

⁶ P. 36-37

- 2. Suppose I grant, for the sake of argument, that there is no such obligation under the law in any way, shape or form – then your retort would seem quite out of place, given (i) the ease with which you could have forestalled the fraudulent activities depicted herein; and (ii) the increasingly individualized approach that is newly being offered to consumers in view of best industry standards aiming at minimizing financial crime and fraud.**
- 3. Your understanding of the role of financial institutions in society is seriously flawed. It certainly does not help to solve the rising problem of online fraud and financial threats that unfortunately go unheeded and unchecked, nor does it show any readiness or willingness to ward off such unlawful activities.**

As one who responsibly approaches this subject with the utmost gravity and objectivity, I am resoundingly confident that there is no available sound foundation for, let alone a persuasive argument, in support of your position.

If despite these objections, my concerns are not appropriately taken into consideration and are instead simply dismissed, you can be assured that alternative action will be taken, and I will make it a point to share our exchanges with the public so that at least pre-emptive action can be taken by other potential clients to avoid any dealings with organizations where customer security is not a priority.'

The Complaint was filed by Complainant with the Office of the Arbiter for Financial Services (OAFS) on 31 October 2022 basically repeating the same issues made in the original complaint to the Service Provider.

Service Provider's reply

The Service Provider's official reply was received on 16 November 2022⁷ 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.

⁷ P. 101 - 124

That the Complainant became a customer of Foris DAX through the *Crypto.com* App on the 23 November 2021.

The following timeline was provided by the Service Provider:

- a) 01 December 2021 – The Complainant transferred to his wallet account €5,000 with which he purchased USDT (a digital asset pegged to the value of the US\$) and, shortly after on same day, these USDT were transferred (less transfer charges) from his wallet to an unknown external wallet as instructed by the Complainant.
- b) 02 December 2021 – The Complainant transferred to his wallet account €4,000 with which he purchased USDT (a digital asset pegged to the value of the US\$) and, shortly after on same day, these USDT were transferred (less transfer charges) from his wallet to an unknown external wallet as instructed by the Complainant.
- c) The same procedure was adopted for transfers of:
 - €6,000.00 on 03 December 2021
 - €7,700.00 on 06 December 2021
 - €1,529.59 on 08 December 2021
 - €10,000.00 on 10 December 2021
 - €11,500.00 on 13 December 2021
 - €3,414.90 on 14 December 2021

In all, client transferred €49,144.49⁸ which were all converted in USDT 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

⁸ For reasons unclear, this does not correspond to the loss claimed by Complainant for €35,000.

A copy of the communication between the *Crypto.com* Complaints Team and the Complainant was provided with the submissions of the Complainant.⁹

The Service Provider submitted that:

'Based on our investigation, the Company is of the opinion that we are unable to honour the Complainant's refund request based on the facts that the reported transfers were clearly made by Mr NF himself, and the Company was merely adhering to Mr NF's instructions and providing the technical service of transferring the requested assets to an address provided by Mr NF. We have observed no new unique logins, and all transactions were executed using Mr NF's personal login credentials, using an active two-factor authentication (2FA). Furthermore, there were no changes to the Complainant's personal passcode through the period between December 01, 2021 – December 14, 2021. This leads us to conclude that the Complainant purposefully funded his Wallet and executed the transfers of his own volition, possibly to seek the gains promised by the alleged scammers.

Whilst we sympathize with the Complainant and recognize 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.

Unfortunately, Crypto.com cannot revoke any virtual asset withdrawals because blockchain transactions are fast and immutable.'¹⁰

The hearing process

The first hearing was held on 6 March 2023, but Complainant failed to show up and efforts to contact him to urge his virtual presence proved fruitless.¹¹

A second hearing was held on 28 March 2023, but yet again the Complainant failed to connect but sent a message informing that he had translation problems.

Considering that his communications in elaborating his Complaint both to the Service Provider and to the OAFS were well written in professional English, it was

⁹ P. 27 - 43

¹⁰ P. 109

¹¹ P. 125

suspected that the Complainant had 'lost' the shadow assistance of an undisclosed entity.

The Arbiter ordered that submissions be made in writing giving due time for cross-examinations, and final submissions by both sides.¹²

On 25 April 2023, the Complainant informed that he had:

“no additional information to provide beyond the two documents already submitted to Foris AX MT Limited.”¹³

The written proofs of the Service Provider were submitted on 31 May 2023, wherein they repeated what they had already explained in their reply above referred to but added:

- ***‘After the Disputed Transactions occurred, the Complainant first contacted the Crypto.com Customer Service team on 8 April 2022, almost four months after the last of the Disputed Transactions was performed by sending a demand letter (this demand letter can be found beginning at page 006 in the complaint filed with the OAFS). In this demand letter, the Claimant reported that he had been a victim of a scam by “tocoina.com” and requested a full refund.***
- ***For the avoidance of doubt, the Respondent does not have any affiliation with Tocoina.com.***
- ***There is no doubt that the Complainant carried out the Disputed Transactions himself, having admitted to falling victim to a scam and sending the funds that form subject matter of the Disputed Transactions to the scammers (Please see page 002 of the Complaint: “I fell victim to a multi-layered scam operation orchestrated by tocoina.com. (T)he equivalent of 35.000,00 EUR was transferred from my wallet utilizing services of crypto.com” and page 062 of the Complaint: “Hello, I’ve paid the security deposit, please check”).***

¹² P. 126

¹³ P. 128

- ***As outlined in the Terms and Conditions (please see Clause 7.2 of FS-1), the Complainant is solely responsible for the security and authenticity of all instructions submitted through the Crypto.com app.***
- ***The Respondent does not play any role in second guessing customer transactions. A simple withdrawal of cryptocurrency would not raise any alarms.***
- ***It is important to note here that cryptocurrency transactions and the technology on which it works is very different from the traditional forms of security and banking. Cryptocurrency transactions are designed to be irreversible, and the service provider has no control over them. This is an inherent characteristic across the industry.***
- ***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 a non-custodial cryptocurrency wallet. 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.¹⁴***

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***

¹⁴ P.135 - 136

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.¹⁵

Service Provider filed in support of the proofs:

- Terms and Conditions¹⁶
- Complainant's Transaction History¹⁷

Final submissions were made only by the Service Provider^{18 19} on 11 July 2023 but these repeat what was already stated in their reply and in their proofs.

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 555²⁰ 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.²¹ 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) Execution of orders on behalf of other persons (ii) Dealing on own account and

¹⁵ P. 136

¹⁶ P 138 - 190

¹⁷ P 191 - 192

¹⁸ P. 196

¹⁹ Complainant confirmed he had no further submission to make p. 195

²⁰ Art. 19(3)(d)

²¹ <https://www.mfsa.mt/financial-services-register/>

(iii) Custodian or Nominee Services to Experienced and Non-Experienced investors.²²

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'.²³

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...'.²⁴

It offers the account holder 'a crypto custodial wallet' and 'the purchase and sale of digital assets on own account'.²⁵

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.

²² <https://www.mfsa.mt/financial-services-register/>

²³ <https://crypto.com/eea/about>

²⁴ P. 138

²⁵ P. 101

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').

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*'²⁶ 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.

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:

²⁶ Guidance 1.1.2, Title 1, '*Scope and Application*' of the '*Guidance on Technology Arrangements, ICT and Security Risk Management, and Outsourcing Arrangements*'.

- 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 €35,000.

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 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.

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 8 April 2022, nearly four months after the disputed transactions,²⁷ by which time the transactions had long been completed and finalised.²⁸

²⁷ The last withdrawal to the external wallet undertaken on 14 December 2021

²⁸ 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).

Once finalised, the crypto cannot be transferred or reversed as specified in the Service Provider's Terms and Conditions of Use²⁹ (and as typically indicated on various other internet sites).³⁰

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.³¹

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 ...'*³²

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.³³

'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

²⁹ Clause 7.2(b) of the *Crypto.com* App Terms & Conditions - P. 151

³⁰ E.G. <https://www.chargebackgurus.com/blog/chargebacks-more-volatile-complex-than-cryptocurrency>

³¹ Clause 3.1 and Clause 7.2(b) of the Terms and Conditions on the use of the *Crypto.com* App Services (P. 143; 151)

³² P. 151

³³ *Ibid.*

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 standards applicable to Foris DAX '*as a licensed and regulated financial institution*'.³⁴ In the said formal complaint reference was also made to '*The Federal Trade Commission (FTC) Act, 15 U.S.C.*',³⁵ 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.^{36 37}

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.**

³⁴ P. 8; 11

³⁵ P. 8; 17

³⁶ 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).

³⁷ It is not clear whether Complainant explored possible protection under EU Payments Services Directive PSD2 (EU 2015/2366) from his bank through whom 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 the account relationship.

- **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.³⁸**

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.³⁹

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.

³⁸ 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/>

³⁹ 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

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 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