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Report of the Task Force on the Role of Lawyers and International Commercial Structures

Executive summary

The Panama Papers¹ and Paradise Papers leaks have shone a spotlight on offshore commercial structures and on the role of lawyers in the establishment and conduct of structures that may facilitate potentially illegal conduct². As a consequence, the media has given significant attention to the alleged conduct and/or responsibility of lawyers and the law firms involved in these structures. We are thus reminded that the law is not static, but rather dynamic and evolving: what is considered unethical by society and a reputation risk today may be unlawful tomorrow.

The IBA-OECD Task Force on The Role of Lawyers and International Commercial Structures was established by the Secretariat of the Organisation for Economic Co-operation & Development (OECD) and the International Bar Association (IBA) in late 2016 to review and consider the role of lawyers in detecting, identifying and preventing illegal conduct in commercial transactions, in particular transactions with an international character, where the risks of such conduct may be higher.

The Task Force is currently chaired by Nicola Bonucci (OECD Director for Legal Affairs) and Horacio Bernardes Neto, President of the IBA (David Rivkin and Martin Solc, former IBA Presidents, were the chairs during their term of office). The work of the Task Force has been coordinated by Natalie Limbasan for the OECD and Robert Wyld (former Co-Chair of the IBA Anti-Corruption Committee) and Claudio Visco (former Chair of the IBA Bar Issues Commission) for the IBA.

The Task Force, in consultation with the internal constituencies of the two organisations, has elaborated the Statement of Principles set out below. It recommends these Principles to governments and/or national bar associations and law societies, where appropriate, with a view

1 This refers to the public disclosure in April 2016 of approximately 11 million electronic files sourced from the Panama law firm Mossack Fonseca, whose services included the incorporation and administration of offshore companies.

2 Such conduct can include bribery and corruption, tax fraud, sanctions-busting transactions and money laundering and/or terrorism financing.

to encouraging them to adopt the Principles and to explain their role and their importance in ensuring the proper administration of justice and in upholding the rule of law.

Principle 1: Non-facilitation of illegal conduct – By the very nature of a lawyer’s professional functions, such as the establishment of companies, trusts and partnerships, as well as the conduct of internal investigations, and the design and oversight of compliance programmes, a lawyer may be unwittingly associated with illegal conduct, including financial crimes. A lawyer should not facilitate illegal conduct, and should undertake the necessary due diligence to avoid doing so inadvertently.

Principle 2: Misuse of the duty of confidence and privilege – The lawyer’s duty of confidence to a client and the concept of legal professional privilege are of fundamental importance to the legal profession. The Task Force recognises this, mindful of the need to preserve the rule of law. However, a lawyer should not use the confidential nature of the lawyer–client relationship or the principles of legal professional privilege to shield wrongdoers. A lawyer should give due and proper consideration to refraining from acting for a client if the lawyer is aware of, or has reasonable grounds to believe, that the main purpose of the retainer is to allow the client to be able to rely on the confidential nature of the lawyer–client relationship (or privileged communication) so as to permit or encourage the client to engage in illegal conduct.

Moreover, lawyers should not place themselves in a position where they might be said to be aiding or abetting the commission of a criminal offence.

Principle 3: Client due diligence – A lawyer should undertake and document all reasonable and proportionate enquiries in order to identify and verify a client, as well as identify any ultimate beneficiary of the conduct or transaction, the origin of the funds for the transaction (consistent with applicable anti-money laundering or counterterrorism financing legislation), the substantive nature of the conduct or transaction (including expected revenue and taxation consequences of the transaction) and, subject to Principle 5, be satisfied that the conduct and/or transaction is legal in the lawyer’s jurisdictions.

The enquiries that a lawyer undertakes should be heightened if the risk profile of the client, the type of transaction, the origin of the funds, the parties involved and/or the jurisdiction fall within well-established international benchmarks for jurisdictions with increased risk of bribery, corruption and commercial crime (e.g. pursuant to the Transparency International Corruption Perception Index), or otherwise raise objectively grounded and reasonably based suspicion.

Principle 4: Action where client conduct is, may be or becomes illegal – Where the conduct of a client is, may be or becomes illegal, even if it was originally legal and the lawyer continues to be retained by the client, a lawyer should advise the client of the consequences of the conduct and recommend that the client pursues alternative solutions. If the client persists in the conduct, the lawyer should give due and proper consideration to ceasing to act, and terminate the retainer. Depending on the jurisdiction, a suspicious transaction report may also need to be filed or a similar reporting obligation triggered.

Principle 5: Multijurisdictional risk – Where a transaction involves conduct by a client, agents or representatives of a client in more than one jurisdiction and the lawyer has reasonable grounds to

believe that the conduct may be or may become illegal in a jurisdiction(s), a lawyer should verify that expert advice is or has been obtained by the client from a lawyer experienced in the conduct or transaction in that jurisdiction. If such advice has not been obtained and the client wishes to proceed with the transaction, the lawyer should recommend that such advice be obtained (at the cost of the client). If the client declines to obtain such advice and persists in the conduct, then the lawyer should give due and proper consideration to ceasing to act and terminate the retainer. The same consideration applies where the client persists in the conduct after obtaining advice and refuses to follow it. Depending on the jurisdiction, a suspicious transaction report may also need to be filed or a similar reporting obligation triggered.

Principle 6: Use of illegally obtained information – While domestic legal frameworks should clearly define the professional duties and obligations on lawyers in relation to what extent illegally obtained evidence may or may not be used, lawyers should strongly discourage a client from paying private parties or public officials to obtain such information, which of itself may constitute a criminal offence in many jurisdictions. To facilitate this, legal frameworks should be consistent across jurisdictions as much as possible, given that it is often through cross-border conduct that confidential or secret information located in country A is accessed (without the consent of the owner of the information) and then disclosed to a person in country B. The question as to what use can be made of such information should be resolved by an independent court where necessary (subject to avenues of appeal), based on the applicable domestic legal framework.

Principle 7: Disclosure of beneficial ownership – A lawyer should obtain and maintain up-to-date beneficial ownership information and take reasonable measures to verify its accuracy in relation to the lawyer's client(s). To this end, domestic laws should provide for the disclosure of ultimate beneficial ownership of any corporation, trust or other legal entity formed within that country's jurisdiction. Furthermore, the Task Force considers that beneficial ownership information should be available to state regulators, investigators and enforcement agencies. Whether it needs to be publicly available is an issue for governments and parliaments to address.

Principle 8: Advertising by lawyers on international commercial structures – Any advertising by lawyers should be transparent, accurate and truthful. How lawyers can advertise and the requirements that must be satisfied to ensure all advertising is accurate and truthful is a matter for domestic regulation by governments (as a matter of law), and bar associations and law societies (as a matter of professional obligations and ethics).

Prior to forming the Principles, the Task Force identified key questions to consider in relation to the legal profession's role in combatting corruption, including the following:

1. What steps should lawyers and law firms take to satisfy themselves that they have:
 - sufficient knowledge of their client(s) and of the ultimate beneficiaries of their clients' actions; and
 - a proper and informed understanding of the purpose of the act or transaction upon which they are instructed to advise.

2. What steps, if any, should lawyers take in the event that acts or transactions previously legal become illegal as a result of a change of law?
3. What are the law firm's obligations when conflicting sovereign laws apply in cross-border transactions? What should be the result when, notwithstanding the best efforts from the law firm, the client engages in activities that are legal in one jurisdiction but not legal in another jurisdiction?
4. What is the legal profession's role, if any, in combatting corruption, tax evasion, money-laundering and terrorism financing, taking into account the professional duties of lawyers and the role that such duties play in preserving the rule of law?
5. What use, if any, may be made of illegally garnered information and what liability do lawyers have for inadvertent breach of client confidentiality?
6. How can governments clarify the legality of transactions or companies' disclosure requirements to such transactions (ie, regarding beneficial ownership) in order to reduce uncertainties with respect to the issues considered above?
7. What are lawyers' obligations under different legislations and professional ethical rules:
 - When conduct occurs (by a client instructing a lawyer or a lawyer carrying out or implementing the client's instructions) that may constitute or contribute to a criminal offence;
 - When advertising legal services in connection with the use of corporate structures, such as the opening of offshore accounts, which have the potential to be used to conceal criminal offences.

In the view of the two organisations, the Principles represent a major step in their cooperation to ensure that lawyers, who play a crucial role in society and function as key operators in the administration of justice and as guardians of the rule of law, may have a useful tool to address new complex and unprecedented scenarios in a manner consistent with their legal duties and professional obligations.