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Voluntary peer review of competition law and policy of Bangladesh: Overview*, **

* The findings, interpretations and conclusions expressed herein are those of the author and do not necessarily reflect the views of the United Nations or its officials or Member States. The present document is an overview of a full report on the voluntary peer review of the competition law and policy of Bangladesh.

** The present document was scheduled for publication after the standard publication date owing to circumstances beyond the control of the UNCTAD secretariat.

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I. Foundation and history of competition policy

A. Context

1. Before Bangladesh became independent in 1971, competition policy consisted of the Monopolies and Restrictive Trade Practices (Control and Prevention) Ordinance, 1970.[1] The Ordinance was never implemented, and competition in the country remained largely weak.

2. The Government of Bangladesh enacted the Competition Act, 2012, which was triggered by the country's commitment to integrating into the global trade and the structural reforms promoted by the International Monetary Fund and the World Bank.

3. The current supporting policy is provided in "Vision 2041", under which Bangladesh aims at eliminating poverty and reaching upper-middle income country status by 2031, and high-income country status by 2041, to achieve the goal of a "Golden Bangladesh" by the seventieth year of its independence. The 20 year-plan, Perspective Plan 2021–2041, which converts Vision 2041 into a strategy, mentions the role of competition in several sections, such as in relation to the power and energy sectors and supporting the healthy growth of the agricultural value chain.

4. In line with the Perspective Plan 2021–2041, the Government has been implementing the eighth five-year plan for the period July 2020–June 2025. The plan is centred on core themes, including the country's rapid recovery from the coronavirus disease (COVID-19), gross domestic product (GDP) growth acceleration, employment generation, and rapid poverty reduction with a broad-based strategy of inclusiveness, development and improvement of critical institutions, attaining Sustainable Development Goal targets and coping with the impact of graduation from the least developed country status of Bangladesh.[2]

B. Objectives

5. The objectives of the Competition Act, 2012 are to promote, ensure and sustain a congenial atmosphere for the competition in trade, and to prevent, control and eradicate collusion, monopoly and oligopoly, combination or abuse of dominant position or activities adverse to the competition. This reflects that the Competition Act seeks greater integration with the world trade system. There is no mention of the welfare standard to be followed when implementing the law.

6. The Competition Act, 2012 focuses on institutional issues related to the Bangladesh Competition Commission. It provides for the Commission's establishment, including its secretariat, operations, funding, management and accountability. The Act also details the anticompetitive practices to be avoided that the Bangladesh Competition Commission should enforce.

II. Legal framework

A. The Competition Act, 2012, of Bangladesh

7. Like other competition laws, the Competition Act, 2012, covers (a) anticompetitive agreements in both vertical and horizontal aspects, (b) abuse of a dominant position and (c) control of mergers.

[1] UNCTAD, (forthcoming), *Voluntary Peer Review of Competition Law and Policy of Bangladesh*. The full report contains more detailed information and all relevant sources and references.

[2] United Nations resolution 76/8, Graduation of Bangladesh, the Lao People's Democratic Republic and Nepal from the least developed country category.

8. It applies to all enterprises which are involved in the purchase and sale, production, supply, distribution or storage, of goods and services for commercial purposes and does not draw a distinction between regulated and non-regulated sectors.

9. Section 44 entrusts the Bangladesh Competition Commission to adopt regulations to carry out the purposes of the Competition Act, 2012, with the approval of the Government and by notification in the official gazette. Interview findings indicate that the Ministry of Commerce and the Ministry of Law, Justice and Parliamentary Affairs must approve draft regulations prior to finalization. At the time of writing of the present document, the Commission was drafting Competition Complaints and Judicial Procedure Regulations, Mergers and Acquisitions Regulations and Bangladesh Competition Commission (Meetings and Miscellaneous Activities) Regulation 2022.

10. On the scope of the law, it applies "to all enterprises which involve in purchase-sale, production, supply, distribution or storage, as the case may be, of goods or services for commercial purposes" (section 3). Exempted from the law are goods or services which are not open for the private sector and controlled by the Government for national security purposes (section 4).

B. Anticompetitive agreements

11. Section 15 prohibits entering into any agreement or collusion, express or implied, in respect of production, supply, distribution, storage or acquisition which causes or is likely to cause an adverse effect on competition or creates monopoly or oligopoly in the market. While not explicitly, it covers both horizontal and vertical anticompetitive agreements.

12. Section 15(2) provides that any agreement "shall be deemed to have adverse effect on competition in goods or services if it: (a) directly or indirectly (i) determines abnormal purchase or sale prices; or (ii) determines the deceptive price in all process including bid rigging; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) divides the market or source of production or provision of services by the way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar basis." This implies that the conduct described in section 15(2) is prohibited outright, thus constituting a per se prohibition and not permitting an exemption on grounds of efficiency.

13. Section 15(3) states also that: (a) a tie-in arrangement, i.e. any agreement or understanding requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods or facilities from any other person or enterprise engaged by the seller, (b) exclusive supply agreement, i.e. any agreement restricting in any manner the purchaser in the course of her or his trade from acquiring or otherwise dealing in any goods other than those of the seller, (c) exclusive distribution agreement, i.e. any agreement limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods, (d) refusal to deal, i.e. any agreement which restricts, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought and (e) resale price maintenance (resale as stipulated by the seller) are deemed to be anticompetitive if they have an adverse effect on competition. As such, these agreements are similar to those analysed under a rule of reason approach in other laws, where the prohibition is conditional on the "effect" of such agreement on competition in the market.

14. Bangladesh Competition Commission officials interpret the anti-competitive agreements listed under sections 15(2) and 15(3) as an exclusive, rather than descriptive list of prohibited agreements. This removes the flexibility to identify other possible anticompetitive agreements at the enforcement stage. Commission officials would like the exclusive list to be expanded to accommodate other conducts, either through an amendment of the Competition Act, 2012, or through the issuance of secondary regulations.

15. Section 15(4) explicitly excludes the following acts: (a) the right of any person, to restrain any infringement of, or for protecting intellectual property rights conferred under the intellectual property law, to impose reasonable conditions; and (b) the right of any person to export goods from Bangladesh to the extent to which the agreement relates

exclusively to the production, supply, distribution or control of goods or provision of services for such export.

16. The Competition Act, 2012, does not yet provide the framework for block exemptions for specific types of agreements and other practices, nor for key economic sectors.

C. Abuse of dominance

17. The Competition Act, 2012, contains a general prohibition of abuse of dominance (section 16(1)) and a declaration of what the Bangladesh Competition Commission considers an exclusive list of related offences (section 16(2)). An abuse of dominant position is presumed if an enterprise (a) imposes directly or indirectly unfair or discriminatory conditions in the purchase or sale of goods or service or discriminatory price or predatory price in the purchase or sale of goods or service; (b) limits or restricts the production of goods or provision of services or market thereof or technical or scientific development relating to goods or services to the prejudice of consumers; (c) indulges in practice or continues to conduct practices which deny the market access of others; (d) makes the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or (e) uses its dominant position in one relevant market to enter into or protect another relevant market.

18. The Competition Act, 2012, defines “dominant position” as a position of strength enjoyed by an enterprise in the relevant market that enables it to (a) operate independently of competitive forces prevailing in the relevant market; or (b) affect its competitors or consumers or the relevant market in its favour.

19. While several competition laws contain an indicative market share threshold for the presumption of dominance, this is not provided in the Competition Act, 2012, although presumptions could improve legal certainty in a young competition regime such as that of Bangladesh.

D. Mergers and acquisitions

20. Merger control is set by section 21, which prohibits combinations that have an adverse effect on competition in goods or services. Combinations are defined as trade acquisitions or taking control or amalgamation or mergers (section 1(2)). The Bangladesh Competition Commission may approve them “on application”, after assessing that they will not have an adverse effect on competition; otherwise, the Commission may forbid the operation.

21. Regulations on the notification and review process, including the criteria and thresholds for notification, local nexus rules, deadlines for review, applicable special investigative processes and sanctions for non-compliance, are under way. The Competition Act, 2012, is silent as to the nature of the notification regime, that is, whether it is voluntary or mandatory and pre- or post-merger. To date, the Bangladesh Competition Commission has not reviewed nor prohibited any mergers, nor it has acted against non-compliance.

22. Interview findings indicate that the Bangladesh Competition Commission is considering inclusion of the following points in the draft Mergers and Acquisitions Regulations:

(a) A binding notification requirement and a deadline for the notification of certain concentrations.

(b) Thresholds for merger notification, leaving out of scrutiny small companies that seek to grow and improve their efficiency through these operations.

(c) Possible exemptions from merger review for transactions that do not result in durable changes to the market and the granting of temporary authorizations conditional to merger benefits outweighing disadvantages.

(d) The length of time to assess notified mergers, either to approve them or reject them. The lack of a fixed time frame may lead the Commission to delay mergers interfering with the parties' interests.

(e) Consequences of failing to notify a notifiable merger, including the powers of the Commission to unwind or divest a merger not notified, and if a merger is ex post found to be prohibited.

E. Private enforcement

23. The Competition Act, 2012, does not contain provisions regarding damages claims through private enforcement. Several stakeholders, including Bangladesh Competition Commission officials, think that such damages should be considered in the next amendment of the law.

F. Consumer protection and unfair trading

24. The Directorate of National Consumers' Right Protection, under the Ministry of Commerce, is mandated by the Consumers' Right Protection Act, 2009, to protect the rights of consumers and prevent practices against them. It views the relationship with the Bangladesh Competition Commission as "complementary", especially as, like the Commission, the Directorate is also framed under the Ministry of Commerce.

25. The Competition Act, 2012, does not have specific provisions on consumer protection, but the Bangladesh Competition Commission has the power to review the actions taken under any other law for consumer rights protection and implementation, although it has not handled any cases so far.

26. Interview findings indicate some interest in incorporating the consumer protection functions of the Directorate of National Consumers' Right Protection into the Bangladesh Competition Commission, in line with some competition authorities in other jurisdictions, such as the Australian Competition and Consumer Commission.

III. Institutional issues: Enforcement structures and practices

A. Competition policy institutions

27. The Bangladesh Competition Commission was established as a statutory body having perpetual succession with authority to acquire, hold, and dispose of property (Competition Act, 2012, chapter II). It comprises a chairperson and not more than four members appointed by the Government and holding office for a term of three years, with the possibility of reappointment.

28. The Competition Act, 2012, does not address the process for the nomination and appointment of the chairperson and members. In practice, the Ministry of Commerce proposes nominees to the Prime Minister. The criteria for the selection of nominees and whether the selection is scrutinized by other public bodies and relevant stakeholders are unclear.

29. The three-year duration of an appointment is generally deemed too short for members to learn and master the subject. The Competition Act, 2012, is silent on staggering the membership of the Commission, considering this short duration.

30. Section 9 provides that the Government may remove the chairperson or any member from his/her office if, among other things, he/she is (a) adjudged as insolvent by a competent court; (b) has been appointed in any post in consideration of wages out of his/her own service; (c) has been convicted of an offence involving moral turpitude; and (b) has so abused his or her position as to render continuance in office in the opinion of the

Government as prejudicial to the public interest. A chairperson or member will not be removed without an opportunity to be heard.

Powers and decisions of the Commission

31. Under section 8, the Bangladesh Competition Commission has the following duties, powers and functions: eliminate practices that adversely affect competition in order to promote competition and free trade; inquire and investigate, upon complaint or *suo moto*, all agreements, dominant position or practice which impede competition, and file the appropriate cases; inquire into, approve or disapprove combinations; make rules, policies, instructions, directions or administrative directions regarding competition, and give advice to and assist the Government in the implementation thereof; set appropriate standards for the promotion of competition, provide competition-related training, prepare plans of action to develop the public's awareness of competition by publication or other means, conduct research and hold seminars, symposiums, workshops on anticompetitive activities, publish the results of such research and provide recommendations to the Government; implement, comply with, follow or consider any matter relating to competition sent by the Government; review the actions taken under any law for the protection of consumer protection rights; enter into a memorandum of understanding with foreign organizations, with prior approval from the Government; determine the fees, charges, or any other expenses to carry out the objectives of the Competition Act, 2012; and undertake any other act prescribed by the rules issued to achieve the objectives of the Competition Act, 2012.

32. Public stakeholders interviewed emphasized that the Bangladesh Competition Commission does not act under the direction of the Ministry of Commerce. This appears to be supported by section 32, which provides that the Commission is not required to get permission from the Government to spend its budget, and which can be construed to mean that, in the lawful exercise of its functions, the Commission shall not be subject to the direction or control of any other person or authority. Such provision can be taken to bestow statutory independence, particularly in decision-making. However, this independence is tempered by several provisions:

(a) Section 37 provides that the Commission, in the exercise of its powers or the performance of its functions under the Competition Act, 2012, is "bound by such directions of the Government on questions of policy other than those relating to the implementation [and] technical and administrative matters" of the Competition Act, 2012. Interview findings indicate that the Government has not yet provided a "direction" under section 37 but has sent reports from the State Security Agency to the Commission about anticompetitive activities that are to be investigated by the Commission.

(b) Section 43 states that the Government may make rules to carry out the provisions of the Competition Act, 2012.

(c) Section 44 states that the Bangladesh Competition Commission, subject to the approval of the Government, may create regulations that are not inconsistent with the Competition Act, 2012, and the rules approved by the Government.

(d) Section 29 provides that a person aggrieved by an order by the Bangladesh Competition Commission may appeal to the Government. Interview findings reveal that "appeal to the Government" refers to an appeal to the Ministry of Commerce.

(e) Section 11 requires the Bangladesh Competition Commission to send the minutes of its meetings to the Government within 20 days of such meetings.

Investigative and adjudicative powers

33. The Bangladesh Competition Commission describes its Inquiry and Investigation Division as "separate and independent" from the Commission. In practice, this Division is supervised by one of the members of the Bangladesh Competition Commission, but Commission officials stress that the Bangladesh Competition Commission does not interfere with the work of the Division. The Commission has adopted certain measures to protect the independence of this Division, such as:

(a) The teams do not share any kind of information with the Commission before the submission of a final report.

(b) Both inquiry and investigation reports are submitted to the Commission in a sealed envelope.

(c) Only the Commission *en banc* can see the report. Commission members are not allowed to view the reports on their own.

(d) The Commission has asked the Ministry of Commerce for an amendment of its organizational structure, adding a Director-General, more officers and staff members to the Inquiry and Investigation Division to foster independence.

34. In addition to its investigative powers, the Bangladesh Competition Commission also has an adjudicative function. Section 8(6) provides that all proceedings before the Commission shall be deemed to be judicial proceedings. Thus, the Commission is vested with powers to investigate, prosecute and determine matters that fall within its jurisdiction. In the Bangladesh judicial system, as elsewhere, those functions are separated to ensure a separation of powers and a system of checks and balances. As both the prosecutor and adjudicator, the Commission may be tempted to confirm its own decisions. This risk may be tempered by ensuring that the Commission's decisions are appealable to an independent and impartial tribunal.

35. Given that the Bangladesh Competition Commission acts in a judicial capacity where due process must be observed, as competition cases tend to be lengthy, the short terms of the chairperson and commissioner may interfere with the "right to be heard" requirements.

B. Enforcement of the Competition Act, 2012

36. The Competition Act, 2012, provides for a four-phased enforcement process, divided into the pre-inquiry, inquiry, investigation and adjudication phases.

37. **Pre-inquiry**. Should the Bangladesh Competition Commission find it "necessary" to immediately prevent any agreement, misuse of dominant position or collusion which causes or is likely to cause an adverse effect on the relevant market, it may, after giving reasonable opportunity for the concerned parties to be heard, settle the issue "with necessary directions" without opening an inquiry.[3] The Competition Act, 2012, does not provide a time frame for the pre-inquiry stage nor guidance on the analysis undertaken by the Commission in such cases.

38. **Inquiry**. If the Bangladesh Competition Commission has a reason to believe that any enterprise has entered into any agreement or misused its dominant position, and that this is harmful to the relevant market, it may, *suo moto* or on receipt of a complaint from anyone, inquire into the matter.[4] According to section 7 of the draft Bangladesh Competition Complaints and Judicial Procedure Regulations of 2022, after the Commission approves a case for inquiry, the Commission Secretary will send the case to the Department of Inquiry. The inquiry team shall complete the inquiry within a period not exceeding 15 days.[5] The inquiry period may be extended for another 10 days upon request of the inquiry team[6] or if the Commission feels that further inquiry, examination or analysis is necessary. Upon receipt of the inquiry report, the Commission will decide if the case merits an investigation based on the gravity of the allegations. If so, it shall send the complaint to the investigation directorate, which will conduct a more in-depth investigation.

39. During an inquiry, if the Bangladesh Competition Commission determines that an enterprise entered into anticompetitive agreements, abuse of dominant position or

[3] Competition Act, 2012, section 17.
[4] Competition Act, 2012, section 18.
[5] Section 7, draft Procedure Regulations, provided by the Bangladesh Competition Commission.
[6] Section 8(2), see footnote 6 above.

anticompetitive consolidations, and that such offence continues or is likely to continue,[7] it may, considering the importance of the activities involved and giving the parties the opportunity to be heard, issue an interim order to temporarily restrain implementation of such offences, until the conclusion of the inquiry or until further orders.[8] Parties may file an appeal with the Commission for the reversal of the interim order within 30 days of its issuance.[9]

40. **Investigation**. According to the draft Bangladesh Competition Complaints and Judicial Procedure Regulations, the investigation team's evaluation of cases includes identifying the adverse effects of competition in the relevant market, involving economic analysis. The investigation team may hear complainants in the form of written or oral statements through previous notice.[10] The Competition Act, 2012, does not grant the Bangladesh Competition Commission the power to undertake unannounced inspections and to search business or private premises. After completing the investigation, the team submits a report to the Commission, which shall decide if a hearing is necessary, providing a copy of the investigation report to the parties.

41. **Adjudication**. Afterwards, the Commission hears the case in the presence of the parties.

C. Prioritization of enforcement activities

42. The Bangladesh Competition Commission has not engaged in strategic planning nor in prioritizing competition concerns in the past. Competition law and policy has yet to fit into the development plans of Bangladesh. Interview findings indicate that cases are initiated by the Commission based on possible anticompetitive practices reported by the media. The Commission has no power to decide whether to investigate a complaint based on its priorities and available resources and, therefore, scrutinizes all complaints and proceeds to a full investigation when there is prima facie evidence.

43. Without the flexibility to prioritize, the Commission may not be able to efficiently allocate resources to pursue the most impactful practices.

D. Sanctions

44. **Administrative sanctions**. Non-compliance with section 15 on anticompetitive agreements and section 16 on abuse of dominant position is subject to the following sanctions and penalties (section 20): (a) an order to discontinue the anticompetitive activities or agreements and an administrative fine in an amount not exceeding 10 per cent of the average turnover of the offending person for the previous three years; (b) for cartels under section 15, an administrative fine of up to three times the offender's profit for each year that the agreement continues or 10 per cent of the average turnover of the offending person for the previous three years, whichever is higher. Failure to pay financial penalties exposes the offender to additional fines of not more than 100,000 taka (approximately US$1,160) for each day of delay; (c) any order, as the Bangladesh Competition Commission may deem fit, for the preservation of competition, including the division of an enterprise enjoying a dominant position. Commission officials noted that similar sanctions should apply to non-compliance with section 21 on concentrations.

45. **Criminal sanctions**. Under section 24, any person who, without reasonable cause, contravenes any order or direction of the Bangladesh Competition Commission shall be penalized by imprisonment for a term not exceeding one year or a fine not exceeding 100,000 taka (approximately US$1,160) for each day of non-compliance. The Commission serves as the complainant in the court case, and the penalty is imposed by the magistrate of

[7] The Bangladesh Competition Commission shall consider the importance of the matter and give the parties ample opportunity to be heard.

[8] Competition Act, 2012, section 19(1).

[9] Competition Act, 2012, section 19(3).

[10] Section 20, see footnote 6 above.

the first class or, as the case may be, the metropolitan magistrate under section 25. Section 8(7) provides that any person interfering in the exercise of the power of Commission or intentionally failing to comply with the order shall be held liable and be subject to imprisonment for a term not exceeding three years or a fine or both.

46. The Code of Criminal Procedure of Bangladesh applies to investigations, trials, appeals and other ancillary matters relating to offences under the Competition Act, 2012 (section 26), and any cases initiated on the basis of a report by the Commission are equivalent to cases initiated by a police officer under the same Code.

47. While the wording of sections 24 to 26 appears to indicate that anticompetitive conduct itself is subject to criminal penalties, Commission officials have clarified that this is not the case, as criminal penalties are only imposed for contravening the orders of the Bangladesh Competition Commission or interfering with the exercise of its powers.

E. Review and appeal

48. Any person aggrieved by an order of the Bangladesh Competition Commission may, within 30 days, apply to the Commission for review or to the Government for appeal. The review or appeal must be disposed of within 60 days. The order of the Commission or the Government shall be deemed final.

49. The High Court Division of Bangladesh has the power to judicially review decisions of the Bangladesh Competition Commission if the case involves a "substantial question of law as to the interpretation of [the] Constitution, or on a point of general public importance, the determination of which is necessary for the disposal of the case" (section 110, Constitution of Bangladesh).

50. Two cases have reached the High Court Division; both are still pending. One was appealed to the Ministry of Commerce, which upheld the Commission's order to cease the anticompetitive agreement but reversed the Commission's decision to impose administrative penalties on only one of the respondents,[11] invoking equality principles.

51. Given the infancy of competition culture, limited competition jurisprudence in Bangladesh and the fact that the Commission is both the prosecutor and adjudicator in competition cases, it might be advisable to establish an independent and specialized tribunal to handle competition and regulated sectors related issues, to encourage specialization, provide a reasonable case load, gradually increase the caselaw in these areas and protect the parties' right to a fair trial.

F. Competition advocacy

52. The Bangladesh Competition Commission's power and duty to advocate for competition can be found in sections 8(1) (g) and (h). Since 2018, the Commission has organized 44 competition advocacy seminars and workshops for different ministries across divisional headquarters and districts, business communities, journalists, traders and academics. Moreover, the Commission requested that the Bangladesh Civil Service Administration Academy and other training institutions and universities introduce a competition law and competition economics module in their training courses.

53. The Bangladesh Competition Commission and numerous stakeholders admit that the Commission's advocacy initiatives must be improved. After almost 10 years of the Competition Act, 2012, the level of awareness of the Act and of the Commission is very low or even absent.

54. There are currently no specific studies on competition at either the undergraduate or postgraduate level in Bangladesh. Some universities teach competition as part of other law or economics courses. There is limited legal and economic expertise in competition law,

[11] The Bangladesh Competition Commission took a lenient approach and did not impose penalties on the other respondents considering their admission of their ignorance of the Competition Act, 2012.

which is shared by lawyers and judges who have to prosecute and decide cases on anticompetitive practices.

G. Agency management, resources and caseload

Management

55. The Bangladesh Competition Commission is headed by a chief executive officer (who is concurrently the chairperson of the Commission). It is divided into directorates on: (a) business trade, economics and research, (b) information and communications technology, (c) advocacy and policy, (d) international relations, (e) mergers and acquisitions, (f) inquiry, (g) investigation, (h) intelligence, (i) law and (j) implementation.

Resources

(a) Human resources

56. The Bangladesh Competition Commission has an approved human resources base of 78 staff members. The Commission supplements its staff by hiring contractual employees who assist in administrative matters. A proposal to supplement its organizational structure is pending; it seeks to increase full-time staff to 165 and accommodate more mid-level officers.

57. Most of the current senior staff (directors, deputy directors, assistant directors, and other officials) are relatively new to the organization. Commission officials noted that operational staff did not benefit from competition training at university; only a few have undergone competition-related training in university degrees that include modules on industrial economics. There has not been enough comprehensive in-house staff training.

(b) Financial resources

58. The Bangladesh Competition Commission has limited funds to carry out its broad mandate. The Competition Fund, comprising annual government grants, fees and charges established by the Competition Act, 2012, interest on bank deposits and any other source not prohibited by existing rules and regulations, are the main sources of funding for the Commission's operations. For fiscal year 2021–2022, the Commission, which covers a country of more than 164 million people, had a budget of approximately US$415,672, which is low compared to peers in the region. For example, the Philippine Competition Commission, which operates in a country of approximately 110 million people, had a budget in 2018 that exceeded US$9 million.

(c) Information and communications technology resources

59. The Bangladesh Competition Commission has a dedicated information and communications technology (ICT) wing. It has a functioning website and an established email domain. Currently, ICT infrastructure needs to be improved for case-handling purposes through additional government funding.

(d) Technical assistance project

60. To supplement its initial capacity-building efforts, the Bangladesh Competition Commission, through the Ministry of Commerce, submitted a technical assistance project proposal to the Ministry of Planning (Industry and Energy Division, Planning Commission) to be financed through grants. The proposed three-year project, for July 2021–June 2024, set out the following objectives: (a) create public awareness about the Commission in various divisions and districts in the country; (b) improve the capacity of Commission staff members; (c) strengthen the Commission's ICT capabilities, including setting up ICT software, databases and connecting the Information and Communication Technology Division with the Four-Tier National Data Centre of Bangladesh, to help the Commission deal with emerging issues of the digital economy; (d) help discover anticompetitive activities in the market through research and market studies of relevant economic sectors;

(e) organize seminars and workshops to disseminate knowledge, share experience and gather insights from different stakeholders, to strengthen the capacities of the Commission; and (f) build technical capacity by hiring experts on competition economics and law, capacity development and ICT. The proposal has not yet been approved by the Ministry of Planning.

Caseload

(a) Anticompetitive agreements

61. Since 2018, the Bangladesh Competition Commission has received eight complaints and initiated four *suo moto* investigations related to anticompetitive agreements.

Number of cases by status of investigation	*Year*				
	2018	*2019*	*2020*	*2021*	*2022*
Number of cases investigated and concluded	1	1	0	5	0
Number of cases resolved by settlement under section 17 (settlement before inquiry) or section 8(e) (provision of advice to the Government)	0	0	0	4	0
Number of cases with ongoing investigation	0	0	0	0	4

62. Of these cases, 4 were settled pre-inquiry under section 17 of the Competition Act, 2012, and by providing advice to the government agencies involved in the dispute, pursuant to section 8(1) (e).

63. The Commission imposed sanctions in two cases, both of which have been appealed to the High Court Division.

(b) Abuse of dominant position

64. The Bangladesh Competition Commission had less enforcement activity related to abuse of dominant position. The only abuse of dominance case is *United Dhaka Tobacco Company Ltd. v. British American Tobacco Bangladesh Ltd.*, still under investigation and without public information available. To date, the Commission has not applied any sanctions or remedies to abuse of dominance practices.

(c) Mergers

65. As mentioned, the Bangladesh Competition Commission has not reviewed any mergers, nor imposed sanctions for non-compliance with merger provisions. This is attributed to gaps in the Competition Act, 2012, and lack of regulations (under preparation) regarding the procedure, namely the notification and review process, including criteria and thresholds for notification, local nexus rules, deadlines for review, any special investigative processes applicable and sanctions for non-compliance.

H. Competition and regulated sectors

66. Under combined sections 3 and 4, the Bangladesh Competition Commission is deemed to have jurisdiction over all regulated sectors, including telecommunications and energy, except those not yet open to the private sector in the interest of national security. However, sectoral regulators are also mandated by their laws to deal with competition issues, as is the case for telecommunications.

Telecommunications

67. The Bangladesh Telecommunication Regulatory Commission regulates and develops the telecommunications industry of Bangladesh. Section 30 (e) of the Bangladesh Telecommunications Regulatory Commission Act of 2001 provides that one of the functions of the Bangladesh Telecommunication Regulatory Commission is to maintain and promote competition among the service providers in order to ensure high-quality telecommunication services. Representatives from the Bangladesh Telecommunication Regulatory Commission believe that the Bangladesh Telecommunication Regulatory Commission is the primary agency responsible for the promotion of competition in the sector, as it has specialized knowledge of technical aspects of the sector. The Bangladesh Competition Commission maintains that section 21 of the Competition Act, 2012, on the prohibition of combinations authorizes the Bangladesh Competition Commission to approve or forbid mergers and acquisitions in the telecommunications sector.

Energy

68. For the energy sector, section 22 of the Bangladesh Energy Regulatory Commission Act states that among the functions of this Commission are "(h) to encourage to create a congenial atmosphere to promote competition amongst the licencees". Bangladesh Energy Regulatory Commission representatives claim it has the primary responsibility to evaluate mergers of energy companies. There have been no discussions with the Bangladesh Competition Commission with respect to possible overlaps in the functions of both.

Securities and Exchange Commission

69. Under section 8(2) (h) of the Securities and Exchange Commission Act of 1993, the Bangladesh Securities and Exchange Commission has the authority to regulate the holding of shares of stocks, takeovers and acquisition of companies. Bangladesh Securities and Exchange Commission representatives recognize that the Bangladesh Securities and Exchange Commission and the Bangladesh Competition Commission have overlapping tasks with respect to mergers and acquisitions of listed companies, but operations involving other companies are under the jurisdiction of the Bangladesh Competition Commission (section 21 Competition Act, 2012). The Bangladesh Competition Commission maintains that section 8(2) (h) of the Securities and Exchange Commission Act only authorizes the Bangladesh Securities and Exchange Commission to "deal with acquisition and control issues" and does not authorize the Bangladesh Securities and Exchange Commission to approve or forbid merger cases.

Arrangements with sectoral regulators

70. The Bangladesh Energy Regulatory Commission, the Bangladesh Telecommunication Regulatory Commission and the Bangladesh Securities and Exchange Commission have acknowledged the Bangladesh competition regime and the Bangladesh Competition Commission in particular, although they were not extensively familiar with the functions and duties of the Bangladesh Competition Commission or the broad scope of the Competition Act, 2012. According to interview findings, the Bangladesh Competition Commission and sectoral regulators recognize that they are not competitors but partners that should work together for the common good. Where jurisdictional issues arise, the three agencies noted that these should be resolved through dialogue, without diluting their respective mandates.

71. Section 14 of the Competition Act, 2012, details the procedure for the exchange of opinions between the Bangladesh Competition Commission and statutory bodies. When a person raises an issue that a court proceeding or decision of the statutory authority would be contrary to any of the provisions of the Competition Act, 2012, then such statutory authority may, on its own motion, refer the issue to the Bangladesh Competition Commission (and suspend its own proceedings). The Bangladesh Competition Commission must act on the referral within 60 days. A counterpart procedure may be triggered against proceedings or decisions of the Bangladesh Competition Commission alleged to contravene laws implemented by other statutory bodies.

72. In line with section 14 of the Competition Act, 2012, the Bangladesh Competition Commission has prepared a draft Bangladesh Competition Commission (Meetings and Miscellaneous Activities) Regulation 2022, which provides for the establishment of an Advisory Committee consisting of members from ministries, the Commission and other regulatory bodies. The Bangladesh Competition Commission intends to utilize this regulation to coordinate and share information among different ministries and regulatory bodies in Bangladesh. This initiative is a positive step towards developing a relationship of consultation and cooperation between sectoral regulators and the Bangladesh Competition Commission when anticompetitive cases involve the regulated sectors at stake, for better appreciation of their mandates and to clarify jurisdiction. The coexistence of sectoral regulators with the Bangladesh Competition Commission could be further improved through a structured cooperation framework, namely memorandums of understanding providing for regular dialogue, promoting improved mutual understanding of respective mandates, encouraging harmonization between sector-specific regulation and competition legislation and establishing consultations in the assessment of competition issues in regulated sectors.

IV. Role of competition in the promotion of cottage enterprises, microenterprises and small and medium-sized enterprises in Bangladesh

A. Importance of cottage enterprises, microenterprises and small and medium-sized enterprises and challenges faced

73. Cottage enterprises, microenterprises and small and medium-sized enterprises make up 99.9 per cent of all enterprises in Bangladesh.[12] The Small and Medium Enterprise Foundation reports that there are approximately 7.8 million cottage enterprises, microenterprises and small and medium-sized enterprises in the country. These enterprises play a crucial role in the creation of jobs as they are generally more labour-intensive than bigger enterprises. Cottage enterprises, microenterprises and small and medium-sized enterprises employ 86 per cent of the labour force outside of agriculture and the public sector and contribute 25 per cent to the country's GDP.[13]

74. Recognizing the importance of cottage enterprises, microenterprises and small and medium-sized enterprises to the Bangladesh economy, in 2019 the Ministry of Industries issued a policy on small and medium-sized enterprises to help strengthen the cottage enterprises, microenterprises and small and medium-sized enterprises sector, by enhancing efficiency, improving the business environment, providing easy access to finance, ensuring better marketing facilities, upgrading technology and innovative capabilities and creating employment opportunities. The Government targets increasing the sector's contribution to the country's GDP to 32 per cent, to help implement the country's development goals.

75. The policy on small and medium-sized enterprises identifies the Bangladesh Small and Cottage Industries Corporation and the Small and Medium Enterprise Foundation as the organizations responsible for the "overall implementation of strategic goals and action plans" described in the policy. Both also have the duty to create an effective supportive environment to accelerate the development of the sector. To avoid the duplication of efforts, these organizations are expected to coordinate with different government and non-government organizations.

76. Most cottage enterprises, microenterprises and small and medium-sized enterprises in Bangladesh are informal and unregistered with the Government. In 2019, the World Bank reported that 90 per cent of microenterprises and 95.5 per cent of small enterprises in

[12] Asian Development Bank, 2021, *Asia Small and Medium-Sized Enterprise Monitor 2021: Volume I – Country and Regional Reviews*, Manila, p. 45.

[13] Bangladesh, Ministry of Industries, [Small and Medium Enterprise] SME Policy 2019.

Bangladesh were providing informal services domestically.[14] This informality hampers access to financing for these enterprises, due to their low capitalizations, insufficient assets and the rate at which these businesses close down.

77. The challenges were exacerbated by the COVID-19 pandemic. Around 50 per cent of cottage enterprises, microenterprises and small and medium-sized enterprises experienced either permanent or temporary closures, with the fashion and clothing sector having the highest share.[15] Despite the high economic growth of Bangladesh, 78 per cent of small and medium-sized enterprises still suffered a cash shortage, 57 per cent experienced temporary exit, and 50 per cent faced a combination of both.[16]

78. To provide support during the pandemic, the Government provided a total of US$2.36 billion as working-capital facilities, half of which was for refinancing schemes.[17] It was however reported that only 0.4 per cent of firms received support from banks due to the lack of awareness of the available financial schemes.

B. Competition and cottage enterprises, microenterprises and small and medium-sized enterprises

79. Competition law and policy are important to cottage enterprises, microenterprises and small and medium-sized enterprises. A competitive business environment prevents larger operators from hindering innovation and preventing more affordable and better quality products and services produced by cottage enterprises, microenterprises and small and medium-sized enterprises. Open market competition benefits both operators of cottage enterprises, microenterprises and small and medium-sized enterprises and consumers, especially strengthening the resilience and supporting the post-pandemic recovery of cottage enterprises, microenterprises and small and medium-sized enterprises.

80. It is relevant to enhance the post-crisis competitiveness of cottage enterprises, microenterprises and small and medium-sized enterprises, designing policies that will enable them to be more sustainable, efficient and resilient after the pandemic. Competition authorities, such as the Bangladesh Competition Commission, have the tools to ensure that competition policy and law support and do not hinder this objective.

81. Despite the Bangladesh Competition Commission's initial efforts to collaborate with partners on these issues, interview findings indicate that its involvement in the design of the policies at stake is limited and done on an ad hoc basis. Many cottage enterprises, microenterprises and small and medium-sized enterprises and related organizations are still unaware of the Competition Act, 2012, and the Bangladesh Competition Commission, or unsure of whether or how competition law applies to or benefits them. The few familiar with them do not consider competition a priority.

82. The Bangladesh Competition Commission needs to continue raising awareness among public and private stakeholders related to cottage enterprises, microenterprises and small and medium-sized enterprises about how competition law and regulation affects them. Small firms need to understand when the Competition Act, 2012, applies to them, the benefits of competition policy for cottage enterprises, microenterprises and small and medium-sized enterprises, and how they can actively utilize the Competition Act, 2012, for their benefit. The Bangladesh Competition Commission may also consider establishing cooperation in consultation with the Small and Medium Enterprise Foundation and the Bangladesh Small and Cottage Industries Corporation to ensure that competition principles

[14] World Bank, 2019, *Financing Solutions for Micro, Small, and Medium Enterprises in Bangladesh*, Washington, D.C., p. 2.

[15] UNCTAD, 2022, *The COVID-19 Pandemic Impact on Micro, Small and Medium Sized Enterprises* (United Nations publication, Geneva), p. 15.

[16] Asian Development Bank, 2021, The impacts of the COVID-19 pandemic on micro, small, and medium enterprises in Asia and their digitalization responses, ADBI Working Paper Series No. 1241, p. 9.

[17] International Finance Corporation, 2020, *Business Pulse Survey: Impact of COVID-19 on MSMEs in Bangladesh*, Washington, D.C., Introduction, p. 13.

are considered in the design of policies related to cottage enterprises, microenterprises and small and medium-sized enterprises.

83. The Bangladesh Competition Commission can continue to familiarize itself with the concerns of the small and medium-sized enterprise sector by establishing small and medium-sized enterprise-specific consultation mechanisms, to identify new ideas and issues for consideration and help promote competition advocacy to the small and medium-sized enterprise community. Doing so will also help the Commission and the stakeholders related to cottage enterprises, microenterprises and small and medium-sized enterprises determine if block exemptions for specific types of agreements and other practices of cottage enterprises, microenterprises and small and medium-sized enterprises are necessary.

V. Policy recommendations

A. Recommendations for the Government

Proposals for amending the competition law

84. The Competition Act, 2012, may be complemented as follows:

(a) **Section 15 on anticompetitive agreements**: (i) identify the legal standards for the assessment of the anticompetitive agreements listed under sections 15(2) and 15(3); (ii) clearly distinguish between agreements that are per se prohibited and those that fall under the rule of reason; (iii) clarify that the list of examples of anticompetitive agreements are non-exhaustive and can be expanded or introduce a catch-all provision for anticompetitive agreements not captured here, and consider using expressions such as “among other possibilities”, “in particular”, “among others”, “other cases with an equivalent effect”; and (iv) clarify in secondary legislation that anticompetitive agreements with overall insignificant market share are of minor importance, being exempted under the *de minimis* concept.

(b) **Section 16 on abuse of dominant position**: (i) identify the legal standards for the assessment of the abuse of dominant conduct; (ii) consider revising the general prohibition of the abuse of a dominant position adding a non-exhaustive list of examples; (iii) discuss whether a rebuttable presumption of dominance based on a specific market share threshold should be introduced; and (iv) consider adopting guidelines as to how the Bangladesh Competition Commission will assess market power and the types of factors to include.

(c) **Section 21 on consolidation**: (i) consider introducing a mandatory requirement for notification of mergers; (ii) consider introducing thresholds for notifiable mergers; (iii) consider including a reasonable binding time frame for merger review; (iv) consider including a provision on the power of the Bangladesh Competition Commission to approve a concentration subject to conditions, impose administrative penalties for failure to file a notification for notifiable mergers and unwind or divest a merger that is ex post found to infringe the prohibition test and the effects thereof cannot be fixed by any conditions; and (v) consider moving the provision on consolidations to chapter III to clarify that the violation of such provision will also be subject to the administrative penalties under section 20 of the Competition Act, 2012.

(d) **Section 17 on pre-inquiry procedure**: consider including a time frame for pre-inquiries to prevent legal uncertainty for the subject(s) of the pre-inquiry.

85. It is recommended that the Competition Act, 2012, be amended to address the gaps and other issues identified in the present report, as follows:

(a) The scope of the law in relation to regulated sectors and the interaction between the Commission and sector-specific regulators, when applicable;

(b) The objective requirements for the appointment of the Commission and the enhanced transparency of the selection process;

(c) The restrictions on the operational autonomy of the Commission and the prerogatives given to the Ministry of Commerce with regard to the decision-making powers of the Commission, including the appeal of the Commission's decisions to the Ministry of Commerce, which may negatively affect the independence of the Commission.

(d) The need for additional investigative tools for a more effective law enforcement the Commission, such as inspections of business premises and leniency;

(e) The option of including a provision on private enforcement if such a course of action is not available under civil laws.

86. The drafting of these amendments should be preceded by a comprehensive study to examine the economic and legal aspects of the competition regime, based on the requirements of the contemporary Bangladesh social, economic and political contexts.

Institutional framework and resources

87. Increase the budget of the Bangladesh Competition Commission to optimal levels, comparing with sectoral regulators, since the Commission mandate cuts across all sectors and is wider than the regulators' scope. The funding increase could come from Government grants and a new statutory regime that allows the Commission to receive funds from regulated sectors.

88. Substantially increase the salaries for Commission personnel to support staff motivation and retention, and for improved reputation of the Commission as an employer. The Government should also consider exempting Commission personnel from the practice of following a 3-year maximum tenure in one government agency.

89. To allow more flexibility and increased efficiency of service delivery, enable the Commission to exercise independence to vary working tools such as operational guidelines, strategic programmes and organizational structure without Ministry of Commerce endorsement.

B. Recommendations for the Bangladesh Competition Commission

90. Promptly publish guidelines for merger control, abuse of dominance, horizontal and vertical agreements, and sanctions to increase legal certainty, facilitate compliance and promote competition.

91. Ensure that market definition, the assessment of market power and anticompetitive analysis tools follow international best practices, namely through the drafting of guidance also used in the reasoning of decisions.

92. Develop a strategic plan identifying annual or biannual priority activities.

93. Consider adopting a formal procedure clearly separating the investigative from the decision-making functions of the Bangladesh Competition Commission.

94. Strengthen the existing ICT wing and develop the automation of complaint forms, applications and workflows; electronic documentation of proceedings and archives; and the creation of an electronic library.

95. Engage sectoral regulators in discussions for better appreciation of the respective mandates, to clarify jurisdiction, and establish structured cooperation through memorandums of understanding (with the Bangladesh Telecommunication Regulatory Commission, the Bangladesh Energy Regulatory Commission and the Bangladesh Securities and Exchange Commission) to promote harmonization in the treatment of competition issues in the regulated sectors in sectoral legislation.

96. Develop a competition culture among different stakeholders, in cooperation with public and private partners through nationwide awareness programmes (meetings, seminars, workshops, awareness-raising through electronic and print media, among other activities) and establish relationships to advocate for competition, in particular with business communities and media organizations.

97. Continue raising awareness among public and private stakeholders related to cottage enterprises, microenterprises and small and medium-sized enterprises about the benefits of competition. Consider establishing cooperation with the Small and Medium Enterprise Foundation and the Bangladesh Small and Cottage Industries Corporation to ensure that the Bangladesh Competition Commission is consulted in the design of policies related to cottage enterprises, microenterprises and small and medium-sized enterprises.

98. Continue to familiarize itself with the challenges of cottage enterprises, microenterprises and small and medium-sized enterprises, by establishing specific consultation mechanisms to gather a dedicated perspective, gather new ideas and issues to consider, and launch competition advocacy campaigns with the community of cottage enterprises, microenterprises and small and medium-sized enterprises.

99. Bangladesh Competition Commission internship programmes may encourage students to pursue studies or future careers in competition law and economics.

C. Recommendations for the Government and the Bangladesh Competition Commission

100. Provide tailored training activities on competition, and training of trainers to staff, commissioners, other officials and magistrates (those handling appeals relating to Bangladesh Competition Commission decisions), sectoral regulator staff and practitioners on a regular basis. These activities may include:

(a) Consultative workshops for the formulation of rules and regulations, legal instruments, policy documents and guidelines for effective development and implementation of the Competition Act, 2012.

(b) Staff exchanges or secondment programmes with other competition authorities, international organizations and development partners.

(c) Continued participation in different trainings activities, seminars, workshops where participants can learn from the experiences and other practices of other matured competition regimes.

101. The Commission should work with the Government to establish competition law and policy courses at local universities to improve knowledge.

D. Recommendations for the judiciary

102. The judiciary should consider attending workshops on competition law enforcement to interact with other judges handling competition issues and thus enhance and sustain such knowledge and skills.