

**TRAINING / CAPACITY BUILDING AT EUROPEAN UNION – DG COMP
Cartel- Section**

AREAS OF FOCUS/INTEREST

NO	AREA OF FOCUS	REMARKS
1	Overview of the EU Commission	<p>The EU currently has 27 member states. The Members were 28 before UK left through Brexit on 31st Jan 2020.</p> <p>The European Commission, together with the national competition authorities, directly enforces EU competition rules, Articles 101-106 of the Treaty on the Functioning of the EU (TFEU), to make EU markets work better, by ensuring that all companies compete equally and fairly on their merits. This benefits consumers, businesses and the European economy.</p> <p>Within the Commission, the Directorate-General (DG) for Competition is primarily responsible for these direct enforcement powers.</p> <p>All the EU member states have National Competition Agencies. The National Competition Agencies together with the EU Commission cooperate with each other through the European Competition Network (ECN). The ECN provides effective mechanism to counter companies that engage in cross – border cartels.</p>

2	Structure of the Competition Commission (Policy)	<p>The Commission is currently divided into the following departments;</p> <ul style="list-style-type: none"> □ Antitrust and Cartels: The cartel are basically concerned with horizontal violations. □ Mergers □ State Aid (<i>Article 107 of the Treaty on the Functioning of the European Union (TFEU) ensures that aid granted by a Member State or through State resources does not distort competition and trade within the EU by favoring certain companies or the production of certain goods</i>) □ Digital Market Act □ Foreign Subsidy (<i>Under the Regulation, the Commission has the power to investigate financial contributions granted by non-EU governments to companies active in the EU. If the Commission finds that such financial contributions constitute distortive subsidies, it can impose measures to redress their distortive effects</i>).
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		<p>✓ Sectors. The Commission has dedicated teams to look at any competition concern in the following sectors;</p> <ul style="list-style-type: none"> ○ <i>Agriculture Food and Fisheries</i> ○ <i>Electronic Communication</i> ○ <i>Energy and Environment</i> ○ <i>Financial Services</i> ○ <i>ICT</i> ○ <i>Media</i> ○ <i>Motor Vehicle</i> ○ <i>Pharmaceutical and Health Services</i> ○ <i>Postal Services</i> ○ <i>Professional Services</i> ○ <i>Sports</i> ○ <i>Transport and Tourism</i>
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		<p>The sector teams are responsible for the vertical agreements and the violations under article 102 (Abuse of dominance in the sectors)</p>
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3	Case Procedure/Process	<p>Antitrust procedures in anticompetitive agreements Article 101 of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between companies which prevent, restrict or distort competition in the EU and which may affect trade between Member States (anti-competitive agreements).</p> <p>These include, for example, price-fixing or market-sharing cartels.</p> <p>Anti-competitive agreements are prohibited regardless of whether they are concluded between companies that operate at the same level of the supply chain (horizontal agreements) or at different levels (vertical agreements)</p> <p>The cases at the EU can start through either of the following;</p> <ul style="list-style-type: none"> □ a complaint, □ opening of an own-initiative investigation, □ a leniency application from one of the participants to a cartel. <p>The commission can then initiate the investigation process by;</p> <ul style="list-style-type: none"> □ Sending an information request (RFI) to companies.
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		<p>✓ conduct an inspection:</p> <p>At the end of the initial investigative phase, the Commission can take the decision to pursue the case as a matter of priority and to conduct an in-depth investigation, or to close it.</p> <p>The commission will then issue a Statement of objections and prohibition decision if the in-depth investigation confirms the Commission's competition concerns. The statement of objections (SO) shall give details the prohibition and shall be sent to the undertakings.</p> <p>Rights of defense:</p> <p>To ensure an objective outcome, the parties are given certain rights of defense such as;</p> <ul style="list-style-type: none"> □ Right to have access to the file – this means they can see all non-confidential documents from the Commission's investigation. □ Right to reply to the SO in writing within a certain period. □ They may also request an oral hearing, which is conducted by an independent Hearing Officer. <p>After examining the parties' arguments, the Commission reviews and sometimes abandons (part of) its initial objections and may decide to close the case.</p> <p>If the Commission's concerns are not – or are only partly dispelled – the commission shall draft a decision prohibiting the identified infringement (according to Article 7 of the Antitrust Regulation).</p> <p>The draft is then submitted to the Advisory Committee composed of representatives of the Member States' competition authorities. This provides a final check of the draft decision.</p>
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	<p>If fines are proposed in the draft decision, the Advisory Committee meets a second time to specifically discuss them.</p> <p>Finally, the draft is submitted to the College of Commissioners which adopts the decision.</p> <p>Right of appeal. The Undertakings have the right to appeal to the EU General Court, to amend or annul the decision. The Court can cancel, increase or reduce the fine imposed by the Commission.</p> <p>Judgments of the General Court can be appealed before the European Court of Justice (ECJ) by the unsuccessful party (so the Commission can also be an appellant). However, these appeals to the ECJ are limited to questions of law only.</p> <p>Victims' claims for damages. Any citizen or business which suffers harm as a result of a breach of the EU competition rules is entitled to claim compensation from the party who caused it. This means that the victims of competition law infringements can bring an action for damages before the national courts.</p>
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4	Screening and Case Initiation	<p>The commission has the following methods to launch a case/investigation.</p> <ul style="list-style-type: none"> □ Complaints □ Ex – officio (own motion) □ Informant/whistle blower □ Market intelligence □ Market surveys /screening □ Leniency application <p>The commission mainly depends on Leniency application for their cases.</p> <p>The commission also runs a whistle blower program but with no reward to a whistle blower.</p> <p>The commission has also partnered with some of the big law firms to help in creating awareness among their clients.</p>
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		<p>Sometimes when the commission has slight information about a cartel operating in a particular sector, they will write a request for information (RFI) to the parties. This is referred to us Shake The Tree (STT) to test if the parties can be willing to come forward and give more information or apply for leniency.</p>
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5	Bid Rigging cases	<p>This has not been there for a longer period, but the commission has handled a few cases on bid rigging. The most recent one being the hand grenade case where the commission.</p> <p>The commission is working closely with other state agencies and other national competition agencies to help in detecting bid rigging cases for tenders that cover more than one member state.</p> <p>Currently the commission is developing training manuals on bid rigging to train all the National Competition Agencies.</p> <p>The commission has a team that is tasked with developing these manuals and they hold meeting every Thursday. (I was privileged to be incorporated in this team)</p>
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6	Investigation plan/process	<p>The three things to look at during an investigation plan are;</p> <ul style="list-style-type: none"> • What do I need to enable me to move forward with the investigation. What information do I need and what type of evidence are we looking for to support the investigation. • What investigation tools are best suit to enable me to obtain what I want above. Such tools include; <ul style="list-style-type: none"> □ Inspection (dawn raid) □ Request for information (RFI) □ Sector inquiry □ Meetings • What is the best source of the information I am looking for. Are they the target companies, the competitors, 3rd parties, data industry or public information. • Types of evidence to be collected. <ul style="list-style-type: none"> □ Quantitative □ Qualitative □ Documents □ Legal professional privileged
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7	Dawn Raids /Inspection	<p>The EU refers to dawn raids as inspection. Basically, the process is conducted with the following;</p> <ul style="list-style-type: none"> □ Forensic team □ Inspectors/case handlers <p>When the Commission visits for inspection, the parties are allowed to be represented by their legal counsel.</p> <p>The inspection team will notify the parties of their reason for the visit. The parties may grant them the permission to continue with the inspection or deny.</p> <p>If the commission is denied the permission to conduct inspection, then the parties shall be liable to an automatic fine of 1% of the annual turnover for obstruction of justice. The parties will then be charges additional penalty of 5 % of the relevant turnover for each day that they delay the inspection.</p> <p>When the commission visits for an inspection, the exercise is conducted for about one week.</p> <p>During this time, the commission staff will be stationed at the suspect premises.</p> <p>The inspection team will secure all the targeted equipment on the 1st day of the visit and have them kept at designated office as they conduct the inspection till the end. Such office will be secured and only accessible to the commission staff during inspection.</p> <p>During inspection, the commission staff have the powers to ✓</p> <ul style="list-style-type: none"> enter the premises of companies. □ examine the records related to the business. □ take copies of those records. □ seal the business premises and records. □ ask members of staff or company representatives questions relating to the subject-matter and purpose of the inspection and record the answers. <p>The inspectors are expected to take explanatory notes describing what happens during an inspection. (<i>importance of having a note taker during inspection</i>)</p> <p>The Commission staff will have a written authorizations identifying the officials and other accompanying persons authorized by the Commission to conduct the inspection</p>
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	<p>('the Inspectors'). The inspectors will each provide a proof of identity.</p> <p>The officials and other accompanying persons authorized or appointed by the competition authority of the Member State of the territory on which the inspection is conducted are entitled to actively assist the inspectors in carrying out their duties.</p> <p>The presence of a legal counsel is not a legal condition for the validity of the inspection. The inspectors may enter the premises, notify the decision ordering the inspection and occupy the offices of their choice without waiting for the undertaking to consult its legal counsel.</p> <p>The inspectors will, in any case, accept only a short delay pending consultation of the legal counsel. Any such delay must be kept to the strict minimum.</p> <p>Where any representative or member of staff of the undertaking gives oral explanations on the spot-on facts or documents relating to the subject matter of the inspection at the request of the Inspectors, the explanations is and a copy of any such recording will be made available to the undertaking concerned after the inspection.</p> <p>The inspectors may not only use any built-in (keyword) search tool but may also make use of their own dedicated software and/or hardware ("Forensic IT tools").</p> <p>These Forensic IT tools allow the Commission to copy, search and recover data whilst respecting the integrity of the undertakings' systems and data.</p> <p>The undertaking has the obligation to cooperate fully and actively with the inspection. This means that the undertaking may be required to provide appropriate representatives or members of staff to assist the inspectors, not only for explanations on the organization of the undertaking and its IT-environment, but also for specific tasks such as temporary blocking of individual email</p>
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		<p>accounts, temporarily disconnecting running computers from the network, removing and re-installing hard drives from computers and providing 'administrator access rights' support.</p> <p>The inspectors may ask to use hardware (e.g., hard disks, CD-ROMs, DVDs, USB-keys, connection cables, scanners, printers) provided by the undertaking, but cannot be obliged to use the undertaking's hardware.</p> <p>Storage media or any document selected for examination may be kept under the inspectors' control until the end of the inspection on the spot. They may be returned earlier, for instance after a forensic copy of the data under investigation has been made. Such a forensic copy is an authentic duplicate of (part or all) the data stored on the original medium. The examination of the authentic duplicate is equal to the examination of the original storage medium.</p> <p>If the selection of documents relevant for the investigation is not yet finished at the envisaged end of the on-site inspection at the undertaking's premises, the copy of the data set still to be searched may be collected to continue the inspection later.</p> <p>This copy will be secured by placing it in a sealed envelope. The undertaking may request a duplicate. The Commission will invite the undertaking to be present when the sealed envelope is opened and during the continued inspection process at the Commission's premises.</p> <p>Alternatively, the Commission may decide to return the sealed envelope to the undertaking without opening it.</p> <p>As regards the final data collected by the Inspectors during the inspection on the spot (or following a continued inspection) which are added to the case file, the undertaking</p>
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		<p>will receive a data carrier (e.g., a DVD) on which all these data are stored.</p>
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8	Decisions by the Commission	<p>Decisions</p> <p>The Decisions by the commission can take the following forms.</p> <p>A "Prohibition Decision" based on Article 7 of Regulation 1/2003 formally finds an infringement against the concerned parties. The Commission may require the parties concerned to stop the infringement, impose remedies and/or impose a fine.</p> <p>A "Commitment Decision" based on Article 9 of Regulation 1/2003 allows companies to offer commitments that are intended to address the competition concerns identified by the Commission. The commitment decision makes the commitments binding on the parties without establishing an infringement. Acceptance of the commitments is at the discretion of the Commission.</p> <p>Publications of decisions</p> <p>Final public versions of Decisions are published on DG COMP's website along with a summary of the Decision</p>
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		<p>summary, the final report of the Hearing Officer, and the opinion of the Advisory Committee in the Official Journal.</p> <p>Fines</p> <p>A company that has participated in an anti-competitive agreement and therefore infringed competition law may have to pay a fine. the Commission's fining policy is aimed at punishment and deterrence.</p>
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9	Digital and Forensic Investigations	<p>The commission has forensic team that is dedicated to mining of data during inspection.</p> <p>Currently the commission is using a NUIX software. Electronic searches are done with the Nuix platform. During the inspection, a collection of potentially relevant data is exported from the Nuix platform and stored as an encrypted “.ZIP” archive file.</p> <p>In addition to the archive file with the potentially relevant data, the system also generate an MD5 hash value¹ of the complete archive(s) file(s) and this will be stored in a “.CVS” formatted file (similar to .XLS format), or in one or several “.TXT” files.</p> <p>The compressed file and “.CVS” file or the “.TXT” file (with the MD5 hash value) are both copied on a data carrier (DVD, USB stick or an external hard drive).</p> <p>A list of exported documents is produced along with every export. The list of documents includes the name, the path, the date and an ID number for each exported document. Once the list of documents considered as relevant for the DG COMP team is finalized, the content of the data carrier (i.e., the archived file and the file with MD5 hash value) is burned on a DVD. There are three authentic copies produced on the spot. One of the copies is handed over to the undertaking and two will be brought to DG COMP. Finally, the paper version of the “Report.html” is signed by</p>
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		<p>both the representatives of the undertaking and the DG COMP team leader.</p> <p>Note: A hash value is an algorithm that is unique for any combination of digits on whatever support. If somebody changes afterwards one single dot in the data container, this will change the hash value. It is therefore a guarantee that, as long as there is the same hash value, the container contains identical data.</p>
10	Forensic Tools used in a cartel Investigations	<p>The commission has a well-equipped forensic lab. The tools being used are;</p> <ul style="list-style-type: none"> □ Oxygen Forensic □ Cellebrite <p>Both tools are used to mine data from laptops, mobile, desktop and any other electronic device of interest. These Forensic IT tools allow the Commission to copy, search and recover data whilst respecting the integrity of the undertakings' systems and data</p> <p>The limitation of the above tools is that they do not have the capacity to break the pass code.</p> <p>There are however forensic tools like X-ray and Grey key that can break the pass code (recommended).</p>

11	Analysis of Abuse of Dominance	<p>Article 102 cases are dealt with by the European Commission under the sectors or a national competition authority can originate either through</p> <ol style="list-style-type: none"> 1. <u>complaint</u> or. 2. <u>ex officio investigation</u> or a <u>sector inquiry</u>. <p>Assessing dominance</p> <p>The Commission's first step in Article 102 investigation is to assess whether the undertaking concerned is dominant on any given market or not.</p> <p>Before assessing dominance, the Commission defines the product market and the geographic market.</p>
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		<ul style="list-style-type: none"> • Product market: the relevant product market is made of all products/services which the consumer considers to be a substitute for each other due to their characteristics, their prices and their intended use. • Geographic market: the relevant geographic market is an area in which the conditions of competition for a given product are homogenous. <p>Market shares are a useful first indication of the importance of each firm on the market in comparison to the others.</p> <p>The Commission's view is that the higher the market share, and the longer the period over which it is held, the more likely it is to be a preliminary indication of dominance.</p> <p>If a company has a market share of less than 40%, it is unlikely to be dominant.</p> <p>The Commission also considers the following in assessing the dominance,</p> <ul style="list-style-type: none"> □ ease of entry into the market □ existence of countervailing buyer power; □ the overall size and strength of the company and its resources and □ the extent to which it is present at several levels of the supply chain (vertical integration). <p>A dominant company has a special responsibility to ensure that its conduct does not distort competition.</p> <p>Examples of behavior that may amount to an abuse include:</p> <ul style="list-style-type: none"> □ requiring buyers to purchase all units of a particular product only from the dominant company (exclusive purchasing); □ setting prices at a loss-making level (predation or predatory pricing);
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		<ul style="list-style-type: none">□ refusing to supply input indispensable for competition in an ancillary market and□ charging excessive prices.
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12	<p>How Leniency works and its ups and downs (Challenges in application)</p>	<p>The leniency process in the EU has undergone about three amendments. The 1st leniency did not provide automatic immunity, and this made people to shy away from coming forward as they were not sure of the immunity. The 1st amendment was therefore done about 2003/2004. However, this still had some loopholes in terms of confidentiality.</p> <p>The second amendment was done in 2006. This amendment brought in the following attribute to leniency application;</p> <ul style="list-style-type: none"> □ Predictability □ Transparency and □ Accessibility <p>The commission has for the longest time relied on leniency as a source for its cases. The main reason for the high leniency application was attributed to the high level of awareness by the member states on competition provisions. Again many member states have National Competition Agencies and therefore any cartel conduct that covers more than one member state is always referred to the EU.</p> <p>The leniency process has been more straight forward and predictable up to the time of introduction of private damages.</p> <p>Under the Commission's Leniency program, the first firm to submit evidence that is sufficient for the Commission to either launch an inspection or enable it to find an infringement receives full immunity.</p> <p>The firm must also end its participation in the infringement.</p> <p>Firms that approach the Commission later and that contribute a real added value to the investigation are eligible for a fine reduction, subject to the same on-going cooperation as for immunity applicants.</p>
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		<p>The success of the leniency in the EU can also be attributed to the high fines that the commission charges when one is found culpable. These high fines scare the parties and thus</p>
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	<p>makes them look for a way to save their businesses and so they come forward for leniency.</p> <p>It was however noted that since the introduction of private damage claim, the number of leniency applicants went slightly down since the affected parties are not aware of how much claim they may be subjected to pay for the private damages.</p> <p>The commission has no control on what the court may award for private damages and this created some uncertainty among the parties. This uncertainty lowered the number of leniency applications.</p> <p>Challenges in leniency application</p> <p>Some of the challenges experienced in leniency are;</p> <ul style="list-style-type: none"> □ The introduction of private damage claim □ The reduction of international cases because many jurisdictions now have their own competition agencies. □ The EU no longer receives cases that are direct like those touching on price fixing but only get complicated cases that require further analysis. □ Leniency is not applicable to vertical agreements under the EU <p>“Tips on effective leniency by Brent Snyder”</p> <p>“Be the first to tell film”</p>
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13	The fining process	<p>The Commission's fining policy is aimed at punishment and deterrence. The fines reflect the gravity and duration of the infringement. They are calculated under the framework of a set of Guidelines last revised in 2006.</p> <p>The starting point for the fine is the percentage of a company's annual sales of the product concerned in the infringement (up to 30%).</p> <p>This is then multiplied by the number of years the infringement lasted.</p>
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		<p>In cartel cases, the fine is increased by a onetime amount equivalent to 15-25% of the value of one year's sales as an additional deterrent.</p> <p>The aggravating and mitigating factors are then considered.</p> <p>The maximum level of fine is capped at 10% of the overall annual turnover of a company.</p>
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14	Settlement process	<p>The settlement process is provided for under Article 7 and Article 23 of the regulations (EC) No.1/2003.</p> <p>It is the accused parties to indicate to the commission their intention to settle. The parties who apply for a settlement atomically qualify for a 10% fine reduction.</p> <p>The commission may agree to this proposal or reject.</p> <p>The main reasons why the commission may reject this proposal are;</p> <ul style="list-style-type: none"> □ When the commission is convinced that they have strong evidence for the case □ When they want to use the case to create deterrence in a sector (where there has not been a cartel in the sector before) □ When the commission want to use the case to develop a policy. □ When they want to use the case to create precedent <p>The main reason why parties may decide to enter into a settlement are;</p> <ul style="list-style-type: none"> □ To save time and resources □ To benefit from the settlement discount that is currently 10% of the fine □ To avoid bad publicity. <p>Once the settlement process begins, the commission and the parties are to have three meetings.</p> <p>The 1st meeting is where the commission invites the parties and then provide to them the evidence for the case. This is more like the statement of objection (summary of findings)</p>
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	<p>During this meeting, the commission will then allow access to file to the parties so that they can also interrogate the evidence. The parties are then given time to respond to the same. This response time can be between 1 to 3 months.</p> <p>The parties must admit their liability to the infringement for the settlement process to proceed.</p> <p>The parties may then after interrogating the statement of objection decide whether to continue with the settlement process or opt out.</p> <p>When they decide to continue with the process, they will make their submission to the commission which will form the discussion in the second meeting.</p> <p>During the second meeting, the commission will also hint to the parties the possible penalty they are likely to pay. The penalty is calculated as prescribed under article 9 as below;</p> <ul style="list-style-type: none"> □ Basic amount (not below 15% but not more than 30% of the value of sales depending on the gravity of the infringement) X the number of years in the cartel. □ Entry fee which is usually the same percentage above □ Add any aggravating factor □ Less any mitigating factor <p>Once you get to the final percentage you can decide to increase the same either using point 30 or point 37 under the article <i>(this is when your initial penalty is low and not likely to create deterrence)</i></p> <p>When using point 30, then you can only multiply the penalty by 2.</p> <p>When using point 37, then you can multiply the penalty with any figure not less than 2.</p>
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		<p>The main reason for this is to create deterrence so that the parties can feel the pinch of the fine.</p>
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		<p>After this, the commission will apply the available discounts such as settlement discount (10%) and leniency discount if the parties qualified for any.</p> <p>Can the parties challenge a settlement decision? YES. However, this challenge will not be on the full procedure or the liability but can be on the method used to calculate the penalty like in the basic amount, the value used under point 30 or point 37.</p> <p>Note.</p> <ul style="list-style-type: none"> □ The final penalty should however not be more than 10% of the preceding year’s worldwide turnover of the undertaking. □ The preceding year is the year just before the year of determination. □ Where the infringement is by an association of undertakings, the value of sales will be the sum of the value of sales by the members.
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Recommendations.

From the above learnings, I would recommend to the Authority as below;

BID RIGGING CASES.

1. Conduct more awareness on bid rigging. The Authority has been focusing a lot on the tail end of the cartel cases by training the lawyers (Showing the stick) but have not done much to create awareness on how to initiate the cases. Bid rigging happens mostly in the tendering process and the professionals involved in this process are accountants, procurement officers, engineers and so on.

2. The Authority should therefore engage with professional bodies such as ICPAK, KISM, Engineers Board, Institute of surveyors and many more to create more

awareness on bid rigging. Through this we will be able to also create more awareness on leniency programme and informant reward scheme.

DAWNRAIDS/INSPECTION

1. Amend the Act to have specific penalty/ fine for obstruction of justice during dawn raids
2. Acquire a more robust forensic tool that is able to mine including deleted data/information
3. Train more staff on the use of such forensic tools
4. The Authority should also practice more on conducting raid to build more confidence and efficiency on its staff for such exercises.

SETTLEMENT

1. Even though the Authority currently has a settlement guideline, there is no notable benefits to parties who apply for the same. The Authority should consider introducing some penalty discounts to parties who apply for settlement. This discount should be applied on the final figure after scoring both the aggravating and mitigating factors.

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