

Competition Law and the Digital Economy – Shaping a New Bangladesh

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There is international consensus that competition agencies should devote their efforts to enforcing prohibitions against cartels. Competition laws across the world differ in various aspects; however, there is one feature that unites them, i.e. condemning anti-competitive agreements. There is almost universal agreement that price-fixing and market allocation cartels reduce economic efficiency.

One cannot but accept the harsh reality that unfair trade practices and anti-competitive practices are rampant in Bangladesh. These cause damage to consumers and give rise to frequent allegations of “syndication” or “cartelization” in many essential consumer goods. This is particularly prevalent during Ramadan, year after year. Consumers and society at large very often fall victim to unfair trade practices by a section of unscrupulous traders or “interest groups” who control the import and trade of essential items. In the absence of regulatory control, these interest groups dictate terms to consumers, causing harm.

The national parliament of Bangladesh passed its much-awaited Competition Act in June 2012 (“the Act”).² This new law sought to ensure a competitive marketplace. It states that “the law aims at preventing, controlling or

eliminating anti-competitive activities relating to collusion, situations of monopoly and oligopoly, combinations or abuse of dominant positions. The law mandates the creation of a Bangladesh Competition Commission (“BCC”), which was constituted in 2016.³

The stated objectives behind the Act related to the economic development of the country.⁴ In order to fulfil these objectives, the Act established an independent Agency (the “BCC”) to maintain and promote competition by preventing, controlling or eliminating restrictive agreements, arrangements among enterprises, combinations (mergers and acquisitions), abuses of dominant positions, or any activity that would appreciably and adversely limit freedom of trade or access to markets, or otherwise unduly restrain competition in a manner detrimental to consumer welfare and economic efficiency.

The need for effective competition law enforcement is great, but young competition agencies face serious institutional, political, human and financial constraints, which hamper effective implementation of the rules. William Kovacic, Professor at George Washington Law School and Former Commissioner at the U.S. Federal Trade Commission, who has significant experience

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² <https://www.thedailystar.net/news-detail-238772>.

³ [Is Competition Essential? What Anti-trust Policy is Doing In Bangladesh](#) -Abu Saieed, Fellow, Central European University, Budapest, Hungary.

⁴ <https://www.thedailystar.net/news-detail-238772>.

of working with new and old agencies, presented a summary of the major tasks facing a new competition agency (particularly in its first decade) during his visit to Bangladesh in July 2012.⁵ The lessons for the Bangladesh Competition Commission included, among other things, establishing credibility and a “presence” through enforcement, as well as through advocacy, publicity, and due process. Through these means, the new agency might obtain and sustain good leaders and staff, master the skill of information-gathering and sanctioning identified anticompetitive conduct, and build links to other institutions (such as sectoral regulators, consumer organizations, business organizations, universities and the media).

The GDP of Bangladesh is projected to reach USD 310.00 billion in 2021 and USD 340.00 billion in 2022, according to econometric models.⁶ Improvements in standard of living have led to a significant shift toward online transactions. Over the last few years, internet connectivity has improved, and the number of people with access to the web has increased, making way for e-commerce businesses to flourish. Turnover in the e-commerce sector exceeded Tk 17.0 billion in 2017 (up from Tk 4.0 billion in 2016), as documented by the e-

Commerce Association of Bangladesh (“e-CAB”). The size of the Bangladeshi e-commerce sector is expected to amount to Tk 70 billion by 2021.⁷

According to the Huawei Global Connectivity Index (“GCI”), Bangladesh has been one of the top four countries in terms of “improvement and remarkable growth” in the digital economy over the last four years.⁸ Eight years since its inception, while the BCC is still far from achieving its overarching goals, the new dynamics of the digital economy have brought it to a crossroads.⁹ This is in large part because the digital economy is ruled by data, including, in particular, personal data. The latter, of course, raises privacy concerns. That said, privacy is not necessarily in and of itself an important factor for competition regulators, but data is. Data can act as a barrier to entry, and can also be used to foreclose competitors’ access to markets, and as a means to leverage market power from one market to another. These issues go to the core of antitrust analysis. It is extremely important to understand how data is collected, how it is used and combined, and how it is monitored. Data gives firms a competitive advantage in almost all markets.¹⁰

⁵ http://www.cuts-ccier.org/Presentations-Developing_Awareness_on_Competition_Issues_in_Bangladesh.htm.

⁶ <https://tradingeconomics.com/bangladesh/gdp>.

⁷ <https://thefinancialexpress.com.bd/views/views/e-commerce-in-bangladesh-where-are-we-headed-1578666791>.

[https://thefinancialexpress.com.bd/economy/bangladesh/bangladesh-among-top-four-countries-in-digital-economy-growth-#:~:text=Bangladesh%20is%20one%20of%20the,Connectivity%20Index%20\(GCI\)%202019.&text=GCI%202019%20report%20said%20as,GCI%20score%20by%20seven%20points%E2%80%9D](https://thefinancialexpress.com.bd/economy/bangladesh/bangladesh-among-top-four-countries-in-digital-economy-growth-#:~:text=Bangladesh%20is%20one%20of%20the,Connectivity%20Index%20(GCI)%202019.&text=GCI%202019%20report%20said%20as,GCI%20score%20by%20seven%20points%E2%80%9D).

⁹ https://gaidigitalreport.com/wp-content/uploads/2020/11/The-Global-Antitrust-Institute-Report-on-the-Digital-Economy_Final.pdf.

¹⁰ <https://digitalfreedomfund.org/the-importance-of-antitrust-in-the-digital-economy/#:~:text=Why%20is%20antitrust%20so%20important,by%20data%2C%20including%20personal%20data.&text=D ata%20can%20act%20as%20a,market%20power%20in%20another%20market>.

The Act has been portrayed as a means to open markets to new ideas, products, and innovation, lowering barriers to market entry and to increase the economic freedom for firms in Bangladesh to engage with the rest of the world. The Act is applicable to all enterprises engaged in providing goods and services for commercial purposes, but with exceptions covering goods or services not open to the private sector (i.e. that are controlled by the Government in pursuance of its sovereign functions or national security). Provisions of the Act supplement other laws in force, meaning that it is possible for certain industries to be regulated by industry specific regulation in addition to the Act. The Act has a provision stating that an agreement causing an appreciable adverse effect on competition and/or an abuse of a dominant position (whether that agreement was entered into in or outside of Bangladesh) may be prohibited. As a statutory body, the Act gave the BCC the power to act as a civil court; and all proceedings before the BCC are deemed to be judicial proceedings (but an appeal against a BCC decision can be made before the Ministry of Commerce). The BCC can direct anyone involved in a prohibited activity to cease and desist from any such activity, and order a penalty up to 10 percent of its average turnover for last three preceding financial years. In the case of a cartel, the penalty can amount to thrice the profits made from the cartel, or 10 percent of the average turnover of the cartel for the last preceding three financial years (whichever is higher). The BCC can also issue orders, which may include splitting companies up for abusing a dominant position. Moreover, mergers can be prohibited based on

an “appreciable adverse effect” on competition test.

There is certainly a shift in culture and in politics that can be felt in Bangladesh. Over the last ten years, the Awami League government made a promise to transform the nation under its “Digital Bangladesh” policy by 2021. The country has indeed seen radical transformation in the arena of information and communication technology since then. The exponential growth in internet connectivity, mobile phone usage, IT export earnings, use of ICT in education, and accessibility of public services was only possible due to widespread digitization in the public and private sectors, along with policy support. People are breaking from cultural norms and making huge changes through the use of digital platforms.

However, even after almost eight years of existence, the BCC has failed to achieve its most obvious objectives, specifically with respect to prosecuting cartels. This is evidenced by the fact that even when prices for certain goods fall abroad, higher prices are maintained locally due to “syndication” – or, in other words, “cartels.”¹¹

So, is the current structure sufficient to eliminate cartels, anticompetitive behavior, and abuses of dominant position; to properly assess mergers and acquisitions; and to manage the impact of the digital economy on the emerging marketplace? Perhaps not. The current structure of the BCC does indeed have the necessary legal powers, but it needs adequate resources, economic experts, and funds to become fully active and functional. The BCC has received 18 complaints so far, and with its limited capacity of 25 staff has

¹¹ <https://www.oecd.org/countries/bangladesh/46146440.pdf>.

successfully disposed of only two of them. Unless the BCC becomes fully operational, and begins to bring successful actions against the large cartels that are distorting the market, it will be hard to tell whether or not it is a success. That said, the BCC certainly has all the potential to become an effective competition agency. Skills shortages occur in all areas of the enforcement of competition law, and can be improved through targeted training, and, in the longer run, relationships with the universities, think tanks, NGOs, and other international forums promoting competition, like International Competition Network (“ICN”), the U.S. Federal Trade Commission (“FTC”), the Global Antitrust Institute (“GAI”), the U.S. Department of Justice (“DOJ”) and Competition Policy International (“CPI”).

Going forward, the BCC needs to engage in dialogue to ensure that it is independent but nonetheless responsive to the broad policies of the government, while ensuring that its decisions are subject to judicial review. Independence from political interference, especially on a day-to-day or decision-by-decision basis, is required in order to ensure that an agency’s decisions and advocacy efforts are not politicized, discriminatory, or implemented on the basis of the narrow goals of special interest groups. Financial independence is a huge factor in ensuring independence, and this must be balanced with accountability. Politicians, the media, the public and the business community must know who is responsible for a decision, and the reasoning behind it. Stakeholders must be able to provide relevant input to decisions, through consultation processes, for instance

when going for an amendment or making additional rules. They must be able to obtain redress easily and quickly if the competition agency has acted arbitrarily or incompetently. These types of safeguards produce a balance between independence and accountability. Transparency enhances the confidence of interested parties in the effectiveness and independence of the competition agency and strengthens its legitimacy. Skill shortages occur in all areas of the enforcement of competition law, and can be improved through targeted training, and, in the longer run, relationships with universities, think tanks, NGOs and other international forums promoting competition, like ICN, FTC, DOJ, and CPI.

The risk of corruption and capture in developing countries is a troublesome issue. It is not possible to create a one-size-fits-all template for all the substantive areas covered by an agency, but advocacy for competition can be targeted toward certain powerful, competition-friendly audiences. In sum, where there are limited resources available for advocacy and studies, those resources should be deployed as strategically as possible. Good governance practices and an intelligent choice of priorities may well advance competition enforcement in Bangladesh. The “Enhancing Digital Government and Economy Project” with a budget of \$395 million, and approved by the World Bank in June 2020, may well be a worthwhile initiative for the BCC to support.¹²

The BCC was listed on the U.S FTC’s website for the first time in 2019, and since then, has

¹² <https://www.worldbank.org/en/news/loans-credits/2020/06/19/bangladesh-enhancing-digital-government-and-economy-project>.

grown in international stature.¹³ During the (virtual) 2020 annual conference of the ICN concerning the digital economy, the Chairman of BCC, Md. Mofizal Islam, acknowledged the importance of the digital economy and the challenges it raises. He highlighted the lack of sufficient data as a key challenge in antitrust enforcement in this sector. He further went on to propose a separate unit to conduct market surveys that will address anticompetitive behavior in digital markets. Cooperation with local authorities, developing a local data collection center while ensuring its protection and privacy and increasing digital literacy are fundamental issues, he added. It is evident

that the BCC is committed to capacity building, budget allocation, and recruitment process to reinforce these existing policies and procedures.

Big things often start slowly, and BCC will now have an additional mechanism to enforce antitrust law if it proactively considers aspects of the digital economy in Bangladesh. It is crucial to take this step, but then to constantly reassess to seek a better equilibrium. How the BCC, if it overcomes all of its challenges, will use its powers is something to watch out for in the coming years.

¹³ <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide>.