Voievodina, G. (2026). Regulatory arbitrage in European Union digital finance: Development dynamics and implementation risks. *Legal Horizons, 29*(2), 73-85.
All authors declare that they have no conflicts of interest.

REGULATORY ARBITRAGE IN EUROPEAN UNION DIGITAL FINANCE: DEVELOPMENT DYNAMICS AND IMPLEMENTATION RISKS

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Recieved: 14 February
Accepted: 16 April 2026

Abstract

Regulatory arbitrage remains a recurring concern in the regulation of EU digital finance, particularly as crypto-asset markets develop within the MiCA framework. This article asks why such arbitrage persists and what risks it creates for regulators and supervisors. It argues that regulatory arbitrage cannot be reduced to opportunistic behaviour by individual market participants. Instead, it emerges from gaps in the EU digital-finance framework itself, where legal categories often struggle to keep pace with evolving technological and business models. Based on doctrinal legal research and qualitative functional analysis of European Union legislative, regulatory and supervisory materials, the article develops a working definition of regulatory arbitrage tailored to digital finance. It identifies the main drivers of arbitrage, including overlaps between legal regimes, difficulties in classifying digital products, the strategic use of token design and platform architecture, supervisory divergence within the EU and regulatory lag. The article also analyses the principal risks generated by arbitrage, including weaker investor and consumer protection, reduced market integrity, operational and cyber vulnerabilities, financial-stability concerns, competitive distortions and supervisory blind spots. It concludes that an effective response requires not only more detailed rules, but a coherent, function-oriented approach to legal qualification, stronger supervisory convergence and a regulatory framework capable of adapting to technological and business-model innovation.

Keywords: crypto-assets; legal qualification; supervisory convergence; market integrity; financial stability.

1. Introduction

Over the past few years, digital finance in the European Union has evolved from a peripheral segment of the financial market into one of the key areas of regulatory transformation. This shift reflects more than the growing role of crypto-assets. Digital business models, tokenisation and platform-based services have increasingly reshaped financial intermediation, often cutting across the previously distinct categories of investment activity, payment services, electronic money and crypto-asset services. The European Commission acknowledged this development already in 2020, when the Digital Finance Package set out an approach designed to support innovation while safeguarding financial stability and an adequate level of investor and consumer protection (European Commission, 2020b, 2020c).

The adoption of Regulation (EU) 2023/1114 on markets in crypto-assets (hereinafter - "MiCA") became the European Union's most systematic attempt to respond to the

DOI: https://doi.org/10.54477/LH.25192353.2026.2.pp.73-85

challenges of digital finance through the creation of a special harmonised regime for crypto-assets and crypto-asset service providers (hereinafter - "CASPs") (Regulation (EU) 2023/1114, 2023). At the same time, MiCA did not create a fully self-contained regulatory space; instead, it operates alongside other existing EU regimes, in particular the regimes established by Directive 2014/65/EU on markets in financial instruments (Markets in Financial Instruments Directive; hereinafter - "MiFID II"), Directive (EU) 2015/2366 on payment services in the internal market (Second Payment Services Directive; hereinafter - "PSD2") and Directive 2009/110/EC on the taking up, pursuit and prudential supervision of the business of electronic money institutions (Second Electronic Money Directive; hereinafter - "EMD2"), as well as alongside the supervisory approaches of the European Securities and Markets Authority (hereinafter - "ESMA") and the European Banking Authority (hereinafter - "EBA") with regard to the qualification of specific digital products and the supervision thereof (Directive 2014/65/EU, 2014; Directive (EU) 2015/2366, 2015; Directive 2009/110/EC, 2009). For this reason, digital finance in the EU remains a sphere in which the legal qualification of a product or service directly determines the scope of obligations, the type of licensing, the requirements for the organisation of activities, and the model of supervisory oversight.

Against this background, regulatory arbitrage becomes particularly important. The academic literature generally describes it as the structuring of activities, transactions or products in a way that exploits gaps, differences or inconsistencies between legal regimes, while leaving the underlying economic function largely unchanged (Langenbucher, 2021). Digital finance is especially exposed to this dynamic. The technological architecture of a product, its token design, corporate structure and cross-border organisation may all be adjusted to bring the activity closer to a more favourable regulatory perimeter, even where these choices are also justified by commercial or technological considerations. Such conduct should not be reduced to bad faith on the part of market participants, since much of it follows from the interaction between innovative business models and a fragmented legal architecture.

MiCA's harmonising effect has not removed this risk; rather, the risk has appeared in new forms. ESMA's recent guidelines on distinguishing crypto-assets from financial instruments are one indication of this, as is the broader emphasis EU institutions now place on supervisory convergence, future-proof regulation and openness to new technological and business-model solutions (ESMA, 2025). The trajectory of EU legislation itself suggests that the difficulty lies less in the absence of rules than in the consistent application of those rules to hybrid digital structures (Divissenko, 2023).

It therefore remains important to examine how regulatory arbitrage emerges in EU digital finance and what risks it poses for legal certainty, supervisory effectiveness, investor protection and the integrity of the internal market. The central claim of this article is that such arbitrage is not an accidental by-product of isolated loopholes, but a systemic outcome of several partially overlapping regulatory logics that respond differently to the same, or functionally similar, digital phenomena. This requires analysis beyond the individual provisions of MiCA or MiFID II and calls for a broader account of how legal qualification, technological form and economic substance interact in digital financial activity.

Existing studies have looked at regulatory arbitrage in financial markets generally and at crypto-asset regulation as a separate field, with less attention paid to how MiCA, MiFID II, PSD2 and EMD2 interact as a source of arbitrage within the EU digital finance framework. This article examines that interaction, asking how overlapping regulatory regimes, difficulties in legal qualification and supervisory divergence create conditions for arbitrage in digital finance, and what risks this creates for investor protection, market integrity, legal certainty and supervisory effectiveness.

2. Materials and Methods

This article relies on doctrinal legal research combined with a qualitative analysis of how legal qualification, technological design and overlapping regulatory regimes interact to produce regulatory arbitrage in EU digital finance.

The principal materials are EU legislative acts and official regulatory or supervisory documents relevant to digital finance, including MiCA, MiFID II, PSD2 and EMD2, together with selected materials issued by the European Commission, ESMA, EBA, the European Central Bank, the Financial Stability Board and the International Organization of Securities Commissions. Academic literature on regulatory arbitrage, digital finance, legal qualification and crypto-asset regulation is used to supplement these sources.

Three questions guide the analysis and shape both the choice of sources and the structure of the article: how regulatory arbitrage in EU digital finance can be understood in light of existing scholarship, which structural features of the EU framework create room for such arbitrage, and what legal, supervisory, market and financial-stability risks arbitrage strategies generate.

The materials mainly cover the period from 2020 to 2025. This period spans the European Commission's Digital Finance Package, the legislative development and entry into force of MiCA, and more recent interpretative and supervisory materials on token qualification, supervisory convergence, multifunction intermediaries and the links between crypto markets and traditional finance. Earlier theoretical sources are used where necessary to clarify the conceptual foundations of regulatory arbitrage.

Several analytical methods are combined. A doctrinal reading of the relevant EU regimes is used to establish how their wording, scope and internal logic may generate overlap, exclusion or uncertainty, with particular attention paid to MiCA's relationship with MiFID II, PSD2 and EMD2. A functional approach then asks whether digital products or services with different legal structures may nevertheless perform the same or a similar economic function. This is especially important in digital finance, where token design, platform architecture, custody arrangements and the allocation of operational roles may affect legal qualification without changing the underlying economic substance of the activity.

The article also draws comparisons within EU regulation itself, rather than across national legal systems, in order to identify cases where the same, or a similar, digital phenomenon may be treated differently depending on its formal classification. Finally, the literature is used to assess different accounts of regulatory arbitrage, including its treatment as avoidance of stricter rules, as a form of regulatory competition and as a structural consequence of divergence between legal form and economic substance. On that basis, the article develops a working definition suited to EU digital finance.

Taken together, this methodology aims less at describing the applicable legal framework than at explaining why partially overlapping regulatory logics create structural incentives for arbitrage in digital finance. Particular attention is therefore paid to the relationship between the legal form of digital financial products and their economic function, and to the risks arising from fragmented legal architecture and uneven supervisory application.

3. Result

Definitions of regulatory arbitrage vary across the literature, but they share a common point: the term refers to situations in which differences, gaps or inconsistencies between regulatory regimes are used to obtain a more favourable legal outcome, while the economic substance of the activity remains broadly unchanged (Langenbucher, 2021). In this sense, regulatory arbitrage concerns not only the choice between different jurisdictions, but also the structuring of activity within a single legal order in such a way that it falls under a lighter or less burdensome regulatory regime.

Katja Langenbucher proposes that regulatory arbitrage should be considered in at least two dimensions. On the one hand, it may be perceived as unwanted

DOI: https://doi.org/10.54477/LH.25192353.2026.2.pp.73-85

avoidance of a legal regime, that is, the avoidance of a less favourable regulatory regime through the special structuring of a transaction or activity. On the other hand, it may also be understood as a form of regulatory competition, where market participants choose, among different legal regimes or sectors of regulation, the one that ensures lower regulatory costs. Within this approach, Langenbucher separately distinguishes repackaging-arbitrage, where activity is repackaged within one regime, and moving-places arbitrage, where a more favourable result is achieved through the choice of another jurisdiction (Langenbucher, 2021).

Jan Friedrich and Matthias Thiemann formulate an even stricter emphasis, as in their view regulatory arbitrage often means formal compliance with rules while simultaneously violating their spirit. This distinction matters for financial law because it separates the external legal form of a product or service from its actual economic function, a separation that, according to Friedrich and Thiemann (2021), lies at the heart of many arbitrage structures in the financial sector.

Elizabeth Pollman's work on technology and regulatory arbitrage offers a useful lens for digital finance: she defines regulatory arbitrage as structuring activity to exploit gaps or differences in regulations or laws, and argues that the technology sector is especially prone to it. Digital business models are highly adaptive, built on intangible assets, easy to scale across borders, and frequently sit outside existing legal categories. In digital finance, then, regulatory arbitrage often reflects a mismatch between new technological models and an existing regulatory architecture, alongside any deliberate search for advantage (Pollman, 2019).

Andrea Minto, Stephanie Prinz and Melanie Wulff take a different angle, treating regulatory arbitrage as a risk to regulatory objectives such as financial stability, and not merely as a technique for circumventing rules. On their account, what matters is the existence of an arbitrage opportunity together with the likelihood that it will be used and the consequences this could have for the relevant regulatory goal. This risk-based view is particularly relevant to digital finance, where a product's legal qualification shapes licensing requirements, the level of investor protection, the quality of supervision and the resilience of the market (Minto, Prinz & Wulff, 2021).

Drawing on these approaches, this article understands regulatory arbitrage in EU digital finance as the strategic structuring of a product, service, corporate model or cross-border activity so as to fall within a more advantageous regulatory regime, or to avoid a stricter one, while the economic function of the activity remains broadly unchanged. This definition is broad enough to cover both jurisdictional arbitrage and arbitrage between different sectors of financial regulation, yet precise enough to apply to the hybrid digital structures found in the contemporary market for crypto-assets and digital financial services.

Turning to the causes of regulatory arbitrage in EU digital finance, the most fundamental is arguably the fragmentation of the regulatory architecture. MiCA created a special harmonised regime for crypto-assets, but the EU does not treat digital finance as a self-contained sphere; rather, it sits at the intersection of several regulatory logics. The European Commission's Digital Finance Package already proceeded on this basis, recognising that new digital products may perform several functions at once, for instance, serving as an access key to a service, as a payment instrument, or as a financial instrument (European Commission, 2020c). It is precisely such multifunctionality that creates a situation in which the applicable legal regime depends not so much on the overall economic purpose of the product as on its legal qualification. For its part, MiCA was conceived as a separate regime intended to ensure legal certainty, support innovation and fair competition, as well as consumer protection and financial stability, but it does not absorb the entire sphere of digital finance. Accordingly, regulatory arbitrage arises already at the level of the structure of the law itself, where models that are similar in economic function may be brought closer to different regulatory perimeters.

The second key cause is the hybrid nature of digital financial products and the complexity of their legal qualification. Nikita Divissenko emphasises that MiCA is built on an activity-based and risk-based logic and on the "same activity, same risk, same rule" approach. However, it is precisely the innovativeness of crypto-assets that makes the boundaries of the regulatory perimeter vulnerable to constant pressure from new use cases and new business models (Divissenko, 2023). In his view, one of the main weaknesses of the future effectiveness of MiCA lies in the ability of the regime to capture innovations that fall outside existing categories, as well as to respond to the risks of re-characterisation and re-qualification of tokens. This problem has already received practical confirmation at the level of ESMA, which in 2025 was compelled to issue separate Guidelines on the conditions and criteria for the qualification of crypto-assets as financial instruments (ESMA, 2025). The very fact that such Guidelines have appeared indicates that the qualification boundary between crypto-assets and financial instruments is not self-evident and therefore itself becomes a point of potential arbitrage (Zetzsche, Annunziata, Arner, & Buckley, 2021).

The third cause is the high adaptability of technological business models, which allows market participants not merely to respond to regulation, but actively to design products towards a desired legal outcome. It is precisely this that Elizabeth Pollman emphasises, defining regulatory arbitrage as structuring activity to take advantage of gaps or differences in regulations or laws. Pollman shows that technology companies are especially prone to arbitrage, given their capacity to quickly alter contractual architecture, operational design and corporate structuring while the basic economic function of their activity remains broadly unchanged (Pollman, 2019). In digital finance, a product's legal qualification therefore depends on more than its economic function alone: it also turns on the specific combination of legal and technical characteristics involved, including the rights embedded in the token, the model of access to the asset, how the platform and interface are organised, and how operational, governance and control functions are allocated among participants in the ecosystem (IOSCO, 2023a). Token design and platform architecture can accordingly serve technological or business optimisation, but they can equally be used to secure a more advantageous regulatory outcome (Garrido, 2023).

A fourth cause lies in regulatory and supervisory divergence within the EU itself, despite the formal harmonisation of rules. Even before the current crypto framework took shape, the European Commission's Expert Group on Regulatory Obstacles to Financial Innovation pointed to systemic obstacles such as regulatory fragmentation, an uneven playing field and inconsistent approaches to new financial models (Expert Group on Regulatory Obstacles to Financial Innovation, 2019). The adoption of MiCA did not resolve this problem; rather, it shifted attention to the issue of supervisory convergence. This is directly confirmed by the ESMA statement of 17 October 2023, in which the authority emphasised the need for a coordinated approach by national competent authorities to the transition to MiCA and to the future application of the new regime (ESMA, 2023). Where the regulatory text is uniform, but practices of interpretation and application remain heterogeneous, this creates additional incentives for structural or jurisdictional arbitrage even within the internal market.

The fifth cause is the regulatory lag in relation to the pace of innovation. As the Expert Group on Regulatory Obstacles to Financial Innovation has shown, in the sphere of technology-driven financial services the key problem lies not only in the content of individual rules, but also in the ability of the regulatory framework as a whole to remain accommodative to innovation without deepening regulatory fragmentation (Expert Group on Regulatory Obstacles to Financial Innovation, 2019). Dirk Zetzsche, Ross Buckley, Janos Barberis and Douglas Arner emphasise that post-crisis regulation together with rapid technological change profoundly challenges the existing regulatory paradigm and therefore requires new, more flexible and more coherent models of regulatory

DOI: https://doi.org/10.54477/LH.25192353.2026.2.pp.73-85

adaptation (Zetzsche et al., 2017). The European Commission in the Digital Finance Strategy likewise proceeded on the basis that the existing financial services framework must be made fit for the digital age and therefore requires constant adjustment under the influence of digitalisation (European Commission, 2020a). This means that arbitrage in digital finance often arises not because of a complete absence of law, but because of the temporal gap between the emergence of a new technological model and the moment when a sufficiently clear and established legal qualification appears for it. The faster tokenised and platform-based solutions develop, the stronger the temptation becomes to exploit this transitional state for one's own benefit.

Accordingly, the causes of regulatory arbitrage in EU digital finance cannot be reduced merely to the bad-faith conduct of individual market participants. These are structural factors, arising from the combination of fragmented legal architecture, the hybrid nature of digital products, the adaptability of technological business models, heterogeneous supervisory application and a persistent gap between innovation and legal qualification. Together, they make digital finance a particularly favourable environment for arbitrage strategies and explain why addressing such strategies cannot rely simply on adding more rules.

Certain examples of regulatory arbitrage can be traced in the practice of large companies entering the crypto market of the European Union, both before and after the beginning of the application of the MiCA Regulation. In particular, one should mention one of the largest crypto-exchanges, Binance, which in 2023 announced its withdrawal from the Dutch market after it had failed to obtain authorisation as a provider of services related to virtual assets in that jurisdiction (Reuters, 2023a). Almost at the same time, Binance withdrew its application for a licence in Germany, following reports that the local regulator was not prepared to grant the company authorisation to carry out crypto-custody activities ((Reuters, 2023b). This reflects the fragmentation that existed among European states before the adoption of the MiCA Regulation, since one and the same large platform could face impossibility or significant difficulties in entering the market in some Member States, while at the same time maintaining a presence or registrations in other EU jurisdictions.

After the introduction of MiCA, the problem did not disappear, but changed its form. Instead of the multiplicity of national regimes, the choice of the Member State of authorisation acquired key importance, since a licence of a crypto-asset service provider obtained in one Member State opens the possibility of providing services in other EU Member States through the passporting mechanism. For this reason, the issue of the quality, depth and strictness of the national authorisation assessment became central to preventing regulatory arbitrage. Already at the stage of transition to MiCA, ESMA emphasised the need for supervisory convergence, that is, a coordinated approach of national competent authorities to the authorisation and supervision of service providers (ESMA. (2023, October 17).

The most explicit confirmation of the problem of divergent approaches among different states was the public conflict between France, Italy and Austria, on the one hand, and Malta, on the other, which took place in September 2025, when the French regulator AMF, together with the Italian Consob and the Austrian FMA, supported the transfer of supervision over large crypto companies to the level of ESMA. The reason for this was concern that different Member States may apply MiCA unevenly, while crypto companies are able to choose jurisdictions with softer or faster licensing standards for their own benefit. In public discussion, this was directly described as regulatory shopping, that is, the search for a weaker or more convenient regulatory link within the single market (Reuters, 2025a). At the same time, the Maltese regulator MFSA opposed the centralisation of supervision at ESMA level, stating that such centralisation could create an additional bureaucratic layer and reduce the effectiveness of regulation (Reuters, 2025b). Accordingly, this case demonstrates that the risk of regulatory shopping and

arbitrage after MiCA is not merely theoretical; rather, it has become the subject of an open political and regulatory discussion between Member States.

A separate practical example of the connection between token design, stablecoin arrangements and regulatory arbitrage can be seen in the example of such crypto-assets as USDT, USDC and EURC, as well as Coinbase's reaction to the requirements of MiCA. Pursuant to the provisions of the MiCA Regulation, the offer or admission to trading of e-money tokens in the European Union is possible only provided that the issuer is a credit institution or an electronic money institution and has also complied with the requirements concerning the notification and publication of a crypto-asset white paper. Accordingly, for stablecoins pegged to a single official currency, what becomes decisive is not only their economic function as a "stable" digital asset, but also the legal structure of the issuer, the reserve model, users' redemption rights and the manner in which such a token is admitted to the EU market. This problem manifested itself after MiCA began to apply to ARTs and EMTs, when, in January 2025, ESMA, together with the European Commission, published guidance on non-MiCA-compliant asset-referenced tokens and e-money tokens, stating that service providers should restrict services that facilitate the acquisition of such tokens by users in the EU (ESMA, 2025b). In this context, USDT became an example of a stablecoin access to which through licensed European platforms began to be restricted due to the absence of a MiCA-compliant structure. By contrast, Circle announced the issuance of USDC and EURC in the EU in accordance with MiCA requirements, effectively adapting the issuer model and the token structure to the EMT regime (CoinDesk, 2024).

Coinbase stated that it would restrict, for users in the European Economic Area, services concerning stablecoins that do not comply with MiCA and would offer a transition to compliant stablecoins, in particular USDC and EURC (Reuters, 2024). Accordingly, the example of USDT, USDC and Coinbase demonstrates that the regulatory outcome for functionally similar stablecoins depends on the combination of token design, the status of the issuer, the reserve and redemption model, as well as CASPs' decisions on admitting or restricting such assets on their platforms. For this reason, stablecoin arrangements are one of the most illustrative practical examples of how technologically similar digital assets may receive different legal consequences within a single regulatory space.

The consequences of regulatory arbitrage in digital finance go well beyond the formal circumvention of a less favourable legal regime.

Its risks manifest themselves in at least five interrelated dimensions: investor protection, market integrity, financial stability, supervisory effectiveness, and equal competitive conditions within the EU internal market. It is precisely this multidimensional nature that explains why contemporary international and European institutions increasingly regard regulatory arbitrage not as a technical problem of classification, but as a source of broader policy risks. This follows, in particular, from the approaches of the International Organization of Securities Commissions, the Bank for International Settlements, the European Central Bank, and the analytical materials of the European Parliament.

First, regulatory arbitrage creates risks for investors and consumers, since it makes it possible to remove economically similar products or services from the scope of stricter standards of disclosure, conduct, custody, or conflict-management. In its Policy Recommendations for Crypto and Digital Asset Markets, the International Organization of Securities Commissions expressly states that many retail investors trade through centralised intermediaries and entrust them with the custody of their crypto-assets, while a significant number of such CASPs have demonstrated an unwillingness to comply with frameworks aimed at investor protection and market integrity and, in many cases, have even structured their activities so as to avoid these requirements (IOSCO, 2023b). In its Bulletin Crypto shocks and retail losses, the Bank for International Settlements adds an empirical dimension to this problem: according to Giulio Cornelli, Sebastian Doerr,

DOI: https://doi.org/10.54477/LH.25192353.2026.2.pp.73-85

Jon Frost and Leonardo Gambacorta, the majority of users of crypto apps in almost all of the jurisdictions studied likely suffered losses from their investments in Bitcoin (Cornelli, Doerr, Frost, & Gambacorta, 2023). The median investor lost approximately USD 431, which amounted to nearly half of the funds invested (Cornelli et al., 2023). This points to an important conclusion: arbitrage between regimes is not neutral, and it can directly lower the level of protection actually available to end users.

Regulatory arbitrage also undermines market integrity and enforcement effectiveness. Taking stock in October 2025 of how its recommendations on crypto and digital asset markets had been implemented across twenty jurisdictions, IOSCO called for greater consistency in implementation, a reduction in opportunities for regulatory arbitrage, and stronger enforcement practices (IOSCO, 2025). This assessment matters because it shows that the risk of arbitrage persists even where standards and recommendations already exist. The problem remains where rules are applied differently in practice, cross-border information exchange is uneven, and regulators struggle to respond to global CASPs operating across borders. Accordingly, arbitrage in digital finance causes not only private investor losses, but also an institutional erosion of regulatory capacity.

Thirdly, regulatory arbitrage is capable of generating risks to financial stability, especially where the crypto ecosystem becomes increasingly intertwined with functions typical of traditional finance. In its report on multifunction crypto-asset intermediaries, the Financial Stability Board emphasises that the vulnerabilities of such intermediaries largely coincide with the vulnerabilities of the traditional financial system, in particular leverage, liquidity mismatch, technology and operational vulnerabilities, and interconnections (Financial Stability Board, 2023). At the same time, the combination of several functions within a single intermediary may further amplify these risks. Certain scholars support this conclusion, in particular, Heike Joebges, Hansjörg Herr and Christian Kellermann show that the growing integration of the crypto system with the traditional financial system, as well as the transfer of banking functions into the unregulated sphere of digital finance, increase the likelihood of systemic financial instability and adverse consequences for the real economy (Joebges, Herr, & Kellermann, 2024). At the same time, empirical studies of the connectedness between crypto and traditional financial markets, in particular the study by Julián Andrada-Félix, Adrian Fernandez-Perez and Simón Sosvilla-Rivero, indicate that such links are not linear or equally strong in all periods. However, volatility spillovers between them intensify under conditions of general economic and financial instability (Andrada-Félix, Fernandez-Perez, & Sosvilla-Rivero, 2020). Accordingly, regulatory arbitrage in this area is dangerous not only at the level of an individual product or service: where integration between sectors deepens, it may transform from a micro-regulatory problem into a factor of macro-financial vulnerability.

Fourthly, an important consequence of regulatory arbitrage is the deepening of operational, technological, and cyber risks, especially where digital models combine elements of decentralisation with centralised points of control. In the 2025 European Parliament briefing Digital Assets: EU regulatory framework, market uptake, risks and challenges, it is expressly stated that many alternative digital assets have effectively reintroduced risks by imitating the business models of traditional centralised financial institutions (European Parliament, 2025). The same document emphasises that stablecoins combine decentralised public ledgers with a high degree of centralisation in matters of minting and reserve management and at the same time resemble money market funds, but with increased operational and cyber risks. This means that arbitrage through platform architecture or the allocation of roles among different actors may not only alter the legal qualification of a product, but also create additional technical points of vulnerability.

Fifthly, regulatory arbitrage undermines equal competitive conditions and legal

certainty within the EU internal market. In digital financial markets, as Rainer Kulms observes, regulation and private-law structures interact particularly closely, while digital disruption itself sharpens the issue of regulatory competition and the ability of the legal system to respond adequately to new market models (Kulms, 2022). In such circumstances, different structuring of functionally similar products or services may lead to economically similar models being subject in practice to different regulatory burdens and therefore competing not only on the basis of quality or efficiency, but also on the basis of the attractiveness of their regulatory wrapper. In one of its reports on the call for evidence, ESMA expressly stated that, in order to scale digital finance within the EU, legal certainty is needed to reduce regulatory arbitrage and market fragmentation within the EU (ESMA, 2022). The same vector is apparent in the legislative logic of MiCA, since, as already noted above, the new regime was intended to ensure legal certainty for crypto-assets not covered by existing EU legislation, replace existing national frameworks, and establish uniform rules at EU level (Hallak, 2023). Accordingly, if some market participants bear the full compliance burden of the harmonised regime, while others achieve a similar economic result through different product structuring, a different mode of access to the asset, or a different jurisdictional nexus, this leads not only to a distortion of competition, but also to uncertainty as to which standards actually apply to functionally similar services.

A separate, but extremely important, consequence is the emergence of supervisory "blind spots". In the 2025 Financial Stability Review, the European Central Bank directly points to data gaps regarding crypto exposures, especially in the less-regulated non-bank financial intermediation sector, as well as to limited visibility of leverage and indirect contagion channels (European Central Bank, 2025). In this context, regulatory arbitrage is problematic for two reasons: it allows a lighter regime to be selected, and part of the resulting risk may fall outside supervisory visibility. This is especially true in digital finance, where the boundaries between the issuer, the interface, the protocol, the reserve manager, the custodian and the marketing provider can be blurred or spread across several jurisdictions. The legal and supervisory assessment of risk may then lag behind its actual configuration.

The consequences of regulatory arbitrage in EU digital finance go beyond the formal question of choosing an incorrect or more advantageous legal regime. They are reflected in a real reduction in investor protection, a distortion of market integrity, growing operational and cyber vulnerabilities, new contagion channels between crypto and traditional finance, and supervisory blind spots that delay the identification of risk. For this reason, regulatory arbitrage in this field deserves to be treated as one of the central problems of contemporary digital finance regulation, rather than as a peripheral side effect of innovation.

The findings of this article suggest that regulatory arbitrage in EU digital finance is best understood as a structural consequence of how several partially overlapping regulatory regimes, the hybrid nature of digital financial products, the adaptability of technological business models and the uneven application of supervisory standards interact with one another. The article thereby confirms and develops the line of academic argument linking regulatory arbitrage to the divergence between legal form and economic substance, and to the ability of market actors to structure economically similar activities in legally different ways.

From a broader regulatory perspective, the adoption of MiCA represents a major step towards harmonisation, but it does not by itself remove the conditions that make arbitrage possible. The problem persists because digital finance in the EU remains situated at the intersection of multiple legal regimes, covering financial instruments, payment services, electronic money and crypto-assets. Legal certainty therefore depends both on the existence of special rules and on how consistently functionally similar products and services are qualified across the regulatory framework. This is part

DOI: https://doi.org/10.54477/LH.25192353.2026.2.pp.73-85

of why supervisory convergence has become so central to the post-MiCA environment.

The implications of regulatory arbitrage extend beyond questions of formal legal classification. Where it allows functionally similar activities to operate under different compliance burdens, the result can include weaker investor and consumer protection, distortions of competition, reduced market integrity, higher operational and cyber vulnerabilities and lower supervisory visibility. Regulatory arbitrage is therefore better regarded as a broader problem of regulatory effectiveness in technologically dynamic markets, not merely as a technical challenge of legal drafting. These findings support a more coherent, function-oriented approach to legal qualification, stronger supervisory coordination, and a regulatory framework better able to respond to evolving digital business models.

Future research could build on this analysis by examining more closely how national competent authorities apply the relevant qualification criteria in practice, how cross-border supervisory divergence develops under MiCA, and how emerging forms of digital finance, including multifunction intermediaries and increasingly complex token-based ecosystems, may generate new forms of arbitrage beyond the categories currently recognised in European Union law.

Conclusions

Regulatory arbitrage in EU digital finance is best understood as a systemic phenomenon rather than as an accidental consequence of individual loopholes in the law. It arises at the intersection of fragmented regulatory architecture, the hybrid nature of digital financial products, the adaptability of technological business models, heterogeneous supervisory application and a persistent gap between innovation and its legal qualification. The analysis shows that, even after the adoption of MiCA, the problem remains relevant; what has changed is the form it takes. Digital-market conditions give participants room to do more than choose between existing legal regimes: they can actively construct products, platforms and corporate models that move closer to a more advantageous regulatory outcome. Regulatory arbitrage is therefore a matter of legal technique, but it also points to deeper structural limitations in how digital finance is currently regulated.

No less important is that the consequences of such arbitrage extend far beyond the formal circumvention of a less burdensome regime. As the analysis shows, it is capable of reducing the actual level of investor and consumer protection, undermining market integrity, intensifying operational and cyber risks, creating conditions for financial instability, as well as distorting the competitive environment and deepening legal uncertainty within the EU internal market. For this reason, an effective response to regulatory arbitrage cannot be reduced merely to the formal multiplication of rules or the mechanical expansion of the regulatory perimeter. Rather, it must be based on a more consistent and function-oriented approach to the qualification of digital financial products, on the strengthening of supervisory convergence, international coordination, and the ability of the law to respond in a timely manner to new technological and business-model configurations. Only under such conditions will the EU regulatory framework be able simultaneously to support innovation and minimise the risks generated by the use of differences between legal regimes in the sphere of digital finance.

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