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Council of Bars and Law Societies of Europe
The voice of the European legal profession

Rue Joseph II, 40/8 - B-1000 Brussels
T.: +32 (0)2 234 65 10 - ccbe@ccbe.eu - www.ccbe.eu

CCBE Observations in response to the OECD-IBA "Report of the Task Force on the role of lawyers and international commercial structures"

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I: INTRODUCTION & BACKGROUND

Following on from the London Anti-Corruption Summit which took place in May 2016, the Organisation for Economic Co-operation and Development (OECD) and the International Bar Association (IBA) agreed on 14/12/16 to form a task force "*to develop professional conduct standards and practice guidance for lawyers involved in establishing and advising on international commercial structures and recommended actions for governments".*

The Task Force was established by the Secretariat of the OECD and the IBA "*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*."

According to a press release issued at the time, it provided that:

> "*The principle motivation for forming the OECD-IBA Task Force on The Role of Lawyers and International Commercial Structures is to create a key component in the global fight against corruption. The release earlier this year of the so-called Panama Papers highlighted that, in completing legal transactions for their clients, lawyers may knowingly or unwittingly assist clients in asset concealment or money laundering. International standards, such as the Recommendations of the Financial Action Task Force (FATF), provide a framework for conducting due diligence on customers and identifying the beneficial owner. However, countries' implementation of these standards has been variable. Since the scandal, many governments have called for greater transparency of such transactions, sometimes requiring reporting by lawyers. At the same time, lawyers are mindful of their professional obligations of confidence to their clients. The Task Force will work to develop appropriate guidance with respect to forming international commercial structures, while ensuring that confidence in both the lawyers' role and the core principles of the legal profession are preserved."*

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The press release also mentioned that:

> "*This collaboration builds on the existing OECD-IBA Memorandum of Understanding in which the parties agreed to work together on a number of areas including corporate social responsibility, competition, trade and investment, taxation, financial services and migration. Among other things the two organisations have agreed to: exchange information and participate in fact-finding missions; formulate new rules and guidance for international business and finance; publish joint reports; organise joint forums, workshops and seminars; and for the IBA to contribute to periodic reviews and updates of OECD instruments."*[1]

On 20 May 2019, following two and a half years of work, the OECD-IBA issued its "*Report of the Task Force on the role of lawyers and international commercial structures".* The Report includes a "Statement of Principles" containing eight Principles. It is indicated that:

> "*The Task Force supports the Statement of Principles set out below, recommending them to national Bar Associations and Law Societies with a view to encouraging them to adopt the Principles and to engage with their governments to explain the role of the Principles in ensuring the proper administration of justice and in upholding the rule of law."*

II: CCBE OBSERVATIONS

The CCBE has examined the Report and the eight Principles contained within. A copy of the CCBE's comments can be obtained by contacting the CCBE Secretariat (mcnamee@ccbe.eu).

The CCBE notes that the OECD-IBA Report fails to recognise and portray in an appropriately positive manner the high ethical behaviour and obligations that currently govern the profession and inform our conduct on an everyday basis. In contrast, the Report creates a negative impression that lawyers are not already undertaking many responsible activities to detect, identify and prevent illegal conduct in commercial transactions, in particular transactions with an international character. This rather populist view of the legal profession, based on unique events, does not reflect the high legal and ethical standards of the large majority of lawyers and is in stark contrast to how the CCBE views the contribution of the legal profession. CCBE members have strict ethical duties and obligations which ensure that lawyers operate to the highest ethical standards, while ensuring access to justice for their clients.

[1] On 9 October 2012, the OECD and IBA signed a memorandum of understanding to formalise their commitment to extend collaboration on improving legal frameworks, expertise, and development across a number of sectors. Sectors highlighted included employment, energy, environment and natural resources, financial services, migration, trade and investment, and the rule of law and democratic values.

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Paradoxically, and in contrast to the negative approach as regards the current high standards under which the legal profession operates (see our comments to Principles 1 and 2), the Principles themselves seem to promote a very low standard in places (see Principles 3, 4 and 5).

The following is a summary of the CCBE's observations on the OECD-IBA Report and Principles:

<u>The Report:</u>

1. From a very early stage in the Report (beginning in paragraph 1.2), the impression is created that lawyers are not already undertaking many responsible activities to *detect, identify and prevent illegal conduct*. Paragraph 1.2 provides that "*a lawyer must not act unethically, unprofessionally or in any manner that condones, encourages or constitutes participation in illegal conduct. Moreover, in the exercise of his/her role, a lawyer is well placed not only to identify or detect illegal conduct, but also to facilitate it by action or inaction or prevent it.*"

   To specify that "*a lawyer must not act unethically, unprofessionally or in any manner that condones, encourages or constitutes participation in illegal conduct*" illustrates the approach of presenting the activities of the legal profession in a negative manner, which is not justified in the case of the large majority of lawyers.

2. The CCBE does not deny that there are always people who will not be prevented by existing legislation from wrongdoing, and this may also happen within the legal profession. However, as there are already professional ethical rules and disciplinary sanctions in place - in addition to criminal sanctions - to deal with lawyers who participate in criminal activity, the CCBE is convinced that these incidents must be considered as exceptions to the general conduct of the legal profession.

3. It must be questioned whether it is wise for the IBA to draft a document with the OECD which *"focuses on high-level issues of principle which should assist governments in policy formulation and in guiding lawyers as to how they should conduct themselves, consistent with a lawyer's underlying domestic legal and ethical obligations."* (as indicated in 3.3). The suggestion that the Principles would assist in *"guiding lawyers as to how they should conduct themselves, consistent with a lawyer's underlying domestic legal and ethical obligations*" is also of further concern, as the preparation of any Principles would appear to be a task which Bars, with admission responsibilities, are qualified, competent and best-positioned to undertake without external involvement.

   The different and sometimes contrasting roles and functions of the OECD, the IBA and Bars and Law Societies raise a further question on the necessity and desirability of such a joint approach.

4. The paper indicates (see 2.2) that the *"...Principles are not designed as formal obligations or rules. Rather, they are framed as a broad statement of a principled approach on how lawyers and law firms should conduct themselves when engaged in or undertaking work associated with commercial structures, particularly of an international character".*

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However, the paper provides that (see 2.3) "*Notwithstanding this, the Task Force advocates that where the Principles are adopted and form part of domestic law and/or professional regulations, their disregard ought to result in the application of proportionate disciplinary measures. These should include, where appropriate, disbarment, recognised also in foreign jurisdictions.*"

Paragraph 2.2. and 2.3. are therefore somewhat contradictory in suggesting disciplinary measures, up to and including disbarment, for what are very general, undefined and imprecise principles, which is a draconian and specific consequence for something that is *"not designed as formal obligations or rules"* and for something that is "*framed as a broad statement of a principled approach".*

The CCBE notes with great concern that two organisations who should be dedicated to upholding the rule of law and the principle of legal certainty are proposing far-reaching sanctions based on general principles.

Based on an analysis of the Principles, it would be unwise for any Bar Association or Law Society to (See 2.1) *"adopt the Principles and to engage with their governments to explain the role of the Principles in ensuring the proper administration of justice and in upholding the rule of law",* as the CCBE does not share the same understanding of the Principles and it is unclear how any Bar Association or Law Society could "*explain the role of the Principles in ensuring the proper administration of justice and in upholding the rule of law*".

<u>The Principles:</u>

5. Regarding **Principle 1** *"Non-facilitation of illegal conduct*", the phrasing of this very first Principle results in a negative perception of a lawyer. If a lawyer has to be told that he or she *"… should not facilitate illegal conduct*" then this indeed is a very low starting point from an education and perception point of view.

   This principle overlooks that there are binding rules already in place to prevent lawyers from "associating" with crimes and illegal conduct, which are the respective provisions of criminal law and civil law, and which impose criminal and/or civil law liability on lawyers for illegal behaviour. There is no reason why a "principle" would add any value to this situation. This "principle" merely summarises the legal situation as it is and adds nothing new as there are binding legal provisions in place that apply to both lawyers and their clients which prohibit illegal behaviour.

6. The title of **Principle 2** is another example of the negative tone of this Report: "*Principle 2: <u>Misuse</u> of the Duty of Confidence and Privilege*". This could simply have been entitled "Principle 2: A Lawyer's Duty of Confidence and Privilege".

   With respect to this Principle, the sentence "*However, a lawyer should not use the confidential nature of the lawyer-client relationship or the principles of legal professional privilege to shield wrong-doers*" is an unfortunate and damning sentence.

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A situation has been created whereby an Organisation (the IBA) is indicating to lawyers that "*a lawyer should not use the confidential nature of the lawyer-client relationship or the principles of legal professional privilege to shield wrong-doers.*" This creates the impression that lawyers are currently hiding criminal conduct behind the shield of privilege. When an organisation such as the IBA makes such a statement, it indicates a lack of respect towards the large majority of lawyers who would never behave in the described manner. There is no evidence that there is any problem of a systematic misuse of privilege.

In contrast, it is worth noting the CCBE's Principle (b) from the CCBE Charter of Core Principles: "*Principle (b) – the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy: It is of the essence of a lawyer's function that the lawyer should be told by his or her client things which the client would not tell to others - the most intimate personal details or the most valuable commercial secrets - and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality there can be no trust. The Charter stresses the dual nature of this principle - observing confidentiality is not only the lawyer's duty - it is a fundamental human right of the client. The rules of "legal professional privilege" prohibit communications between lawyer and client from being used against the client. In some jurisdictions the right to confidentiality is seen as belonging to the client alone, whereas in other jurisdictions "professional secrecy" may also require that the lawyer keeps secret from his or her own client communications from the other party's lawyer imparted on the basis of confidence. Principle (b) encompasses all these related concepts - legal professional privilege, confidentiality and professional secrecy. The lawyer's duty to the client remains even after the lawyer has ceased to act*."

The sentence "*Moreover, a lawyer should not be in a position where he or she might be said to be aiding or abetting the commission of a criminal offence*" is also negatively phrased and there is no mention of "knowingly" or "unknowingly" or "wittingly" and "unwittingly". The current formulation falls into the trap of publicly associating lawyers with the activities of their clients.

7. Regarding **Principle 3**, there are already well-established and well-implemented global standards for client due diligence requirements set by the FATF, as well as standards set by national legislation, which are followed by the legal profession. The CCBE does not see the need to ensure this through a "principle".

8. **Principle 4** is weak regarding client conduct which is or becomes illegal and creates the impression that a lawyer may or may not cease their activity if the conduct is illegal as all the lawyer is required to do is "*give due and proper consideration to ceasing to act…".* This "*due and proper consideration*" is clearly the wrong standard. There are clear steps to take if conduct "is" or if conduct "becomes" illegal, and if conduct "is" illegal or "becomes" illegal, something stronger than "*the lawyer should give due and proper consideration to ceasing to act and terminate the retainer*" is required. If the conduct is

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illegal, the lawyer needs to withdraw if the client does not change course. This is straightforward.

9. The same observation applies to **Principle 5** on multi-jurisdictional risk, which describes what a general standard is and does not need to be supported by a "principle". If a lawyer would not advise to take advice in the respective foreign jurisdiction, he or she would run a high risk of liability, which is certainly much more guiding than a "principle". Again, the very weak wording of "*the lawyer should give due and proper consideration to ceasing to act and to terminate the retainer*" is misleading and does not adequately describe the situation.

10. In **Principle 6** (Use of Illegally Obtained Information), the sentence "… *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*" is superficial and does not accurately reflect the duties of the lawyer. The lawyer must always advise the client according to the applicable law and advise them not to enter into criminal behaviour. "*Strongly discourage*" is therefore insufficient in this respect.

11. With regard to **Principle 7** (Disclosure of Beneficial Ownership), there are already well-established global standards and legislation in this regard, to which the principle adds nothing. In addition, it is not clear what disclosure is being referred to; for example, does it include all trusts? There is also a complete lack of protection of legitimate privacy and due process considerations.

12. With regard to **Principle 8** (Advertising by Lawyers on International Commercial Structures), it is completely unclear how a principle on "Advertising" fits into a paper on the "*role of lawyers in detecting, identifying and preventing illegal conduct in commercial transactions*". Again, lawyers are bound by their domestic law with regard to rules on advertising for everybody as well as by the respective deontological requirements. The CCBE cannot see the purpose of repeating this in a "principle".

III: CONTRAST - CCBE Charter of Core Principles

It is regrettable that such a superficial Report has been published, as it is widely damaging to the perception of lawyers. This is especially true when one contrasts the OECD-IBA Principles with the CCBE Charter of Core Principles, which are more "positive" and the product of many years of consultation, discussion and ongoing revision.

The CCBE principles are core principles which are common to the whole European legal profession, even though these principles are expressed in slightly different ways in different jurisdictions. The core principles underlie the various national and international codes which govern the conduct of lawyers. European lawyers are committed to these principles, which are essential for the proper administration of justice, access to justice and the right to a fair trial, as required under the European Convention on Human Rights. The CCBE indicates that Bars and Law Societies, courts, legislators, governments and international organisations

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should seek to uphold and protect the core principles in the public interest. The core principles are, in particular:

(a) the independence of the lawyer, and the freedom of the lawyer to pursue the client's case;

(b) the right and duty of the lawyer to keep clients' matters confidential and to respect professional secrecy;

(c) avoidance of conflicts of interest, whether between different clients or between the client and the lawyer;

(d) the dignity and honour of the legal profession, and the integrity and good repute of the individual lawyer;

(e) loyalty to the client;

(f) fair treatment of clients in relation to fees;

(g) the lawyer's professional competence;

(h) respect towards professional colleagues;

(i) respect for the rule of law and the fair administration of justice; and

(j) the self-regulation of the legal profession.

IV: CONCLUSION

(a) The CCBE has made great efforts to engage with EU and international institutions to explain the importance of various Principles (especially the Principles of Independence and Privilege). It is unfortunate that the CCBE must now correct the wrong impressions brought into the public domain due to the publication of a Report that questions, for example, the legal profession's use of Privilege. It is also regrettable that the general tone of the Report and the Principles it contains is damaging to the portrayal of the profession.

(b) The CCBE also questions how such a Report, which it is assumed has followed an exhaustive consultation process, could be approved with respect to its content and, although this is a matter of internal IBA governance, the means by which the Report has been approved would need to be examined in order to avoid future Reports with similar content.

(c) The actual methodology is also an issue, and it would be interesting to know precisely what input was provided by the Bars that participated, and what precise input formed the basis of the Report (it is specified in footnote 18 that "*Information was supplied by the Bar Associations and/or Law Societies of Belgium, Bosnia & Herzegovina, Colombia, the Czech Republic, England & Wales, Estonia, Fiji, Germany, Hungary, Japan, Lithuania, the Netherlands, Poland, Scotland, South Africa, South Korea, Sweden and Switzerland*").

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In summary, a Report of this nature (in addition to asking the question of why the OECD needs to be involved in any issue concerning the regulation of the legal profession which should be within the competence of the profession itself) is damaging to the perception of the profession. Uninformed commentators already dwell in sensationalist suggestions that lawyers merely discharging their professional duty are complicit in criminal conduct. An ambition of such commentators has long been to pierce the shield of confidentiality, and in truth, to remove other fair trial rights.

The Report is unhelpful in many respects and, although it can be assumed that the Report was well-intentioned, it cannot be said with any confidence that the Task Force has developed *"appropriate guidance with respect to forming international commercial structures, while ensuring that confidence in both the lawyers' role and the core principles of the legal profession are preserved."*