

The instruments of FINMA's practice

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FINMA's practice relies on instruments that shape the market without being laws. Its guidance notices, called Aufsichtsmittelungen, explain how FINMA applies the law in specific areas. Its circulars set out detailed requirements for supervised institutions, while its rulings decide individual cases. Its answers to enquiries from token projects under the ICO guidelines give individual certainty.¹ The crypto industry has relied heavily on these instruments. The ICO guidelines, the travel rule, the staking guidance and the stablecoin guidance were all issued by FINMA without legislation.

This reliance has advantages and disadvantages. FINMA can react faster than the legislator and adapt its practice to new developments. Its guidance is, however, not binding on the courts and can be changed without a parliamentary process. Its no-action letters protect only the project that received them, and only on the basis of the facts that it presented. The industry has called for more legislation to give the framework greater stability. The reform of the Financial Institutions Act would put some of FINMA's practice on a statutory basis.

1 Notes

1. FINMA, "FINMA guidance", finma.ch: guidance is not a supervisory tool and has no legal impact, unlike ordinances and circulars. FINMA, press release "FINMA publishes ICO guidelines", 16 February 2018, finma.ch: enquiries from ICO organisers to the FinTech Desk. ↩

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