

Annual Report of the Swiss Bar Association (SAV/FSA) for the attention of the European Presidents' Conference 2023 in Vienna

After two years of a "drought" caused by Corona and its impacts, the year 2022 was filled with meetings and strategic reflections in which new objectives were defined, some of which have already taken concrete shape.

In the reporting period for example, in the Executive board of the Swiss Bar Association (SAV/FSA) participated in a retreat over several days to reflect on the association's vision and strategy for the next three to five years. The discussions were characterized by diversity and creativity. Thanks to the willingness to compromise within the Executive board, it was possible to summarize the ideas in a four-page document, which from now on will serve as a source of inspiration for the future work of the association for the Executive board.

As an example, the realization of a strengthened relationship with the Cantonal Bar Associations as well as an efficient communication with our membership can be mentioned to the members. For this reason, the President of the SBA, accompanied by her Secretary General, and in each case the sponsor of the canton concerned (each member of the Executive Board was appointed sponsor of one or more cantonal bar associations in the vicinity), embarked on a "Tour de Suisse" which resulted in a meeting with 20 of the total of 24 Cantonal Bar Associations during the reporting period. Visits to the remaining 4 Cantonal Bar Associations are scheduled for this spring. This wonderful experience opens up a rich variety of insights into the role and identity as a lawyer, the vision of legal practice, and the different concerns and expectations. The open and cordial exchanges are greatly appreciated by both sides and allow to strengthen ties and promote joint work in the service of members and our profession.

In addition to strategic issues, numerous key topics were on the agenda in the reporting period:

The attorney-client privilege periodically comes under pressure. Events and processes under the keywords "Panama Papers", "Pandora Papers", money laundering, tax havens or Ukraine sanctions, which stick in the memory of a broad public, also affect lawyers. They advise or represent clients and thus gain knowledge that governments, law enforcement agencies, regulators and, not least, the media are interested in.

Demands ranging from a general suppression of the attorney-client privilege to the separation of legal representation from advice or the proposal to apply the attorney-client

privilege only to legal representation fail to recognize the importance of the attorney-client privilege for our state under the rule of law. They are dangerous because they fundamentally call into question a well-worn system of enforcing law and legal peace. They are also unnecessary because the abusive invocation of attorney-client privilege remains effectively barred anyway, and because lawyers must act within the law in their work for their clientele and are themselves severely sanctioned if they fail to do so.

With the Vademecum "Professional secrecy in the Swiss legal system", which was prepared by the Swiss Bar Association (SBA) in the reporting period, the SBA wants to inform politicians, authorities and the public and show how important it is to understand the professional secrecy of lawyers as an instrument of our value system and not to repress or dilute it out of hecticness caused by individual cases. The Vademecum is available on [the website](#) of the SBA.

The financial year also saw the finalization of an important project that had been initiated and worked on in recent years: the modernization of the National rules of professional conduct (SSR). The Executive board considers the need to modernize the regulatory framework for the practice of law in Switzerland through appropriate association activities as one of its strategic priority objectives. The focus is on the interpretation of the provisions of the Federal Act on the Free Movement of Lawyers (FMLA) by the Federal Supreme Court and the cantonal supervisory authorities and courts. Over and over again, however, thorny questions of interpretation arise. For other professions, such as engineers and architects or the medical profession, courts and authorities also refer to rules of associations when it comes to questions of interpretation on the regulatory framework. Representatives of the Federal Supreme Court have confirmed to the Executive board in traditional contacts that such a reference to rules of professional conduct may also be important for the further development of the rules of professional conduct of lawyers. However, our current SSR offer little concrete in this regard. Hence the request: with modernized rules of professional conduct of the Swiss Bar, which have been concretized in important areas, the Executive board intends to support the further development of the regulatory framework and, if possible, to help shape it.

The draft revision of the SSR was submitted to the Cantonal Bar Associations in the reporting period and discussed with them. The consultations will be completed in April. The plan is to submit the revised version to the Assembly of Delegates in 2023 for final approval.

On this occasion (Congress in Lucerne, June 2023) the 125th anniversary of the SBA will be celebrated. 125 years of existence and only two female presidents! This fact prompted the Executive board to think about greater inclusion and diversity within the SBA, especially in terms of gender representation and participation of our youngest members. Thus, on the 4th of April 2022, the Young Attorneys Forum (FJB FSA – FJA SAV) was founded, consisting of over one third of the under 40-45-year-old members of our association and led by a Board of 13 young attorneys. Its future activities will focus in particular on strengthening relations,

networking through national and international networks, participation of the SBA in social networks and the creation of a micro-site dedicated to the exchange of information among Forum members. In addition, various events, seminars and conferences will be organized, especially in the field of digitalization. Two members will also represent the SBA in the AIJA (International Association of young Lawyers).

The Executive board is also paying increased attention to the matters of diversity and the role and place of women in our profession. The awarding of the Emilie Kempin-Spyri Prize on the occasion of the Lawyers' Day 2021 ("Anwaltstag 2021") in Lucerne demonstrated the SBA's commitment to equality and diversity. The prize will be awarded for the second time at the 2023 Annual Meeting. The SBA has since returned to this topic through its president in the context of various events and articles published in various media (see www.sav-fsa.ch/fr/news). In particular, the Day of the Liberal Professions ("Tag der freien Berufe") on the 16th of November 2021 was an opportunity to present the results of a study carried out on behalf of the SBA: "A profession in robes and numbers" (SAV Anwaltsrevue Review 9/2021) and to suggest concrete actions that should be taken on the part of the profession and professional associations to ensure that women not only gain access to the legal profession, but also remain in it. The undersigned participated in a round table discussion organized by the Austrian Bar Association on the occasion of International Women's Day on the 8th of March 2022 and published an article in the special edition of the "Österreichisches Anwältinnen Blatt" on the consequences of the pandemic for equality.

On the initiative of the President of the SBA and under the impulse of a group of female lawyers on the Executive board of various Cantonal Bar Associations, the first female SBA lawyers' Day was held on 12 January 2023 under the topic "Fix the Law firm, not the Women!". This was a great success. The event was fully booked and dedicated panels and workshops to topics such as "Female partner in a law firm: why and how", "Creating and sharpening your profile", "Becoming a rainmaker: How to build your brand in the market and generate business", "Women in Leadership: How to aim higher and advance your career". In addition to the continuation of this event, the creation of a "Women Chapter" within the SBA is being considered.

Another topic, also explicitly mentioned in the National rules of professional conduct, which the Executive board and the general secretariat deal with intensively, is mediation and ADR (Alternative Dispute Resolution). Therefore, a new expert group specialized in mediation was established. The result of the work of this expert group is a new training program, fully ensured by the SBA, in which numerous external specialists participate, and which entitles the holder to acquire the coveted title of a Mediator SBA. In French-speaking Switzerland, training began in January 2022, while in German-speaking Switzerland it will start in spring 2023.

The Association also pursued its numerous activities in the field of specialized training in the areas of labor law, family law, inheritance law, construction and real estate law, tenancy

law, liability and insurance law. It also provides part of the continuing education for Certified Specialist SBA.

An important concern of the Executive board is the availability of well-trained paralegals for work in law firms, but also in corporate legal departments and in the administration. Our profession is changing. There is increasing competitive pressure, at least in the important area of legal advice. The clientele is increasingly experienced in negotiating fee agreements. This presents challenges for the Bar. Keywords are efficiency, specialization and standardization. With this in mind, professionals who have a solid education and experience in supporting legal and advisory activities will become more important. We call such professionals, influenced by the USA, paralegals. Paralegals with the appropriate training and experience should in future be able to practice their profession with a federally recognized title. Therefore, they have to pass a demanding exam. The reward in return is a federally recognized paralegal professional certificate. The SBA has agreed to act as the responsible sponsoring association. The federal professional exams will be held starting in 2024.

Of course, promoting access to justice through digitalization will remain one of the SBA's main concerns in the coming years. For this reason, among other things, the Association continues to actively participate in the Justitia 4.0 project and organizes several seminars throughout Switzerland in the form of practice-oriented workshops entitled "On the road to digitalization".

The SBA of course also closely follows the draft laws and ordinances under discussion in Parliament. In particular, the Association commented on issues concerning the amendment of the Anti-Money Laundering Act (related to professional secrecy), the amendment of the Code of Civil Procedure (in particular: The to refuse to testify for in-house counsel in international business transactions, creation of international commercial courts, English as the language of proceedings, class actions, regulation of court costs) and the Criminal Procedure Code (no restriction of the right to participate), on the electronic identity project, the new provisions of the Code of Obligations on the establishment of a Swiss trust, and on the new Criminal Code on Sexual Offences.

As far as the international relations of the SBA are concerned, contacts with the French-speaking and German-speaking bar associations were resumed at the meetings in Bordeaux and Vaduz in fall 2021. Activities within the CCBE, the UIA, the IBA and the FBE, for whose chairmanship former Executive board member attorney Marc Labbé is running, have also been re-intensified during the post-pandemic period.

The meetings with the Federal Office of Justice, the Federal Prosecutor and the Federal Supreme Court took place in 2022 in accordance with tradition and each provided an opportunity for an interesting and constructive exchange.

The war in Ukraine has shaken the world and Europe in particular. The Office of the SBA maintains contacts with the Bar Association of Ukraine. The SBA website contains

information on the refugee issue, as well as on the services and offers provided on the part of the Cantonal Bar Associations and our job market.

The SBA also approached SECO to comment on the interpretation of the Ordinance on Measures in Connection with the Situation in Ukraine (SR 946.231.176.72). The issue was an interpretation stating that the Ordinance should be interpreted in such a way that the attorney-client privilege would not apply in the context of the implementation of the sanctions, in particular in connection with the obligation to report knowledge of assets belonging to persons covered by the Annex to the Ordinance. On behalf of the SBA, Professor Marcel Niggli submitted a legal expert opinion on the 20th of April 2022, which clearly states the primacy of professional secrecy and attorney-client privilege. This expert opinion was handed over to SECO and the Federal Department of Justice and Police. It has also been the subject of various media releases.

In a second stage, the Federal Council decided on 23.11.22 to implement the 8th sanctions package Ukraine of the EU and put it into force on the same day. The media release of the responsible office stated that the Federal Council considered the rule of law to be fully respected. How exactly this was meant, however, remained unclear. The SBA did not let up on this question. A new expert opinion by Prof. Marcel Alexander Niggli came to the conclusion that a takeover as such would be problematic in terms of the rule of law.

After repeated follow-up, the SBA received a first response in mid-January, almost two months after the adoption and immediate entry into force of the 8th package of sanctions, mainly on the fundamental issue related to the principle of legality.

It is not only that the competent authority has addressed this issue in an incomplete to evasive manner in the view of the SBA. It is particularly disturbing that the numerous unanswered questions of implementation, which had arisen since the adoption of the first sanctions packages, remain unanswered to this date. This is not beneficial to legal certainty. Uncertainty exists as a result of the vagueness of some provisions, particularly with regard to concrete implementation. The SBA calls for a comprehensive examination of these questions.

The SBA strongly condemns Russia's aggression against Ukraine. Sanctions are legitimate political means of foreign policy and international law to ensure peace. However, such measures must respect the principles governing the rule of law. It is also the practiced understanding of lawyers to refrain from any advisory activity that supports clearly unlawful conduct or serves to evade legal rules. This also includes the evasion of sanctions.

The continuing legal uncertainty in many implementation issues and the dismissal of the supposed question of principle by the competent authority by reference to a large practice of exceptions must, however, make us sit up and take notice. The construct of the emergency ordinance is the path from the legislator to the administration, which determines through its practice what exactly applies. This does not go down well in a state where there

is direct democracy. It is problematic with regard to the separation of powers and legal certainty.

The SBA is concerned with access to justice, not with freedom of trade. According to long-standing and unambiguous case law, the lawyer's advisory activity is comprehensively protected as typical for the profession. The borderline to the pure business activity of the lawyer, which is no longer protected, does not run precisely where the clarification of the process begins. Advice on peacekeeping and on the "right course of action" in legitimate matters is also advice. The justifying remedy of an extensive interpretation of the monopoly activity is an unsuitable artifice to satisfy the claim to access to justice. In the view of the SBA, it would be incompatible with the constitutionally protected right of access to justice if an authority could decide on a case-by-case basis, as it were, whether there is still sufficient proximity to the monopoly activity without a legal basis. Ultimately, it becomes clear that the ban on advisory activities has no basis in Switzerland. This is the point. The SBA insists on refocusing the discussion on the really crucial question: How can Switzerland enforce politically desirable sanctions without cutting off access to justice for those that are affected?



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Berne in February 2023