

Unclassified

DAF/COMP/GF(2014)13/FINAL

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

20-Nov-2014

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

FIGHTING CORRUPTION AND PROMOTING COMPETITION

-- Summary of Discussion --

27-28 February 2014

This document prepared by the OECD Secretariat is a detailed summary of the discussion held during Session I of the 13th meeting of the Global Forum on Competition on 27-28 February 2014.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/fighting-corruption-and-promoting-competition.htm*

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JT03366761

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DRAFT SUMMARY OF DISCUSSION

By the Secretariat

There were 24 contributions* for the roundtable on the issue of corruption and competition. The Chairman, **Frederic Jenny** introduced the first keynote speaker William Danvers who has been the OECD's Deputy Secretary-General since September 2013. He is in charge of OECD regional initiatives on South East Asia, on the MENA region, Latin America and Africa. He is also responsible for outreach activities and the accession process of candidate countries. The second keynote speaker was Ms Obiageli Ezekwesili, the founder of Transparency International, one of the foremost international organisations on the issue of corruption. Previously she held a number of functions in the Nigerian government: she was Minister of Solid Minerals (2005-06) and then Minister of Education (2006-07). She was also the Vice President of the World Bank for Africa from 2007 to 2012.

The panellists were David Lewis, the Executive Director of Corruption Watch South Africa who worked previously at the Competition Tribunal of South Africa; Michael Kramer, an attorney at law and co-founder of the International Anti-Corruption Resource Center in the US; Tina Soreide, a researcher in law and economics at the University of Bergen in Norway; and Drago Kos, the Chairman of the Working Group on Bribery at the OECD who was previously an international commissioner in the independent monitoring and evaluation committee in Afghanistan tasked with fighting corruption. Finally, Cal Goldman, representing BIAC (the business representation at OECD) was also present. He is a partner at Goodmans in Canada.

Next, Frederic Jenny presented the topics of the discussion. The first one was the relationship between competition and corruption and the ability of antitrust enforcement to deal with corruption. The second topic was whether competition authorities should have a direct role in fighting corruption. The third topic was the way that leniency programmes (to fight cartels) should deal with corruption: the question was whether leniency should be extended to cover corruption as otherwise leniency programmes could be weakened if the leniency applicant is then pursued for anti-corruption reasons. The fourth point was the co-operation between competition authorities and anti-corruption bodies and the allocation of cases between the two. The final topic was how to fight corruption within competition agencies.

William Danvers explained that combating corruption is a top priority for the OECD. The OECD has been in the forefront in the fight against corruption for decades and in particular through the Anti-Bribery Convention. The Convention came into force in 1999 based on a realisation that some of the corruption in developing countries originates in the boardrooms of industrial countries. There are 40 parties to the Convention today: all OECD members as well as Argentina, Brazil, Bulgaria, Colombia, the Russian Federation and South Africa. At the last G20 summit in St Petersburg world leaders encouraged all G20 members to engage with the OECD Working Group on Bribery with the view to possible adherence to the Convention. Further, the OECD launched the Clean Gov Biz initiative, which draws together all OECD anti-corruption tools, reinforces their implementation, improves co-ordination among relevant players and

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monitors progress towards integrity. One of the great strength of the OECD is its ability to link up between different policy areas and issues. The CleanGovBiz initiative emphasises that competition is one way to fight corruption by distributing society rewards, awarding success to those businesses that best meet the customers' needs instead of to those with the best connections.

While competition results in pressure to reduce costs and innovate, driving productivity and overall economic growth particularly through the entry of new businesses, the OECD analysis demonstrated that corruption replaces this virtuous circle with a system that rewards inefficient and criminal companies. In other words, free markets can help fight corruption and conversely fighting corruption can help markets to work better. Good infrastructures, education, public procurement, all of these can help create the conditions for market economies to thrive but without vigilant enforcement of laws against corruption they will not be provided. Corruption is one of the biggest systemic threats of the 21st Century and placing corruption high on the agenda is one step further in helping to eradicate it.

Obiageli Ezekwesili explained that corruption is corrosive to growth and that it hampers development in much the same way as an unnecessary tax on production and productivity reduces growth.

Corruption is defined by Transparency International as a misuse of public office for private gain, in other words a dishonest behaviour that people in position of power or authority exercise to subordinate public goods and public interests to their private benefit. Corruption includes things like inappropriate gifts, double dealing, under the table transactions, diverting funds, laundering money, kickbacks in public procurements, bribery and embezzlement of government funds. Transparency International defines two categories of corruption: petty corruption and grand corruption. Petty corruption, which is the corruption that happens at low-level officials of the state, is bureaucratic in nature because these officials, perhaps as a result of low wages and the need to find a way to creatively expand their income, they engage in those kinds of activities at a transaction base level. Grand corruption, on the other hand, happens at the level of the grand officials of state, who by virtue of their position are able to subordinate public interests in policy decisions or in decisions on public investments, and in the process of doing that mortgage the development outcomes that would have been beneficial to the society. There is a strong nexus between grand corruption and petty corruption because grand corruption reduces the probability of economic development. Without economic development there is a lower probability that better wages would be paid, and so this creates a vicious cycle of one type of corruption reinforcing the other. However, grand corruption is the most pernicious of corruption that triggers a whole lot of other negative activities within any society.

There used to be a misconception that corruption was cultural and that certain parts of the world were just culturally corrupt. However, there is nothing called cultural corruption: where bad behaviour is rewarded, bad behaviour will be supplied, where there is a lot of reward for bad behaviour, a lot of bad behaviour will be supplied. In order to reduce corruption both the incentives for corruption and the sanctions against corruption need to be addressed.

As an example, Obiageli Ezekwesili described what happened in the telecommunication sector in Nigeria. Initially, Nigeria had just about 500 000 telephone lines following a huge investment of over two hundred billion US dollars. This created the opportunity for corruption at the level of the managers of the telecom sector and the government officials who invested in all kinds of decrepit and overpriced infrastructure that did not deliver the necessary telephone lines. There were also the activities at the level of the small officials of the State who knew that there were just 500 000 telephone lines but many millions of families needing telephone services. They would accept bribes from families and then install the telephone line in their homes for one week after which the telephone would stop working as it would then be installed in someone else's house. This situation was the result of the government trying to run and manage a sector: because the political elite had vested interests in keeping it that way it offered opportunity for public investment and public procurement that was not delivering value. However, in the 2000s the

government introduced a very comprehensive reform of the telecom sector: it deregulated and liberalised the market and through public auctions private investment entered into the sector. Today Nigeria is probably nearing some hundred and something million handsets of mobile telephony. Most children have absolutely no memory of the previous era. They know what the telephone service is, they know how to get it, they know at what price they should get it, they know how to select between service providers and they know exactly what kind of customer experience they must expect. The change in the market structure of the sector brought with it competition, value for money, cost effectiveness and consumer interest. It also enhanced the value of the economy, because today the telecoms sector is a major contributor to GDP in Nigeria.

Corruption happens in almost every country; Transparency International's corruption perception index shows that more than half of the countries worldwide scored less than five out of a possible 10. That is an indication of serious global corruption: Somalia, Afghanistan, Sudan, South Sudan, Libya, Iraq dominate the lower ranks of the list of the most passive, the most corrupt countries of the world. Corruption creates unstable governments with history of conflicts, low GDP per capita income, and very poor human development indices. When looking at countries where corruption is prevalent, the human development index shows clearly that the opportunity to transit from primary commodity based economy to human capital knowledge driven economy is harder. Thus, the waste and the inefficiency in the society as a result of corruption just continue to reinforce themselves. As a result of corruption, investments are not allocated to sectors and programmes that present the best value for money or where the needs are highest, because the presence of corruption within public office distorts the decision making process. Public sector corruption distorts the quality of investments and decisions made at the level of government. Corruption also slows down bureaucratic processes as inefficient bureaucracies offer more leverage to corrupt public officials.

Corruption corrodes public trust, undermines the rule of law and ultimately delegitimises the state. We have seen it in many jurisdictions that a total collapse of the state can happen as a result of corruption. Competition is very important, because everything that corruption likes, competition dislikes. Corruption likes opacity; it wants to do things in a clandestine environment. Competition loves transparency. Corruption does not care for value for money; competition is about value for money. Corruption does not care about the interest of the larger majority while competition cares about the benefit to the larger majority. Thus, a country needs to decide whether to vote for promoting corruption or to vote for promoting competition.

Now, in order to support competition one must support it wherever it happens. It should not be only when competition benefits us that competition is good as a system. OECD countries should also keep this in mind in relation to developing countries: some OECD countries sometimes do not like competition in developing countries when competition does not favour their interests. Similarly, the OECD would also need to show a very significant example on the benefits of competition by being champions for the major global issue of competition: for example the subsidies to rich farmers in OECD countries, distort competition and breeds inefficiency in terms of global creation of benefit and value for citizens.

1. Competition and corruption and the ability of antitrust enforcement to deal with corruption

David Lewis explained that the problem of competition and corruption is a so-called 'wicked problem': in social science, problems that are incredibly difficult to resolve or, cannot be resolved once and for all are called 'wicked problems'. There is no definitive solution to the problem of competition and the problem of corruption, all one can hope is that one will produce an outcome better than the previous outcome. However, it is certain that having achieved that better outcome, events will soon overtake the situation and the problem will need to be addressed once again from, arguably, a different perspective.

In the fields of competition there are unresolved arguments about the very standards by which the problem of corruption should be gauged. There are grey areas that are incredibly difficult to resolve and understand. When does a gift no longer a courtesy but a bribe? When is a social network a productive way of organising consumption, society and production generally, when does it become an excluding framework otherwise known as nepotism? These are extraordinarily difficult problems.

Competition and corruption are closely related problems. First there is a reverse causality, which is to say that more competition generates fewer rents therefore less opportunity and less incentive for corruption. On the other hand, greater corruption impacts upon levels of competition so the causality runs both ways. The role of rents is central to the concept of both competition and corruption. Economic rent is defined in standard neoclassical economics as the income paid to a factor of production in excess of that is needed to keep it employed in its current use; in another words, the earnings in excess of opportunity cost. Rent seeking is an attempt to obtain rent by manipulating the environment in which economic activity occurs rather than by creating new wealth. Rent seeking is always an unproductive cost imposed on the economy. It is the expenditure and resources and effort in creating, maintaining or transferring rents and it may be legal or it may be illegal, which is one of the early problems that one confronts in dealing with corruption. For instance, when does lobbying constitute a useful service in overcoming information asymmetries, and when is it an undue influence exercised upon a decision maker? There is really no clear line here.

Two types of rents were identified: so-called ‘good’ rents and ‘bad’ rents. While competition economics generally frowns upon rents, rents derived from innovation or precisely an incentive to induce greater innovation in products and processes are not only tolerated but are positively encouraged by intellectual property rights. Similarly, rents that encourage investment in particular sectors or particular regions of an economy possibly in order to overcome market failure are also considered good rents in industrial policy. On the other hand, bad rents are the rents created through anticompetitive behaviour: anticompetitive mergers, cartels or exclusionary conduct. Similarly in the area of public policy rents are frowned upon when the regulatory system is used by rent seeking officials as a mean of manning a gate and appropriating the rent that comes from doing that. The important point is that both good and bad rents entail rent seeking costs and the purpose of public policy is to minimise rent seeking costs in the generation of good rents.

Three typologies of corruption were identified. The first is the *standard neoclassical corruption* where an official effectively mans a gate to extract a fee from anybody who is required to cross that gate. The rents generated by this kind of corruption are all bad rents. In fact this is the kind of rent seeking that standard neo classical economics focused on. Another form of *corruption* is *through industrial policy* gone wrong. As a result of industrial policy interventions, one may get value enhancing outcomes where the benefit of the rent minus the rent seeking cost is positive. On the other hand, one may get value reducing outcomes where the benefit of the rent minus the rent seeking cost is negative. Finally, there is the so-called *political corruption* or patronage of political factions. This may generate political stability that may be a condition for future economic growth in which case possibly there is even an advantage to be derived from political corruption. On the other hand, if it does not lead to political stability it would subvert all possibility of positive economic outcomes.

Tina Soreide defined corruption as a trade in decisions that are not supposed to be for sale. So, when deciding to build a bridge, for instance, there will be a change in the decision when there is corruption. This change away from what would otherwise be the decision does not exclude that one may end up with something that is still useful for society but the bridge may not be at the right price, not the right quality or not across the right river. Therefore, this concept of trade in decisions is useful to understand in the case of corruption. However, lobbying is also a form of trade in decisions particularly when political parties are funded. Therefore, it is important to distinguish between corruption, which is a crime and lobbying, which

is a democratic right of the companies. It is useful to think of lobbying as a group influence, it is very often an industry that wants to have a tax reduced or some other regulation changed, so very often it results in a bend in the rule. Corruption, on the other hand, will often create a unique benefit for the briber and a violation of some other rules, for example procurement rules. Also lobbying payment for political parties will often be wasted; you may not necessarily get what you pay for. Corruption, on the other hand, if that is a trade in decision, you get what you pay for and the decision will often be more distortive because the decision makers are compensated in their personal sphere for the deceits they make.

Sweden then argued that a wide definition of corruption should be used and that fighting corruption is not a task that should be solely entrusted to criminal law agencies and courts but that competition authorities should also have a role in it. A broader definition of corruption is useful for at least three different reasons. First, corruption in Sweden is not primarily a phenomenon that is punishable under criminal law. In Sweden, they consider many instances of favouritism, nepotism and other forms of conflicts of interests and abuse of power to be just as harmful to democratic institutions and businesses as bribery. Second, they believe that the struggle against corruption should also target the underlying mechanisms that feed corruption in its various forms, i.e. that it should aim at finding ways to make both public and private institutions more resilient to corrupt practices. Third, a broader understanding of corruption facilitates the allocation of responsibilities, resources and tools among the public authorities charged with stemming corruption. For example, because of the likelihood of connections between corruption related crimes, cartels and illegal direct awards of public contracts, the Swedish competition authority has intensified its co-operation with the Swedish national anti-corruption unit. In Sweden, it is understood that one of the chief roles of the competition authority, besides fighting collusive practices, is to offer its expertise on how to create and maintain well-functioning markets. Competition authorities should join forces with other institutions in creating a seamless co-operation of anti-corruption authorities that enables society to better understand, withstand and deter corruption in all its forms.

The delegate from **Zambia** explained why in spite of an active anti-corruption policy and an active competition policy there is still a significant problem of corruption in his country. The country has made tremendous progress in the fight against corruption, especially since the new government came into power in 2011. They are not yet in a good position in terms of the ranking of the Transparency International CPI index but they have been consistently making progress in that regard. In Africa, and particularly in Zambia, big multinational companies are also guilty of corruption. Therefore, even if African nations make radical efforts in the fight against corruption, if nothing is being done elsewhere in the world where these companies are coming from, especially from the West, China and India, Africa may be fighting a losing battle. Therefore, while grand corruption and political corruption has received a lot of support from the government of Zambia, petty corruption remains a challenge. Examples of petty corruption include the situation where people, in order to obtain a quick service from the passports office, for instance, engage in corrupt activities. To stop this, the following measures have been implemented: when asking for a passport, citizens no longer pay in cash for that service but they deposit the fee in the bank. This reduces the interface between the citizen and the service provider. Further, there is a specific timeframe attached to different fee levels, if one wants to receive the passport faster the fee is higher. Therefore, citizens know what they get for different fee levels and the incentive for petty corruption is largely eliminated. There have been a lot of similar measures put in place in the Zambian police service where petty corruption is still rampant but there is now a police public complaints desk where members of the public can lodge in complaints when they encounter such corrupt activities.

The delegate from the **European Union** then explained that in a recent study the cost of corruption in the European Union was estimated to be around EUR 120 billion annually. In order to arrive at this figure, they took into account estimates done by specialised organisations and institutions like, for example, the International Chamber of Commerce, Transparency International, UN Global Compact, World Economic Forum, Clean Business is Good Business and others. These studies suggest that corruption amounts to 5%

of the GDP at the world level. On the basis of this and taking into account the perceived level of corruption in Europe and also national and sectoral studies, they estimated the cost of corruption at 1% of the European Union GDP. Hence the EUR 120 billion figure. Going beyond this figure, the situation of corruption in each country of the European Union is different.

The delegate from the European Union also emphasised the complementarity between anticompetitive practices and corruption if one is talking about competition in a broader sense including public tenders or public procurements. One of the biggest barriers to competition in public procurement is precisely corruption. The best remedies to corruption, in their view are a vigorous enforcement of competition and public procurement rules and more transparency at all stages of the public procurement area including the implementation of public procurement contracts.

India raised the possibility that increased competition might lead to an increase in corruption. The delegate explained that while theoretically there is a negative correlation between competition and corruption, competition would truly need to be effective, which may not be the case in transition countries for a period of time. The delegate also stressed that the environment for controlling and punishing errant demand side behaviour of public servants would need to be strong and effective. This is why India decided to have a close engagement between the Central Vigilance Commission that is tasked to fight corruption and the Competition Commission of India.

Mexico explained that competition is lower when corruption in public procurement is present. This is because firms might be discouraged to participate because of suspicion of unfair competition or they are unwilling or unable to pay bribes. Therefore, corruption creates an uneven playing field that affects competition. In addition, when there is less competition, corruption could find a fertile ground since it becomes easier for public procurers to extract personal benefits from companies interested in participating in the procurement processes. By contrast, it may be harder to offer bribes when many firms are competing in public procurement processes. Consequently, when competition authorities protect the efficiency of public procurement processes by preventing or correcting anticompetitive conduct, corruption can also be prevented.

In Mexico, the Federal Competition Commission has been collaborating with the Ministry of Public Administration, the authority responsible for overseeing public procurement purchases and enforcing the law when corruption is present. This co-ordination entails mainly two activities. One focuses on training the ministry's officials as well as public purchasers from different levels of government on collusion and training the Commission staff on acquisition law. Therefore, on the one hand public procurers learn how to prevent, detect and file complaints of possible collusive behaviour and the commission staff is better trained to detect and denounce corruption. The second action related to the co-ordination between the Federal Competition Commission and the Ministry of Public Administration is to provide joint advice on the design of public contracts in order to reduce the risk of collusion and corruption. For example, currently the two bodies are advising the Ministry of Health on the design of procurement processes for the acquisition of vaccines and medicines.

Cal Goldman, the delegate from **BIAC** explained that competition law must be applied and enforced in a truly effective manner to foster an economic environment that will generate investment and economic growth and will also serve as a foundation that deters bribery, corruption and bid rigging. He emphasised two points. First, business investors abhor unpredictability and are more willing to invest where there is increased transparency and government accountability. Business investors want to minimise risk and be able to predict the various parameters that will affect their return on investment. In addition, business investors today are increasingly unwilling to take the high level of legal risk involved when dealing in corrupt countries given the need for compliance with legislation such as the US Foreign Corrupt Practices Act, the British Bribery Act, the Canadian Corruption Foreign Public Officials Act and other such similar

legislations all supported by the OECD Anti-bribery Convention. Second, in the fight against corruption the focus should not only be on eradicating the supply side of bribery and corruption but also on eradicating the demand side as both elements give rise to the detrimental conduct in question.

Cal Goldman also stressed that bribery and bid rigging in particular harms not only consumers but also businesses because the great majority of businesses would not, under any circumstances, engage in this conduct, just as a great majority of businesses don't engage in cartel activity.

BIAC proposed two necessary steps to create the kind of pro-investments level playing field that will generate economic growth. The first step is the effective application of competition law. In BIAC's view, effective competition enforcement should entail the independence and accountability of decision makers, and transparency of the investigation and decision-making process, and the application of objective principles that are explained in public guidelines. The second step is concurrent law enforcement that is directed at corruption and works effectively with other law enforcement authorities. In particular, there is a need for the competition authority to share evidence with the anti-corruption authority as in the US, Canada and other jurisdictions.

Tina Soreide re-iterated that corruption can be a way of increasing profits not only in terms of getting contracts, or contracts with better terms, but also to obtain market positions and better framework conditions and this can happen in many different ways—not only through influence on procurement procedures. Also, the less competition there is, the more profitable engaging in corruption will be for those involved because with more market power and more profits there will be more money to share with those involved. Further, the higher risk of being caught will reduce the problem of corruption but those who are still involved will get higher bribes because when the cost of corruption increases the compensation will also increase. Thus, forces will pull in different directions and as state structures have to be built on trust and controls of civil servants are very costly and demotivating, there will always be a risk of corruption.

However, empirical evidence suggests that in countries with good competition authorities there is also less corruption, i.e. in an institutional environment that allows competition authorities space to operate independently there are also fewer opportunities for corruption. However, it does not mean that by strengthening competition authorities corruption will necessarily diminish. This is not necessarily the case because it is not enough to address the firms of the private sectors but one also has to address the causes, those involved on the side of governments who allow the market distortion to happen. In the same way, focusing only on anti-corruption will not address the problem either because those who work primarily on corruption and focus on corruption will rarely see the market consequences. So it is extremely important to combine the different roles of pro-competition and anti-corruption.

There has been great progress over the last decade in getting a legal platform for acting against corruption. There are preventive mechanisms at the political level and a range of disclosure mechanisms exist at sector level and at the political level. The problem is, however, that this platform for acting against corruption is used very differently. The laws are not implemented or are not implemented the way they should be. One of the areas where countries struggle in terms of defining the law is the issue of how to hold individuals and firms responsible. Those who work only on corruption are concerned about sanctioning, punishing, setting the fines in order to reduce the incentives of being involved in corruption. That is very important but the effects of these measures on the market should also be considered: for instance, if there is an oligopoly with only few companies and one company gets punished because of being involved in corruption this will result in higher profits for the others because they managed to exclude a competitor. It is very important how fines and individual responsibility are combined so that firms are not excluded from the competitive process in the market. Therefore, it may be better to hold individuals involved in corruption responsible rather than whole companies in order to protect the market and allow the whole organisation to continue to work.

Tina Soreide also mentioned that laws to hold companies and individuals responsible at home for the corruption they commit in other countries are enforced asymmetrically, meaning that the rules are different for companies coming from different countries. This would need to be addressed in order to get free and fair markets. She also stressed that hidden ownership makes it easy to engage in corruption and therefore it should not be allowed.

Russia stressed that the main goal in the fight against corruption is transparency as transparency in governmental and business activity decreases the area for possible corrupt behaviour for any governmental authority. He explained that the Russian competition law does not only cover anticompetitive behaviour of enterprises or undertakings but also anticompetitive acts, actions and agreements of governmental and municipal authorities and officials. The law on protection of competition bans granting of unreasonable privileges to business, discrimination, limitation of trade, imposition of restrictions and barriers in economic activity of Russian enterprises. The Federal Antimonopoly Service (FAS) is also responsible for the supervision of public procurement. The FAS promotes open and clear rules for public tenders both for governmental procurement and for selling of any governmental property including the process of privatisation and for selling of rights to use natural resources including subsoil, land, water, sea products, etc. The FAS co-operates with the Ministry of Internal Affairs, the General Prosecutor's Office and the Investigative Committee of the Russian Federation in different forms including information exchange, joint investigation, dawn raids and this co-operation is based on bilateral and multilateral agreements.

The delegate from **Tunisia** mentioned that before the 2011 revolution, the insertion of a number of exceptions in the wording of some Tunisian legal texts (that define and set out the general principles of calls for tenders ensuring equal treatment of candidates and transparent procedures) has created loopholes that allow the development of corruption. This practice has affected not only the privatisation of public enterprises but also public procurement and concessions, due to the fact that these texts were designed before the establishment of the Competition Council.

After the revolution, the Executive Order 2011-120 of 14 November 2011 on fighting corruption expressly states in its article 36 that the Chairman of the Competition Council must forward to the Chairman of the national body in charge of the fight against corruption, any information, data and documents relating to operations carried out by credit companies, collective investment agencies, investment companies and companies floated on the stock exchange that appears to indicate the presence of corrupt practices with a view to criminal prosecution.

Colombia explained that in the past the Colombian competition agency (Superintendence of Industry and Commerce, SIC), addressed the issue of corruption by focusing on fighting bid rigging, i.e. the horizontal agreements between competitors. Vertical agreements between companies and public officials to affect the way a contract is assigned to one or another competitor were not addressed until now by the SIC. However, they have realised that corruption on vertical agreements not only affects one specific contract but also increases barriers to entry in certain sectors. Data shows that in certain sectors in Colombia two out of every three entrepreneurs or companies refrained from participating in contracts in public procurement processes because they believed that the contract was not going to be assigned on merit. The Colombian competition law is sufficiently open to attack acts that may affect competition, thus the law itself allows the SIC to prosecute these kinds of acts. The SIC wants to address the issue of vertical agreements in three different ways. The first one is co-ordination with agencies, such as the Prosecutor's Office. The second is strong advocacy in order to avoid both bid rigging and incentives for vertical agreements. The third strategy is not to rule out prosecution in vertical agreements when it is believed that the contract or that particular conduct may strongly affect consumer welfare.

Michael Kramer then described several examples of different types of collusion and corruption cases that he investigated in the course of his more than 30 years as a US prosecutor and the last 15 years as a

consultant to the World Bank and various UN agencies. He then explained that in his experience bid rigging and collusion are two entirely different things. Bid rigging refers to agreements between a particular bidder and a particular corrupt official under which the official agrees to manipulate the procurement process in order to ensure that the corrupt bidder wins and that the usually more qualified firms are excluded. Collusion means agreements amongst bidders themselves to get together and agree to submit artificially high prices to bids and then to divide the work at high prices. He separates these two practices because the schemes are entirely different, the indicators are entirely different and the investigative steps are entirely different.

In his experience, in developed economies collusion among bidders often occurs without corruption while collusion in the developing world almost always includes corruption. The parties that collude among themselves to inflate prices pay bribes and, in fact, it's often the government officials that organise and sponsor the collusion so that they can get paid from a bigger share of the inflated profit.

Michael Kramer then noted that that the investigative agencies, anti-corruption agencies, police agencies that investigate corruption in public procurement need three elements. First, given the demanding investigative challenges of investigating collusion and corruption, they need to have experienced personnel. Second, they need to use special investigative tactics beyond simple police work because in many cases the only evidence that can be found is evidence of unusual bid patterns itself. In this respect, he noted that, contrary to what is generally assumed, the best evidence of collusion is not only documentary evidence: it is going to be bid patterns, actors acting against their economic interests. In a well-managed investigation this circumstantial evidence can be used by investigators in order to generate the co-operation of witnesses, including excluded bidders. Witnesses can tell exactly what happened and can give the necessary documentary evidence of the collusion. Third, the investigative group needs adequate resources like a basic software program to help analyse bids. They also need the ability to investigate through the internet the existence of shell companies that do not actually exist and have no website, permanent business premises, and no permanent staff. Finally, they would also need software to help the investigators recover information deleted by the bidders that organise the bid rigging.

Michael Kramer also detailed a case that occurred in South East Asia, with an international development project that involved road construction for ten years. Over that period the local road agency and the international donor noted that the unit prices for the construction of the road were increasing dramatically and, in fact, all of the bids were coming in at a much higher price than the estimates indicated.

The road agency and the donor decided that this could be caused by collusion and so they adopted a confidential policy in the next round of bidding that no bid would be accepted if it was 30% or more above the engineers estimate. What they found was that the winning bid came in exactly 28% above the engineers' estimate while the losing bids came in at 31%, 32%, 33%, 34% and 35% over the estimate. This was the result of the losing bids being generated by the winning bidder within 1% of each other and above the winning bid so that they could be certain of winning the auction. This is the kind of pattern that the computer software previously mentioned would pick up. In this case, this collusive behaviour was organised for ten years by the government, the husband of the President of the country and by senior politicians. Because the government was involved in the bid evaluation committee of the government procurement agencies, if some legitimate bidders slipped through, if someone submitted an actual low price bid, the government agency would step in and disqualify the legitimate bid. That is how the investigators found out that government officials were involved in collusion. In order to avoid suspicions of collusion, the conspirators took a line item, 'Earthworks', the amount of earth that the companies have to move around in order to build a road. This was a line item in which companies submit a price based on a cubic meter but where there are millions of cubic meters to be moved so that a relatively small difference in price between the competitors per cubic meter would result in a wide final price difference.

Michael Kramer pointed out that sometimes the conspirators are not that careful, as was the case in bid rigging case involving a company in Geneva, Switzerland. That company was building its new headquarters and was afraid of collusion from the three companies bidding to do the work. Now, a bidder in a construction project must submit a bid security issued by a bank or by an insurance company, which says that if that company wins, it will sign the contract within 90 days and it will not withdraw. It also agrees to pay a fee to the bank in case of a successful bid. Bid securities are only important if a company wins because the tendering agency will not ask a losing bidder to provide a bid security. Therefore, ‘designated’ losing bidders will traditionally submit forged bid securities. They will not have been to a bank, so there will be no trace of the transaction. In this particular case, there was circumstantial evidence with very high prices having been submitted by the losing bidders. The competition authority went to the bank with the bid securities from the losing bidders, and the bank confirmed that these securities were forged. The authority then took the forged security to one of the bidders and threatened to have him debarred for fraud at which point he admitted his participation in the conspiracy. Subsequently he provided evidence showing the actual development of a conspiracy and the fixing of prices.

Michael Kramer finished by pointing out that, in the two above examples, investigators had the necessary skills that were needed to investigate these cases, the tactics of using circumstantial evidence to obtain confessions worked and that the software to identify suspicious bid patterns was effective.

2. Should competition authorities have a direct role in fighting corruption?

The **Czech Republic** noted that the whole public administrative body should be a part of the fight against corruption and, since the Office for the Protection of Competition is responsible for public tenders in the Czech Republic, it is probably sufficient for them to stay vigilant and alert. Fighting corruption is an integral part of competition promotion as competition is not a good friend of corruption. As for their own experience, besides the usual tools of competition promotion they emphasised their responsibility of public procurement surveillance. In that aspect, the authority can ascertain whether the alleged infringement came from the bidders or whether the contracting authority also took part in the conduct. They advise complainants to turn to the police any time they have a suspicion and their officers would usually notify the police and point out the evidence that arose from the complaint on the tender. Generally, they consider this co-operation as fruitful and contributing to the fight against corruption and they hope to extend the level of co-operation by providing other public administration bodies with seminars or conferences on how to identify the relevant evidence in the first place.

Japan explained that, in 2002, the Involvement Prevention Act (IPA) was established, which grants the Japan Fair Trade Commission (JFTC) the power to demand a head of procurer to conduct internal surveys and take necessary measures on bid rigging cases. Additionally, the IPA stipulates that if a procurement official instigates bid rigging or divulges the target price, he or she will be punished by imprisonment of not exceeding five years or a fine of not exceeding JPY 2.5 million. They have already had more than 20 criminalisation cases in Japan. They are investigated and prosecuted by the prosecutors and the police independently from the JFTC investigation of potential government involvement in bid rigging cases. The delegate from Japan then explained the Japan Highway Public Corporation (JHPC) case, where the JFTC found bid rigging concerning the construction of a steel bridge procured by the Japan Highway Public Corporation (a government affiliated subsidiary company). In the process of the investigation the JFTC found that the vice president of the JHPC was involved in the bid rigging. Apart from imposing the necessary administrative measures to improve the performance of the JHPC, the JFTC filed accusations with the prosecutor general against the violating companies and the vice president of the JHPC for a criminal violation of the Antimonopoly Act. In response to the JFTC’s accusations, the prosecutor’s office conducted its own criminal investigation and prosecuted the vice president of the JHPC at the High Court for criminal violation of the Antimonopoly Act and breach of trust under the Penal Code, respectively.

The **Chairman** noted that, so far, delegates mentioned three types of interventions of competition authorities in the area of corruption: (i) the tackling of a vertical agreement, (ii) co-operation with the anti-corruption body, and (iii) initiating criminal proceedings against bribed officials. He then turned to the European Union for a possible fourth type of intervention regarding the recent London Interbank Offered Rate (Libor) case where the Commission fined the banks 1.7 billion Euros for improper behaviour by the people who were sending information for the reference rate of the Libor. Frederic Jenny whether this was a cartel or corrupt behaviour and whether competition law enforcement can take on corrupt practices even in the absence of competition concerns but where there is a dysfunction of the market.

The delegate from the **European Union** explained that the Libor case started with a leniency applicant coming to the Commission with concerns that they might have violated EU competition rules. Therefore, the Commission carefully investigated the case and took the necessary steps that led to two settlement proceedings where the parties agreed with the assessment of the Commission.

The delegate also gave some details of the case: on 4 December 2013 the Commission fined six banks EUR 1.7 billion for participating in two separate cartels, rigging the key benchmark interest rates in the interest rate derivative industry (the Euro Interbank Offered Rate [Euribor] and Libor) to the benefit of their own positions in euros and yen in the interest rate derivative market.

Interest derivative are financial products used by banks for managing the risk of interest rate fluctuations. These products are traded worldwide and derive their value from a benchmark interest rate such as the Libor or the Euribor. These benchmark interest rates are meant to reflect the cost of interbank lending in a given currency and serve as a basis for various financial derivatives and they are based on the banks' individual quote of rates at which each of them believe that a hypothetical prime bank would lend funds to another prime bank. 44 banks send their submission to Thorn and Reuters on every trading day between 10:45 and 11:00. The highest and the lowest 15% of all submissions received were eliminated and the Euribor rate is subsequently set at 11:00 each business day.

As investment banks compete with each other in trading of derivatives, the level of the benchmark rates may affect either the cash flow that the bank receives or the cash flow it needs to pay to its counterparty. The prosecuted cartels aimed at distorting the normal course of pricing components for these derivatives. In the Euribor case, traders of different banks discussed among each other their banks' submission for the calculation of the Euribor as well as their trading and pricing strategies. In the Libor case, traders exchanged commercially sensitive information relating to actual trading positions or to future Libor submissions. These collusive exchanges of information led to different benchmark rates than would have been the case under normal competitive market conditions. This affected the applicable rates throughout the entire banking industry, affecting anything from mortgage to loan rates. In view of these facts the Commission felt that there was a clear case to pursue the infringement as a cartel under Article 101, which turned out to be a very important decision.

According to **Obiageli Ezekwesili**, just as Transparency International built a coalition of countries that took corruption to the front stage 20 years ago, this Forum could also create a coalition that brings the connection between competition and the problems of corruption right to the centre stage in order to ensure that the necessary collaboration for tackling these problems on a global, national and regional scale is made.

The second lesson to take away is that there is no silver bullet for dealing with problems of reduced competition or the challenges of corruption. Perhaps the most important approach should be to rely on prevention, by reducing the opportunities for corruption to happen. This is what happened in Hong Kong, China, where the Independent Commission against Corruption (ICAC) became a model for how to employ sanctions as a mechanism for reducing the tolerance of corruption. Apart from prevention and introducing

sanctions, it is also necessary to mobilise society through civic education. This approach also applies to the nexus between anti-corruption and competition. Market failures of competition become easier to address when a country has decided to follow an economic development approach that understands that allocated efficiency is better guaranteed through the market. However, it is more difficult to fix government and governance failure which often lead to higher corruption. For this, governments should apply some of the lessons in building the technical capabilities that reduce the frequency of government failure in the areas of policy where government must provide the leadership. Another area where progress should be made is on public procurement reform, an issue that is politically charged and not easy to implement since it touches on points where politics and the public treasury are especially intertwined.

Obiageli Ezekwesili finished by making the point that the OECD should develop this nexus between competition and corruption as they can do a lot in helping countries in the area of technical capacity. The OECD can also help the champions of public procurement, of competition and antitrust laws bring these topics to the top of the agenda in their countries and internationally.

Drago Kos then started by noting that he is the newly appointed head of the Working Group on Bribery and Anti-corruption and that this was his first official appearance in this new position. He also noted that the reason the OECD is emphasising the fight against corruption is because the OECD wants to enable markets to function and bribery is one form of market distortion that hampers its functioning.

He then pointed out that while this year marked the 15th anniversary since the Convention entered into force, the OECD has developed other standards in this area, like the two annexes to the 2009 Convention that dealt with (i) the implementation of the Convention and (ii) the good practice guidance for the companies that want to fight against foreign bribery.

At present, there are 41 member states, which cover 80% of world exports and 90% of outward investments and they monitor the implementation and enforcement of the Convention.

The work of the Working Group can be split into different phases. In the first phase, the group monitored how the Convention has been implemented in national legislations. In phase two, they saw how the laws have been implemented. In phase three, they presented the data on the enforcement of the member states and found that, between 1999 and 2012, 221 individuals and 90 legal persons from 13 countries were sanctioned under criminal proceedings out of which 83 were sent to prison. They also found several types of difficulties such as the asymmetric implementation of the Convention (only 13 out of the 41 member states have started and brought proceeding to an end), or the fact that companies have to be held liable for corruption offenses is causing problems in some countries and the difficulties in international co-operation and that sanctions applied are still not effective, proportionate and decisive enough. The Working Group plans to start phase four in 2015. This will involve looking at the role of state-owned or state-controlled companies in bribery offenses. Also, the Working Group wants to further engage companies to work alongside public bodies against corruption. Also, it needs to be ensured that the enforcement authorities will do their job without taking into account the economic interest of their countries or the identities and political affiliation of the persons under investigation. It is necessary to investigate and prosecute companies and individuals not only for giving but also for taking bribes. Important economic players of the world like China, Indonesia and India would also need to be involved so that there is a real level playing field in this area in the world. Finally, it will be important to have experts in the area of anti-bribery and experts in the area of competition working together to achieve the goal of properly functioning markets.

3. Leniency programmes in competition enforcement and its effects co-operation between competition and anti-corruption agencies

Poland noted that the co-operation between the competition authority and anti-corruption bodies has not been an obstacle to the well-functioning of their leniency programme. This was mostly because their criminal law allows for a reduction of liability when someone co-operates with the police or with the state prosecutor. Therefore, when the informant reveals all the relevant circumstances to the law enforcement agencies before they detect the crime this person will be beyond punishment and it may be even eligible for a reduced liability if it informs the authorities after they started investigating (this legal framework is called "active regret"). In a recent case of bid rigging, farmers that were pre-qualified for a limited tender of selling agriculture land had agreed that only one of them would make an offer while the others would give up bidding. In exchange for withdrawing from the bidding one of them was offered a bribe and the second was offered some part of the agricultural land. One of the participants applied for leniency under the competition law while also applying for active regret before the state prosecutor. A second participant also applied for leniency after the investigation started and he got a reduction in fine from the competition authority while the state prosecutor submitted a motion to the court to suspend the execution of the fine. Thus, the two regimes of competition liability and criminal liability can be combined. This was considered important, as the leniency programme is one of the most useful methods for detecting cartels. The competition authority was now looking into ways to expand the leniency programme to include physical persons.

France noted that while the existence of criminal penalties for natural persons can constitute a major deterrent and enforcement tool for the most serious offences, it can also be reconciled and linked with the actions of the authorities who impose administrative penalties on companies, such as the *Autorité de la concurrence*, France's competition authority. Yet, the exemption from penalties that the *Autorité de la concurrence* may grant to companies under the leniency programme does not guarantee natural persons immunity from penalties imposed by a criminal judge, which may deter the parties in question from using the programme since a company's manager who would be induced by the leniency programme to denounce the anti-competitive behaviour of his company could find himself criminally sanctioned. In this context, in France, the policy of the competition authority has been not to send cases to the Prosecutor (the judiciary) for which parties being granted leniency might be subject to criminal penalties. However, the French law also makes the participation of a natural person in an infringement to competition establishes a specific criminal offense. Thus, in this context, to articulate administrative procedures implemented by the authority and the role of the criminal judge who punishes individuals, the law provides a mechanism of transmission of cases from the authority to the Prosecutor when the facts seem to justify the application of an individual criminal sanction and in which case the file is physically transferred to the Public Prosecutor. Under these terms, these measures do not hinder the fight against corruption.

4. Co-operation between competition authorities and anti-corruption bodies

Brazil noted that they recently adopted an anti-corruption law in August 2013. The law innovated by sanctioning companies and not only public agents for corruption practices. The new law expressly mentions that agreements between competitors in public tenders is an illegal practice and thus requires that CADE, the Brazilian competition authority and anti-corruption enforcers co-ordinate to prosecute bid rigging cartels. While this will create an incentive for the detection of bid rigging cases in Brazil it will also create the challenge as leniency applicants will need to negotiate and sign two different leniency agreements in this situation, one with CADE and another with the competent authority in charge of anti-corruption enforcement.

On the other hand, the delegate from Brazil pointed out the influence of the Brazilian competition law on the new anti-corruption law: that private companies may enter into leniency agreements with the public

administration to help identify other companies involved in a corruption case and provide information and relevant documents. The leniency agreement would, of course, be dependent on the company being the first to apply for leniency procedure, the company must stop any involvement in the illicit act as soon as the leniency agreement is proposed and it must admit its participation in the illicit conduct and accept a complete and permanent collaboration with the investigators at its own expense.

Other provisions in the new Brazilian anti-corruption law that were influenced by the Brazilian competition law relate to the amount of fines, which may range from 0.1% to 20% of the company's gross revenue for the past financial year, depending on the gravity of the infraction, the advantages for the authority and the size of the company involved. Therefore, the aim of the new anti-corruption law in Brazil is to serve as a complementary instrument to the competition law in fighting bid rigging cartels.

Latvia noted that in their country the majority of cartel cases were bid rigging cases where the information on the infringement was received from the anti-corruption bureau. In those cases the corruption bureau would deal with the corruption part of the case while the Competition Council deals with the part that relates to competition law. The two agencies have developed both formal contacts (when the corruption bureau files an official application about a possible case) and informal contacts (on employee level). Other ways of developing co-operation are allowing employees from both institutions access to the other institutions' files to do an IT search, doing mutual trainings of investigative personnel or doing joint searches, something they have not yet tried but want to in the future.

Indonesia explained that in their country there is strong co-operation between the KPPU, the competition authority and the Corruption Eradication Commission (KPK). The two bodies have signed a Memorandum of Understanding (MOU) to work together on corruption cases. Moreover, the KPPU has some authority to sanction collusion between actors of business in contracting tenders. The collusion could be with other companies but also with the tender committee or some of its members. If the KPPU finds evidence of bid rigging, it then refers the case to the KPK, which has powers to prosecute corruption, since corruption is purely a criminal concept in Indonesia. For example, in a recent case the KPPU found that during a tender there was a marked-up price. They referred this case to the KPK that will proceed with the investigation based on corruption law.

For example, the KPPU recently investigated a case and found not only marked-up prices but also counterfeit documents and false signatures. This case was referred to the Police on the basis of an MOU signed between these two bodies. Furthermore, The KPPU has also signed a MOU with the General Prosecutor and the Ministry of Domestic Affairs for the prevention of corruption.

Morocco described the current status of their campaigning for the integration of competition and anti-corrupt policies. They consider that there exists an important interaction between competition advocacy and the fight against corruption, requiring co-operation between the public bodies in charge of these questions. On the one hand, competition rewards the spirit of initiative and creativity by seeking legitimate income, on the other, corruption itself generates undue income which goes against this principle, blocking the spirit of initiative and creativity of a country. For this reason, one must enhance competition and fight against corruption in two different bodies while moving them towards co-operation.

In the framework of their new constitution, they highlight the existence of two independent bodies, the Competition Council and the Central Authority for the Prevention of Corruption which have voted modern laws for competition taking advocacy into account as well as the power of action *proprio motu*. They have therefore already co-operated in their efforts to transform their structures and have co-operated in many tripartite symposia. For the future, they will probably face the political and administrative distrust towards the new constitutional bodies, and distrust from society, which sometimes confuses competition and companies that do not comply with rules and practice corruption.

Canada confirmed that co-operation between the competition authority and law enforcement agencies to fight corruption was also very well developed in Canada and that they have a recent case that demonstrates this co-operation. The delegate explained, as a background to his intervention, that in recent years, Canada has witnessed a dramatic increase in allegations of municipal corruption and related anticompetitive activity, mostly in the province of Quebec. As a result, in 2011 the Canadian Competition Bureau began to work very closely with the Permanent Anti-corruption Unit (“UPAC”) that had been established in that province. Bureau investigators were deployed to the Anti-corruption Unit to assist in the investigation of alleged bid rigging connected to municipal corruption. Bureau officers and police officers in UPAC investigated allegations of wrongdoing in the construction industry in an area near the city of Montreal. The investigation uncovered evidence of sophisticated schemes that resulted in preferential treatment being given to a group of construction contractors in order for them to obtain municipal construction contracts for infrastructure projects. In the course of this joint investigation 21 search warrants were executed over an eleven-month period; approximately 40 criminal code production orders were issued to obtain relevant documents; and more than 130 witnesses were interviewed. It was an extensive investigation where all investigative steps were carried out by Bureau officers and Police officers working together and bringing their respective expertise to the table. As a result of this investigation, in June 2012, 77 criminal charges were laid against 9 companies and 11 individuals. Of these charges 44 counts of bid rigging were laid in relation to seven separate calls for tenders. Two municipal employees were charged criminally with various offenses including criminal breach of trust, municipal corruption and fraud on the government. Additional charges were laid in January 2014 and the matter is currently before the court. Of course, all of these companies and individuals are presumed innocent until they are proven beyond a reasonable doubt.

In the meantime, the Canadian Competition Bureau continues to have officers working closely with UPAC on other ongoing investigations. They intend to continue down that path because it was found to be a very successful and efficient use of resources.

Ecuador explained that young competition authorities don’t always have the same ability to co-operate because their laws are newer. This is the case in Ecuador. Nevertheless, the competition authority feels that more co-operation to fight corruption would be important.

Singapore explained that the Competition Commission of Singapore and the Corrupt Practices Investigation Bureau have been collaborating in several instances, even though they don’t have a formal written MOU. Corruption offenses in Singapore carry criminal sanctions while competition law infringements attract civil penalties. As such, even if a case may amount to both a corruption offense and a competition law infringement at the same time both agencies can carry out concurrent investigations as the elements of the crime and infringement are different. Where possible, and of course subject to their respective statutory obligations on confidentiality and investigative powers, both CCS and CPIB will collaborate to handle the case.

In the **United States** the Justice Department oversees both the Antitrust Division and also the full scale of a criminal enforcement agency. If the Antitrust Division investigates a case that looks like bid rigging or price fixing then in the course of the investigation they may discover – though fairly rarely – that there is bribery or corruption involved. More often they will find that there is some sort of criminal fraud involved and not corruption, the Libor case being an example of that. Whenever the suspicion of wrongdoing that falls under the competence of other divisions is discovered the Antitrust Division goes to that other division with the evidence. The decision whether to prosecute the non-competition infringement is then based on the quality of the evidence. In the US to prove a crime of bid rigging it is relatively easy as one has to prove there was an agreement to rig bids and the intent requirement is to intend to agree to rig bids. However, in case of bribery and corruption the intent requirements are more complex and thus there are many more charges of bid rigging than for bribery and corruption for that reason. Thus, in most cases

the Antitrust Division would be the only component of the Department of Justice that would bring charges in a particular bid-rigging case.

5. How to keep competition agencies honest?

Mexico explained that the Federal Competition Commission (CFC) has at least four mechanisms to prevent corruption within the organisation. First, there is an internal controller who has been appointed by the Chamber of Deputies and, by constitutional mandate, the CFC must comply with principles of transparency and access to federal public information. Second, the Commission's staff is subject to administrative liability, staff is compelled to safeguard the principles of legality, honesty, fidelity, impartiality and efficiency and, in addition, the Commission's staff like every federal public official is required to disclose personal financial records on an annual basis that allows the tracking and the monitoring of the evolution of their personal affluence. Third, the Commission's staff has the obligation to preserve confidential information and documents used in their work and, therefore, staff is also liable in case any confidential information is disclosed. Fourth, the law establishes that officials cannot use the knowledge acquired over public service until at least a year has passed after the conclusion of their public service. In addition, the law prohibits the Executive Secretary to join a firm that has been or is being investigated by the Commission during a period of one year after leaving the Commission. Further, the members of the Plenum and the Executive Secretary may not hold any other employment and shall not take part in any Commission decisions in which they might have a direct or indirect interest and commissioners shall not have occupied a former position during a three-year period prior to taking up their position at the Commission in any of the firms investigated by the Commission. These rules also apply to the Executive Secretary but instead of a three-year period it should be only one.

Finally, the CFC has a practice that is not established in the law but exists to prevent misconduct of competition officials and it is related to the participation of officials in meetings with economic agents, particularly officials that belong to an investigation unit. In these cases at least three members of staff should meet with the economic agents. One official should be a member of the Executive Secretariat's office, another one should be from the directorate of the legal affairs and another one should be from the general directorate of economic studies. They have an exception for this in cases of leniency applications when only the staff from the general directorate of cartels should be present.

Colombia explained that the 2011 Anti-corruption Statute of Colombia provides for several rules in different sectors. Public servants cannot advise any company or any person within two years of leaving their posts on the matters of their job. So it is not only case related but refers to the job itself: for example when a public official from the Superintendence leaves it cannot advise anyone on cartels, abuse of dominance, etc. Unfortunately, this measure, instead of providing transparency, stopped experts from taking up positions in the public sector for fear of not being able to work when leaving the public sector. Thus, it has not been a good way to tackle anti-corruption.