

The absence of political will to implement competition policy in Bangladesh is a major obstruction of its rapidly growing economy

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Abstract

The Competition policy and law designed to maintain market behavior by preventing anti-competitive practices of undertakings as well as promoting fair stable market competition. The Adaptations of the competition system now has become a global norm, today, more than 120 jurisdictions have competition policy systems and for a variety of reasons it is indeed a very remarkable development for all of us. First the application of competition law has tremendous economic significance which provides great economic benefits in the form of greater productivity and growth, it can assist in developing more effective ways to deliver goods and services. The basic foundation of the competition law set in European Union through the adaptation of the Treaty of Rome (which creates the EU), and significantly that treaty has powerful competition policy provisions provided the foundation of competition policy in Europe. EU Commission is now the toughest and one of the harsh enforcers in the world fighting anticompetitive behavior, reviews mergers and state aid thus encouraging liberalization.

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An effective, suitably implemented competition law and policy is an inevitable necessity for any country, as it for Bangladesh. Bangladesh as one of the developing countries, significantly suffering from anti-competitive practices as it detrimental to its market-based economy and consumer rights. The absence of competition policy had led the existence of monopoly, oligopoly in the internal market thus consumers and small enterprises are adversely affected. Initiatives were taken to develop a competition policy at the 1996 Ministerial Conferences in Singapore but abandoned after Doha Meeting. At Doha meeting in 2001, there were some dissent among WTO members to adopt competition policies for developing countries, as a result, Bangladesh gave its least attention for its competition policy.

This paper examines the anti-competitive practices in Bangladesh, the overview of the competition policies and it also answers the question why still institutions and enforcement of these laws are ineffective. Furthermore, this article will also explore the type of anticompetitive practices in internal market and its harmful effect in Bangladesh.

Introduction

Bangladesh is overpopulated country with a low per capital income. Its poor economy reveals some clue to the obsequious humanitarian situation in the country. Bangladesh seceded from its union with West Pakistan and became independent in 1971. The whole of Pakistan then was a part of India until 1947, when the British deposed from the Indian sub-continent after ruling over it for approximately 200 years. A democratic environment has been prevailing in Bangladesh since 1991. During the post-independence era (1972 to 1980) Bangladesh was unstable in terms of both economically and politically.

Bangladesh, bordering with Myanmar and India, and situated in deltas of large rivers flowing from Himalayas, into the Bay of Bengal. It is divided into six administrative regions, with the capital being Dhaka.

Economy

After independence, Bangladesh followed a policy of very unbending import exchange in its industrialization strategy. Bangladesh has come a long way in terms of trade and exchange rate liberalization, through its smooth and flexible import procedures; the significant decline of quantitative restrictions; remarkable flexibility of trade in many restricted items; and the considerable rationalization and reduction of import tariff.

Recently, the country introduced a freely floating exchange rate system. In the Cancun meeting of the WTO, Bangladesh abandoned the Singapore issue and had all but given up its initiative of pursuing a competition policy and law. Even though there is no denial of the fact that both procedures and consumers feel strongly that there should be a competitive business environment for their mutual welfare. So a competition policy is an inevitable necessity and internal imperative in Bangladesh, regardless of the outcome of the negotiation at the WTO. The Policy makers and consumers are well aware of this imperative and henceforward, the issue of formulating a national competition policy and law still alive in Bangladesh. The movement of consumers in Bangladesh very weak and the demand for a competition policy and law from their end is not very forceful.²

Competition Evolution and Environment in Bangladesh

After 1971, Bangladesh acceded to a policy of very inflexible substitution as its industrialization strategy. The government was stubbornly inward-looking and isolated that had led many economic barriers such as widespread quantitative

² Competition Regimes in the World-Civil Society Report Dr- Atiur Rahman' ad Mohammed Abu Eusuf

restrictions on imports, high import tariffs, foreign exchange rationing and an overvalued exchange. These policies were designed to create a domestic industry based economy by protecting local firms against foreign competition. Traditionally, the interests of the consumers were often ignored and it was used to believe that these small industries would grow up and will eventually become more efficient that, in long run, dynamic efficiency gains would balance the initial welfare loss. The import-substitution was controlled by macroeconomic concerns about the balance of payments (BoPo) and fiscal balance. After one decade of highly protected trade regime, Bangladesh continued to worsen both the internal and external balance situation, and this import-substitution strategy engendered distorted incentive structure, undermining the potential for export growth and had led an anti-export bias. In the early-1980s, Bangladesh reformed policies for stabilization and taken necessary measures for structural adjustment because there were pressures from the World Bank and IMF as there was a movement against the import-substituting development around the world. As a result, in the mid-1980s, Bangladesh had implemented trade policy reforms with inevitable consequence for the domestic competition regime. Quantitative restrictions on imports were significantly reduced to 40% in all import lines, tariffs were reduced from as high as 350 percent to as low as 40%(currently it is around 25%). Exchange rate restrictions were liberalized greatly with frequent adjustment in the nominal rate.³

The imposition of discriminatory sales taxes on imports, tariffs, were protecting domestic undertakings but with the trade liberalization process, so the measures taken by the government greatly reduced the protection enjoyed by domestic firms, in the tradable sector of economy and those firms' monopolistic power curtailed by a liberal import regime.

³ http://competitionregimes.com/pdf/Book/Asia_Pacific/4-Bangladesh.pdf downloaded in 20th October 2018

Policy and Regulatory Framework in Bangladesh

The aims and objectives of competition policies are meant to promote competition, enhance consumer welfare, by preventing restrictive agreements or concerted practices that distort competition in the market. Competition regimes are vital for its development. Moreover, the competition policy is an area of regulatory economics that has received the least attention in Bangladesh.

Bangladesh, when it was separated from Pakistan in 1971, it inherited all their laws as the basis of domestic implementation. Only one law was not notified that was Monopolies & Restrictive Trade Practices Ordinance 1970(which is the present competition law in Pakistan). However, in 2004, Cabinet approved a law on protection of consumer rights and it was supposed to be presented for final legislation in the Parliament but it did not. This law was emphasizing the consumers' right to obtain goods and services at competitive price, rights to information about the quality, quantity, standard and value of the goods and services. The overall policy framework of the country still preventing the promotion of an efficient and competitive market structure in Bangladesh for the following reasons,

1. The regulatory framework is yet to be developed. Until recently, a regulatory commission has been set up for the telecommunications sector but it's still in its infancy and yet to be matured. Through the establishment of Securities and Exchange Commission (SEC) capital market in Bangladesh is regulated.
2. Transparent and fairness recline at the heart of the competition policy, and rule of law concerning competition policies must be implemented expeditiously. Therefore, an independent, effective and efficient judicial system is vital for ensuring and facilitating business environment for competition. Bangladeshi Judicial system is slow and incompetent, as a result the cost of litigation increased. Currently, Bangladesh's legal system is

burdened with more than 3.3 million cases.⁴ The judicial system cannot ensure property rights and enforce contracts quickly, the competition climate thus seriously disrupted, undermining the interest of consumers.

3. Irrespective of the substantial magnitude of the liberalization and deregulation process, the Government does not allow firms to further entry to specific industries that fall into the categories of reserved, regulate or over-saturated sectors. Under the regime of competition law, no one can tell the firms whether any particular sector is over-saturated, under no circumstances the government cannot restrict entry into any sector. Currently, cooking oil, electric fans, corrugated iron sheets, etc. that are considered as sectors that are saturated. Financial institutions openly discourage investors to enter into these sectors, and such practices are anti-competitive and against the spirit of a competitive environment, as the Government does not know whether potential entrants could be even more productive and technologically better than the existing ones.
4. There are some sectors such as telecommunications, power generation and air transport, that are gradually being opened up to private sector participation but in a non-transparent and unpredictable manner, as a result it increases business transaction costs and widespread rent seeking opportunities as it does not allow the participation of the efficient firms in business and, therefore, the society cannot benefit from any efficiency gains.⁵

Bangladesh, until 2012, did not have competition law system and policy framework but there was the Monopolies and Restrictive Trade Practices Ordinances (MRTPO) enacted in 1970 when Bangladesh was a constituent part as East Pakistan, under the Government of Pakistan and remains on the legislative books. However, neither the government nor the private sector has ever attempted to invoke this law. Despite, the prevalence of

⁴ <https://www.dhakatribune.com/bangladesh/court/2018/01/16/law-minister-3-3m-cases-pending-courts>

⁵ http://competitionregimes.com/pdf/Book/Asia_Pacific/4-Bangladesh.pdf downloaded and assessed on 25th October

competition-related problems in Bangladesh has been widely discussed in the media, press stories in the daily newspapers over the past few years about the existence of anti-competitive practices such as cartels in the purchase, distribution and sale of several staple products such as rice, sugar, potatoes, and various other food products including fresh vegetables. It has been claimed that these cartels may exist in the part due to the monopsonistic market power of wholesalers who also provided finance to farmers, control truck transportation and provide refrigerated storage facilities.⁶ The press report may have helped to strengthen support for reform, and as such highlight the importance of analyzing and publicizing the costs of anti-competitive practices.

The Ministry of Commerce prepared a draft Competition Act 2008 during the stakeholder discussion arranged by the Ministry of Commerce in 2008/9, but some business representative raised their concern regarding the adaptation of the proposed draft competition bill because it was “drawn up by foreign experts”, that the bill was a copy of the Indian Competition bill, and that the advisors sought to introduce a one size fits all plan, notwithstanding the level of development, legal structure or business practices within Bangladesh.⁷ Another concern raised by the stakeholders was that the previous bill (MRTPO of 1970) never been implemented due to the lack of capacity and skilled technical staff to implement it, so there were questions how the new law would be implemented effectively? What will prevent the new competition authority from using its powers as an avenue for further rent seeking by government? Some considered the bill as a trick by the government to intimidate businessmen.

The Bill was based on international best practice, the benefits of the fair competition regime and lessons learned from the experience with competition law around the world. The level of development does not reduce the need for a sound competition framework and law. The existence of anti-competitive practices is potentially more serious in a country with a weaker private sector,

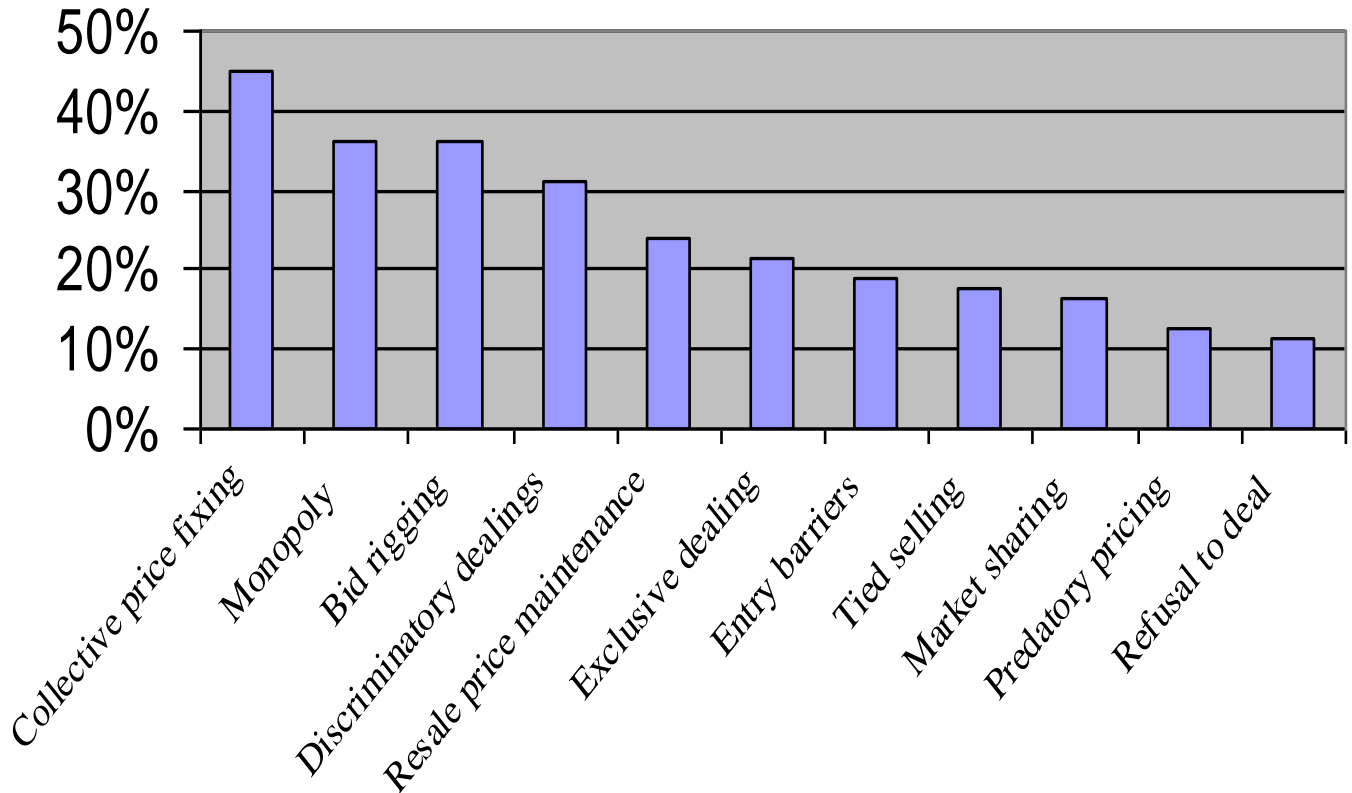
⁶ Based on stakeholder consultation workshop facilitated by Ministry of Commerce and attended by ODI study team in May 2009, Dhaka

⁷ Ibid

where one or a few dominant firms can take full control of the market, as a result the most vulnerable in this practice are both consumers and small enterprises/ other competitors.

The most Prevalent Anti-Competitive Practices in Bangladesh

Due to the lack of legal provisions and consumer's awareness, anti-competitive practices rife with the country. Such practices are, **Natural Monopolies** (e.g. distribution of power gas, railway, telephone and other utility services), **Mergers** (e.g. Standard Chartered Grindlays Bank, embassy appointment fees or visa fees has to be deposited particularly in this bank), **Price fixing** (increasing prices through collaboration among importers, local manufacturers, suppliers etc.), **Presence of state-owned inefficient industries** (e.g. textile, sugar, nationalized commercial banks etc.), **Manipulation of supply** (e.g. through collaboration among importers, local manufacturers, suppliers etc.). **Exclusive dealing and tying arrangement** (e.g. diagnostic services, educational inputs from particular outlets). **Weak Regulatory Framework** (Judicial system cannot guarantee property rights e.g. ETV), **Bid Rigging** (pre-arranged and threat driven), **Price Discrimination** (Dumping and charging different prices for identical products), Bribery and Gifts (e.g. bribing tax officials to avoid taxes), Extortion (e.g. sellers extorted by a purchasing agent).



1. Anti-Competitive Practices in Bangladesh

Source: BEI (Bangladesh Enterprise Institute) Findings

The competition system in Bangladesh

The competition system in Bangladesh has been traditionally weak and fragile. Prior to devising of the Competition Act in 2012, there were almost no policies or laws were in existence to govern market competition and the conduct of undertakings but some Monopolies and Restrictive Trade Practice Ordinance did exist and before the Bangladesh became independent, it became law afterwards

and has never been put to any practical use.⁸ In consequence, the market has always been affected adversely with a number of distortions like market syndicates, cartels, abuse of dominant positions, unfair spiraling price hikes and so on. As a result, such anti-competitive practices had led to endless sufferings for the consumers and crippling overall market efficiency.

A competition law, therefore, has long been adopted to address all these issues and foster fair competition to ensure that the public is offered quality goods and services at fair prices and there are no obstacles for undertakings entering into the market. In 1996, a draft bill for competition law first proposed and it took sixteen years to finally come to fruition.⁹

As of 21st June 2012, the Bangladesh parliament passed the Competition Act, aimed at ensuring fair and effective competition in business practices. It is hoped that the law will improve production and pricing efficiency, benefiting both consumers and producers. The new act enacted to ensure a competitive marketplace, as it states “the law aims at preventing, controlling or eliminating anti-competitive practices relating to collusion, situations of monopoly and oligopoly, combinations or abuse of dominant positions”. A summary of the main provision under the law as follows:

Section 15(1) of the Act, outlawing anti-competitive agreement: No person shall enter into any agreement/understanding/collusion, directly or indirectly, regarding the production, supply, distribution, storage, or acquisition of products, which may cause an adverse effect on competition or result in monopoly or oligopoly. An agreement shall be considered anticompetitive if it directly or indirectly:

1. Determines purchase or sale prices
2. Results in bid rigging or collusive bidding
3. Limits or controls production, supply, markets, technical development, etc.

⁸ Bertelsmann Stiftung, BTI 2012 — Bangladesh Country Report. Gütersloh: Bertelsmann Stiftung, 2012

⁹ Ibid

4. Shares the market, source of production or provision of services.

Section 15 (2) of the Act, outlawing abuse of dominant position: No enterprise shall abuse its dominant position in the market. The following would qualify as an abuse of dominant position:

1. Direct or indirect imposition of unfair or discriminatory prices or purchase conditions.
2. Limitation or restriction of production of goods and technical or scientific developments.
3. Denial of market access.
4. Imposition of acceptance of supplementary obligations at the time of purchase.
5. Use of power to enter into or protect other relevant market(s).

The Section 5 of the Act mandates the creation of a Bangladesh Competition Commission (BCC), which is responsible for implementing of competition law and scrutinizing behavior of the undertakings competing within the market. The Commission will be comprising by a chairperson and a maximum of four members, its main functions including:

1. Supervising the market and taking necessary measures against unscrupulous businesses and organizations.
2. Conducting inquiries -- upon receiving a complaint or on its own -- into anti-competitive agreements, abuse of dominant positions, collusive practices, etc.
3. Framing rules, policies, and administrative orders relating to competition and advising and assisting the government in their implementation.
4. Passing interim orders upon preliminary determination of anti-competitive behavior and final orders upon conclusive determination.

Final orders might include: Refraining from the anti-competitive behavior, Monetary penalty and Division of enterprises.

Violation of any order of the Commission will be an offence entailing a jail term of one year or a fine of Tk 100,000 per day for every day of violation.

Does the Competition Act 2012 raise any concern regarding its effectiveness and enforcement?

After having passed the competition law and creating mechanism to ensure its implementation and the establishment of the Bangladesh Competition Commission, there are still concern can be raised over its practical execution and potential effectiveness. The problems have been identified in regard to this as follows:

Absence of Clarity: Perhaps reasonably, the law is not able to clearly specify the precise line beyond which an agreement would become anti-competitive or an action of dominant position.

Time lag in the establishment of the Commission: It seems intuitively obvious that, the Act will not come into effect until the Commission is established, and there were many instances in the past, shows that such regulatory commissions take a long time to form, stretching from a few months to a couple of years.

Lack of Knowledge: The information about the market behavior and anti-competitive practices is inadequate, because there were very limited works have been done and no research/published materials are available educate the people. People still haven't acquired sufficient knowledge about their rights as consumers and most importantly the existence of the Competition law in Bangladesh thus remains hindered.

Confidence: In order to work effectively, the Commission needs to overcome the common perception of regulatory authorities as believed to be slow, inefficient, and open to influence. Due to lack of confidence, the people are less likely to lodge a complaint unless they are satisfied of the standards of the Commission. In a recent panel discussion on the potential implementation problems, a businessman cited an example, he says the businessmen are aware of the tax ombudsman but they do not go there due to a lack of confidence in the office.¹⁰

Abusing the Act: Similarly, past experiences prove that regulatory bodies are often vulnerable to political and economic influences. There is a fear that the Act can be misused.

Overlapping functions and conflict of interests: The secretary general of Consumer Unity and Trust Society (CUTS) said, there are always some uncertainties in countries with multiple regulatory authorities.¹¹ For an example, he said the Commission's functions may overlap with that of the power and energy regulatory commission or the telecom commission, potentially leading to conflicts over jurisdiction or turf wars.

There are more developing neighboring countries that Bangladesh can draw and learn from, said Mitra and Mehta in their article.¹²

India: India passed Competition law in 2002 replacing its outdated Monopolies and Restrictive Trade Practices Act, which penalized market dominance irrespective of whether the cause was unfair practices or superior efficiency. In 2002, legislation amended and resolved this problem by focusing on the abuse of such dominances, which was followed by

¹⁰ "Strong commission needed to implement competition law". Star Business Report. The Daily Star. July 3, 2012. Accessed at: <http://www.thedailystar.net/newDesign/news-details.php?nid=240661>

¹¹ Ibid

¹² Siddhartha Mitra and Udai S Mehta. "Competition enforcement in Bangladesh". The Financial Express. June 13, 2010 Accessed at: http://www.cuts-ccier.org/ArticlesJune10-Competition_enforcement_in_Bangladesh.htm

Bangladesh afterwards. Unfortunately, however, the competition commission established by the 2002 Act in India, was poorly-staffed and insufficiently equipped. In consequence, in 2007, Act 2002 was amended as it was necessary to give the agency more power.

Pakistan: The Competition Commission is more efficient and successfully proved its neutrality and demonstrating political independence. For example, in spite of being a state-owned company, Pakistan Steel Mills was fined by the commission 25 million for abusing its dominant position in the low carbon market.

Mauritius: The Competition Commission of Mauritius (CCM) praised for its strategic selection of cases and for its transparency in presenting the details of its investigative actions.

Egypt: The Egyptian Competition Agency (ECA) recognized for its strong internal team of experts and for the ties it had built to the business community. The agency was successful and was able to operate effectively with the cooperation of the highest level of Egyptian government.

Conclusion

Until today, about 120 countries around the world have competition law systems and many observers feel that it is now an inevitable necessity for Bangladesh to follow suit, especially given the country's infamous record of anti-competitive cartels, hoarding, black marketing of commodities, and other anti-competitive practices. However, implementation and execution of law have always been challenging for Bangladesh and if this trend continues, the market will remain unstable, small enterprises and potential new entrants will encounter obstacles and threats in entering into the market, thus the competition of the market will be

distorted. In addition, the basic rights of consumers and an absence of fair competition will become detrimental for both the economy and consumers.

Irrespective of the reforms and the establishment of the commission, Bangladesh is still possessing weak competition regime, which hindered the efficiency gains, and as a weak competition regime the interest of consumers is totally ignored. For Bangladesh, setting up an effective regime would be challenging and for this it would require, legal and regulatory reforms, implementation of rule of law, an independent Judicial system, and the development of civil society group is an inevitable necessity in protecting the consumers' interest, as they have an important role to play in raising consciousness , regarding vices of anticompetitive practices, education, media and social organization have a role to play in mobilizing a society for an appropriate competitive regime, and most importantly further deregulation and liberalization of the domestic economy.

Furthermore, competition policy is not a solution for promoting competitiveness, there are some other requirements as well, such as human capital, institutional infrastructure, ethical business codes and commitment to good governance. It is now, obvious that a competition act can be crucial for effective competitive constraints, can be a useful tool for fostering health competition, but it is unquestionably depending on a strong, neutral, transparent, skilled and committed oversight commission.