



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY: BANGLADESH



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ACRONYMS/ABBREVIATIONS

BCA	Bangladesh Competition Act
BCC	Bangladesh Competition Commission
BCSIR	Bangladesh Council of Scientific and Industrial Research
BIDA	Bangladesh Investment Development Authority
BERC	Bangladesh Energy Regulatory Commission
BITAC	Bangladesh Industrial Technical Assistance Centre
BPC	Business Promotion Council
BSEC	Bangladesh Securities and Exchange Commission
BSCIC	Bangladesh Small and Cottage Industries Corporation
BTRC	Bangladesh Telecommunications Regulatory Commission
BTRCA	Bangladesh Telecommunications Regulatory Commission Act of 2001
CMSMEs	Cottage, Micro, Small and Medium Enterprises
ICT	Information and Communications Technology
MFIs	Microfinance Institutions
MOC	Ministry of Commerce
MOF	Ministry of Finance
MOI	Ministry of Industries
PP2041	Perspective Plan of Bangladesh 2021-2041
SDGs	Sustainable Development Goals
SMEF	SME Foundation
UNCTAD	United Nations Conference on Trade and Development

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1. FOUNDATIONS AND HISTORY OF COMPETITION POLICY IN BANGLADESH

1.1 Introduction

The UNCTAD Voluntary Peer Review of the Competition Law and Policy of Bangladesh report is based on information gathered during a fact-finding mission to Bangladesh carried out in March 2022 and on current information available from various sources, including Government Ministry websites.

1.2 Historical, social, political, and economic context

1.2.1 Historical and social context

Bangladesh is a country in the north-eastern part of Southeast Asia. It shares land borders with India to the north, west, and east, and Myanmar to the southeast, while in the south of Bangladesh lies the Bay of Bengal.

Bangladesh covers an area of 148,480 square kilometers with a population of approximately 163.7 million people in 2020.¹

1.2.2 Political context

Following a nine-month war with Pakistan, Bangladesh emerged as an independent country in December 1971. Since 1991, Bangladesh has had a unitary parliamentary form of government with separate judicial and executive branches.²

The Prime Minister leads the Government of Bangladesh, while the President serves as the ceremonial head of state.³ As of April 2022, the current Prime Minister is Sheikh Hasina Wazed.

The highest court in the country is the Supreme Court, followed by the High Court and Appellate Divisions.⁴

The Constitution of Bangladesh declares equality as a fundamental state policy. Pursuant to this policy, the State shall endeavor to ensure equality of opportunity to all citizens, adopt effective measures to remove social and economic inequality, ensure the equitable distribution of wealth and of opportunities among citizens in order to attain a uniform level of economic development throughout the Republic, and ensure the equality of opportunity and participation of women in all spheres of national life.⁵

1.2.3 Economic context

Bangladesh has recorded remarkable growth from the time it gained independence.⁶ When Bangladesh became independent in 1971, it had the tenth lowest per capita GDP in the world. 50 years later, it has become one of the fastest-growing economies in the world, partly attributable to a demographic dividend, strong ready-made garment (RMG) exports, and stable macroeconomic conditions.

The country has consistently reported GDP growth rates of above 6 per cent since FY 2010-11 to up until the COVID-19 outbreak (Figure 1).

¹ World Bank Data. See <https://data.worldbank.org/indicator/SP.POP.TOTL?locations=BD>.

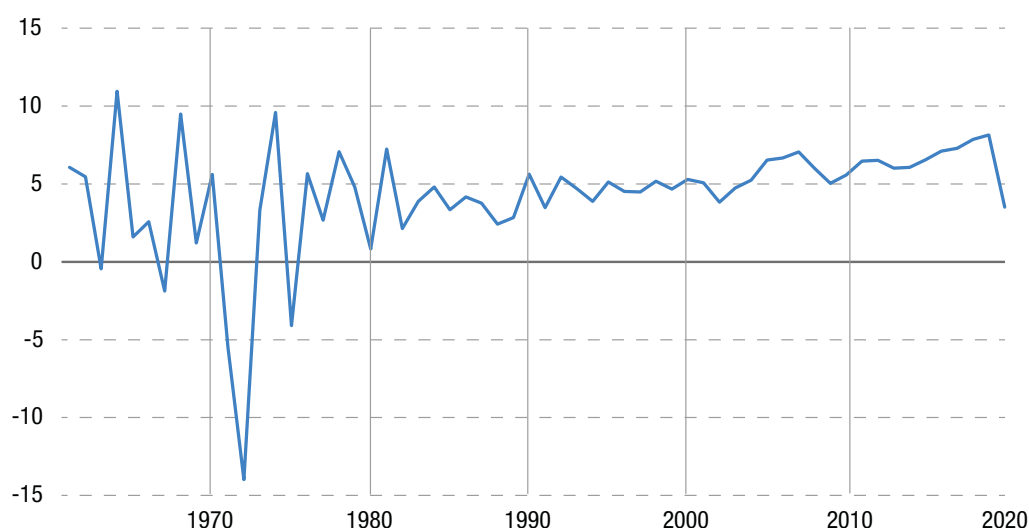
² The Constitution of the People's Republic of Bangladesh, Articles. 1, 23 & 65.

³ The Constitution of the People's Republic of Bangladesh, Part IV, Chapters 1 and II.

⁴ The Constitution of the People's Republic of Bangladesh, Part VI, Chapter I

⁵ The Constitution of the People's Republic of Bangladesh, Part II, Article 19.

⁶ The country's GDP growth slowed down to 3.4 per cent in 2020 due to the outbreak of coronavirus (COVID-19).

Figure 1 Bangladesh Annual GDP Growth (1961 – 2020)

Source: World Bank

GDP growth has since rebounded in 2021 and the economy is expected to continue growing strongly in the following years, at estimated rates of 6.9 per cent and 7.1 per cent in 2022 and 2023, respectively.⁷

Bangladesh has been proclaimed by the World Bank as a global “model for poverty reduction”,⁸ acknowledging the remarkable reduction in poverty rates from 43.5 per cent to 20.5 per cent between 1991 and 2019, while extreme poverty declined to around 5.6 per cent in 2019.⁹

Since 1973, Bangladesh has been adopting 5-year medium-term plans to guide the country’s development efforts. Under the 7th 5-year plan (2010-2021 Strategic Plan), Bangladesh transitioned from its low-income status and became a lower-middle-income country in 2015.¹⁰ Bangladesh is also on track to graduate from the United Nations’ Least Developed Country (LDC)

status in 2026.¹¹ In 2020, the country had per capita Gross National Income of US\$ 2, 030.¹²

Bangladesh’s economic growth, however, came with an increase in inequality in the distribution of income among individuals and households in the country, with the country’s GINI coefficient increasing from 25.9 to 39.5 between 1983 and 2018.¹³

Under “Vision 2041”, the Bangladesh Government aims to eliminate poverty and reach upper middle-income country status by 2031, and high-income country status by 2041, achieving the goal of a “Golden Bangladesh” on the 70th year of its independence. Converting Vision 2041 into a development strategy,

⁷ Asian Development Outlook 2022: Mobilizing Taxes for Development, April 2022. Available at <https://www.adb.org/sites/default/files/publication/784041/ado2022.pdf>

⁸ World Bank Press Release, “Globally Bangladesh is a Model for Poverty Reduction: World Bank”, 29 January 2020. See <https://www.worldbank.org/en/news/press-release/2020/01/29/globally-bangladesh-is-a-model-for-poverty-reduction-world-bank>.

⁹ Asian Development Bank Poverty Data: Bangladesh <https://www.adb.org/countries/bangladesh/poverty>.

¹⁰ WB Update Says 10 Countries Move Up in Income Bracket. Available at <https://www.worldbank.org/en/news/press-release/2015/07/01/new-world-bank-update-shows-bangladesh-kenya-myanmar-and-tajikistan-as-middle-income-while-south-sudan-falls-back-to-low-income>

¹¹ Graduation of Bangladesh, the Lao People’s Democratic Republic, and Nepal from the Least Developed Country Category. Available at: <https://www.un.org/development/desa/dpad/2021/graduation-of-bangladesh-lao-peoples-democratic-republic-and-nepal-from-the-ldc-category/#:~:text=On%2024%20November%202021%2C%20the,the%20least%20developed%20country%20category>. The Committee for Development Policy found that “a five-year preparatory period would be necessary for the three countries recommended for graduation at the 2021 triennial review to effectively prepare for a smooth transition, as those countries would need to prepare for graduation while planning for a post-COVID-19 recovery and implementing policies and strategies to reverse the economic and social damage incurred by the COVID-19 shock”.

¹² <https://data.worldbank.org/country/bangladesh?view=chart>

¹³ <https://knoema.com/atlas/Bangladesh/topics/Poverty/Income-Inequality/GINI-index>. Bangladesh aims to reduce its Palma Ratio from 2.93 to 2.70. See page 41 of the Perspective Plan of Bangladesh 2021-2041.

the Government designed a 20-year plan called the “Vision 2041 a Reality: Perspective Plan of Bangladesh 2021-2041” (“PP2041”), where the Ministry of Planning set as a target for 2041 real GDP growth of 9.9 per cent, extreme poverty ratio of less than 1.0 per cent; reducing poverty to less than 3.0 per cent.¹⁴

PP2041 provides for the transformation of the rural agrarian economy to a primarily industrial and digital economy, building efficient energy and communications infrastructure, ensuring that Bangladesh is resilient to climate change and other environmental challenges, and establishing Bangladesh as a knowledge hub country.

PP2041 also highlights the importance of access to finance for poverty reduction, and the need to support small urban and rural enterprises in manufacturing and services. In fulfilling the objectives under the plan, PP2041 mentions the role of competition in several sections:

- Bangladesh has to reorient its economic policies to prepare for global competition once it loses its LDC status. International competition induces enterprises to automate their processes, impacting employment.
- East Asian economies that have crossed the high-income threshold acquired characteristics that included a strong competition among firms.
- There is a need to continue fostering competition among the entities operating in the power and energy sectors. The distribution of electricity in Bangladesh is a state monopoly. As Bangladesh develops and becomes an upper-middle-income country, it will be appropriate to explore options for private distribution of electricity to promote efficiency and competition.
- The PP2041 strategy includes gradually privatizing or outsourcing operations in marine ports to introduce more competition and increase output.
- Competition can be conducive to supporting the healthy growth of the agricultural value chain.

¹⁴ Bangladesh Planning Commission, Ministry of Planning, Perspective Plan of Bangladesh 2021-2041.

1.2.4 Impact of COVID-19 in Bangladesh

Similar to many countries, Bangladesh is suffering from the socio-economic impact of the COVID-19 outbreak. The country’s GDP growth slowed down to 3.51 per cent in 2020 due to the pandemic.¹⁵

The Government of Bangladesh has been implementing Eighth Five Year Plan (8FYP) to cover the period of July 2020 to June 2025. The 8FYP is centered on six core themes:¹⁶

1. The country’s rapid recovery from COVID-19;
2. GDP growth acceleration, employment generation, and rapid poverty reduction with a broad-based strategy of inclusiveness;
3. A sustainable development pathway resilient to disaster and climate change
4. Sustainable use of natural resources and successful management of the inevitable urbanization transition
5. Development and improvement of critical institutions
6. Attaining Sustainable Development Goal (SDG) targets and coping up the impact of LDC graduation. The main objective of this 8FYP is to start the implementation of PP2021-2041 in a way that it brings Bangladesh closer to the goals of achieving Upper Middle-Income Country (UMIC) status by 2031 and attaining SDGs targets through managing the challenges of LDC graduation, which will also help to eliminate extreme poverty by 2031.

¹⁵ Bangladesh Economic Review 2021.

¹⁶ Graduation of Bangladesh, the Lao People’s Democratic Republic, and Nepal from the Least Developed Country Category. Available at: <https://www.un.org/development/desa/dpad/2021/graduation-of-bangladesh-lao-peoples-democratic-republic-and-nepal-from-the-ldc-category/#:~:text=On%2024%20November%202021%2C%20the,the%20least%20developed%20country%20category>. The Committee for Development Policy found that “a five-year preparatory period would be necessary for the three countries recommended for graduation at the 2021 triennial review to effectively prepare for a smooth transition, as those countries would need to prepare for graduation while planning for a post-COVID-19 recovery and implementing policies and strategies to reverse the economic and social damage incurred by the COVID-19 shock”.

1.3 Evolution of competition law and policy in Bangladesh

Before Bangladesh became independent in 1971, competition policy in the country consisted of the Monopolies and Restrictive Trade Practice (Control and Prevention) Ordinance (MRTPO) of 1970¹⁷ and other economic policies in Bangladesh for governing market practices and actions of market players. The MRTPO was created to minimize the dominance in market power of certain groups of companies, however, state monopolies were excluded from the coverage of the ordinance.¹⁸ Aside from the MRTPO, principles of competition law were promoted by the Government of Bangladesh through the Special Power Act of 1974, Procurement Regulation 2003, and the Public Procurement Act of 2006.¹⁹

The MRTPO was never implemented and competition in the country remained largely weak.²⁰ Stakeholders noted that some of the most common anti-competitive practices in Bangladesh included collective price fixing, bid rigging, and monopolizations.²¹ There

were also no recorded government-initiated studies, stakeholder consultations, or parliamentary debates on the topic of competition law.²² Field surveys by civil society organizations in 2006 found that most consumers, while unaware of competition law, perceived a prevalence of anticompetitive practices in Bangladesh.²³ Civil society organizations, business chambers, and think tanks²⁴ pushed for a competition law to address these issues, with a draft bill first proposed in 1996 and another one in 2008.²⁵ Consultations by the Ministry of Commerce found that many private stakeholders had reservations about the proposed bills, including concerns that the proposed Competition Act was created by foreign experts and would not adequately address the issues specific to Bangladesh's economic context.²⁶

Bangladesh underwent three phases of economic policies that shaped the competitive environment before the enactment of the Bangladesh Competition Act of 2012 (BCA).²⁷ Between 1972 and 1980, public sector institutions dominated the market due to the nationalization of most industries, resulting in restricted trade and import substitution.²⁸ From 1980 and 1991, Bangladesh introduced moderate liberalization, resulting in the privatization of industries.²⁹ From 1991 onwards, the economy of Bangladesh went through a phase of wider liberalization and privatization, directly attributed to the Structural Adjustment Program of the International Monetary Fund (IMF) and the World

¹⁷ Bertelsmann Stiftung's Transformation Index (BTI) 2012, Bangladesh Country Report p. 14, https://bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2012_BGD.pdf

¹⁸ Sharmin Tania and Afroza Bilkis, 'Competition Law in Bangladesh: Towards Achieving Inclusive Sustainable Development' (2021) 21 Australian Journal of Asian Law 159, 163.

¹⁹ The Special Power Act of 1974 deems hoarding a 'prejudicial activity' that is punishable by law. Meanwhile, the Procurement Regulation of 2003 and the Public Procurement Act of 2006 have the objective of promoting free and fair competition through provisions on open tendering methods and public announcements. See Tania and Bilkis (n 17) 163.

²⁰ Tania and Bilkis explained that the MRTPO came into effect on 17 August 1971, amidst a 9-month war with Pakistan that led to the independence of Bangladesh. See Md Mahabubur Rahman and Mohammad Rafiqul Islam (2020), 'Competition Policies and Laws in Bangladesh: a tool to Redress the suffering of the citizen as well as to protect the interest of the businessmen' 1 *International Journal of Multidisciplinary Sciences and Advanced Technology* 5, 8. See also p. 14, https://bti-project.org/fileadmin/api/content/en/downloads/reports/country_report_2012_BGD.pdf.

²¹ Afroz, T. (2012), Challenges in Implementation of Competition Law in Bangladesh: Role of Media, 11-12. The Dhaka Chamber of Commerce & Industry also that there is a lack of research and studies on the competitive environment of Bangladesh that could be used to forecast future trends and behaviours, see Dhaka Chamber of Commerce & Industry, 'Anti-monopoly competition & Anti-trust policies' (2019) Economic Policy Paper, https://dhakachamber.com/storage/economic-policies/June2019/wDIhvX8Kg8KCoJIR83iC.pdf_to_Redress_The_Suffering_of_The_Citizen_As_Well_As_to_Protect_The_Interest_of_The_Businessmen

²² Tania & Bilkis (2021) 163.

²³ Tania & Bilkis (2021) 164.

²⁴ Including India-based institution CUTS International, Bangladesh Enterprise Institute, Unnayan Shamnnay (a non-profit and nongovernmental research organization).

²⁵ Mamun, A. (2015), Competition and Market Governance in Bangladesh: A Critical Analysis of the Competition Act, 2012, Northern University Bangladesh, p. 23 https://www.academia.edu/18165667/Competition_and_Market_Governance_in_Bangladesh

²⁶ Mamun, A. (2015), Competition and Market Governance in Bangladesh: A Critical Analysis of the Competition Act, 2012, Northern University Bangladesh, p. 23 https://www.academia.edu/18165667/Competition_and_Market_Governance_in_Bangladesh

²⁷ Raihan (2005: 205-206) as cited in Sharmin Tania and Afroza Bilkis, 'Competition Law in Bangladesh: Towards Achieving Inclusive Sustainable Development' (2021) 21 Australian Journal of Asian Law 159, 160

²⁸ Raihan (2005: 205-206) as cited in Sharmin Tania and Afroza Bilkis, 'Competition Law in Bangladesh: Towards Achieving Inclusive Sustainable Development' (2021) 21 Australian Journal of Asian Law 159, 160

²⁹ Raihan (2005: 205-206) as cited in Sharmin Tania and Afroza Bilkis, 'Competition Law in Bangladesh: Towards Achieving Inclusive Sustainable Development' (2021) 21 Australian Journal of Asian Law 159, 160

Bank.³⁰ Bangladesh's adoption of a competition law is said to have been triggered by the country's commitment to integrating with global trade and the structural reforms promoted by the IMF and the World Bank.³¹

The BCA was finally enacted on 21 June 2012 and brought into force on the same day. It was adopted in view of the "gradual economic development of the country" which made it "expedient and necessary" to promote and ensure competition and prevent anti-competitive behaviour.³² The BCA explicitly repealed the MRTPO.³³

There was a lack of trust that a new Competition Act would even be implemented effectively as the MRTPO was never invoked by government or private stakeholders. Due to the lengthy administrative processes within the Government, the Commission was not organized immediately after the enactment of the BCA. The Ministry of Commerce appointed the first Chairperson and 3 staff members in April 2016. Two Commission Members were thereafter appointed in August 2016. It took another two years to appoint the third Commission Member. Stakeholders consider that the Bangladesh Competition Commission only became functional only in 2018.³⁴ A new Chairperson was appointed in 2019.

1.4 Objectives of the Bangladesh Competition Act

The objectives of the BCA are "to promote, ensure and sustain [a] congenial atmosphere for the competition in trade, to prevent, control and eradicate

collusion, monopoly and oligopoly, combination or abuse of dominant position or activities adverse to the competition." This provision reflects the historical context behind the adoption of the BCA as a move to further greater integration with the world trade system.³⁵ There is no mention of the welfare standard that will be followed in implementing the law.

The BCA prescribes the institutional framework of the Bangladesh Competition Commission (BCC). It provides for the establishment of the Commission, including its secretariat, its operations, funding, management, and accountability. It also details the practices that the BCC would deal with.

The BCA prohibits all agreements and abuse of dominance that are likely to cause an adverse effect on competition or creates a monopoly or oligopoly in the market.

Section 22 of the BCA grants extraterritorial jurisdiction to BCC. The Commission may inquire into an anti-competitive act committed outside of Bangladesh by person or enterprise which causes an adverse effect on the relevant market, in accordance with the laws and rules of "both countries".

The BCA does not itself relate to any legislation that would deal with consumer protection, even though competition and consumer protection are related, as demonstrated by BCC's power to "review actions taken under any other law for consumer rights protection and implementation."³⁶ The BCC has however not been involved in any consumer rights protection case.

³⁰ Raihan (2005: 205-206) as cited in Sharmin Tania and Afroza Bilkis, 'Competition Law in Bangladesh: Towards Achieving Inclusive Sustainable Development' (2021) 21 Australian Journal of Asian Law 159, 160

³¹ Lee (2007: 29) as cited in Sharmin Tania and Afroza Bilkis, 'Competition Law in Bangladesh: Towards Achieving Inclusive Sustainable Development' (2021) 21 Australian Journal of Asian Law 159, 160.

³² Bangladesh Competition Act (2012), Preamble.

³³ Bangladesh Competition Act (2012), sec. 46.

³⁴ Tania and Bilkis (n 17) 170. BCC's first judgment passed on 16th May 2018.

³⁵ Tania and Bilkis (n 17) 162

³⁶ Bangladesh Competition Act, Section 8(j).

2. LEGAL FRAMEWORK

2.1 Bangladesh Competition Act

Like other competition laws, the BCA covers (a) anti-competitive agreements in both vertical and horizontal aspects, (b) abuse of a dominant position and (c) control of mergers.

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.” It does not draw a distinction between regulated sectors (i.e., natural monopolies especially those in utility networks such as electricity) and non-regulated sectors.³⁷ 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.”

BCA applies to and binds the Government, since Section 2(m) definition of “enterprises” covers “any person or economic body or a department of the Government, who or which is, or has been, engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of goods, or the provision of services of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiary, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place, but does not include any activity relating to the currency or defense of the Government”.

Section 22 of the BCA provides that “an anti-competition act committed outside of Bangladesh by a person or enterprise which causes an adverse [effect] on the relevant market, the Commission may inquire into the matter in accordance with the laws and rules of both countries.”³⁸ The standard operating procedures for the implementation of this provision is in the process of being drafted.

The BCA does not have a provision for the grant of a block exemption, which exempts (after assessment)

some identified activities in key sectors from competition law.

2.2 Regulations implementing the BCA

Section 43 of the BCA states that the Government may make rules to carry out the BCA. These rules, which must be published in the Official Gazette, govern the legal and administrative systems that will be followed by the BCC, such as the hiring of staff.

On the other hand, Section 44 entrusts BCC to adopt regulations to carry out the purposes of the BCA, 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 the draft regulations prior to finalization. At this time, BCC was drafting Complaints and Judicial Procedure Regulations (“Draft Rules of Procedure”), Mergers and Acquisitions Regulations (“Merger Regulations”), and Bangladesh Competition Commission (Meetings and Miscellaneous Activities) Regulation 2022.

2.3 Anti-competitive agreements

Section 15 of the BCA 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. Many jurisdictions apply different legal standards to the assessment of horizontal and vertical agreements. Horizontal agreements are generally treated more strictly compared to vertical agreements which usually pose less of a threat to competition.³⁹

Section 15(2) provides that the following agreements “shall be deemed to have adverse effect[s] on competition in goods or services if [they]”:

³⁷ Bangladesh Competition Act, Section 3.

³⁸ Bangladesh Competition Act (2012), sec. 22.

³⁹ UNCTAD Model Law. Available at https://unctad.org/system/files/official-document/tdrbpconf9L1_en.pdf.

- (a) directly or indirectly-
 - (i) [determine] abnormal purchase or sale prices; or
 - (ii) determine the deceptive price in all process including bid rigging;⁴⁰
- (b) limits or controls production, supply, markets, technical development, investment, or provision of services;
- (c) shares 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 way[.]”⁴¹

This implies that they are outrightly prohibited, similar to conduct as per se prohibited, not allowing for efficiency claim defenses.

On the other hand, Section 15(3) of the BCA states that the following agreements are deemed to be anticompetitive, “if they have [an] adverse [effect] on competition”:

- (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 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;
- (e) “resale price maintenance” i.e., any agreement to sell goods on condition that the prices to be charged on the resale by the

purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.”⁴²

These agreements are prohibited only if they have an adverse effect on competition, similarly to other laws which follow a rule of reason approach, where the prohibition is conditional on the “effect” of such agreement on competition in the market.

BCC officials interpret the enumeration of anti-competitive agreements 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 anti-competitive agreements at the enforcement stage. BCC officials have expressed a desire to expand the exclusive list to accommodate other conduct, either through the amendment of the BCA or through the issuance of secondary regulations.

The provision lacks a combined market shares threshold for which the agreeing parties are prohibited to the extent of their potential effects in a particular market. It is helpful to establish numerical thresholds and they are easier to comply with compared to other more flexible approaches which require an in-depth understanding of competition. Such a threshold and a condition precedent give a definition of agreements that are considered under the rule of reason approach.

The BCA does not yet provide the framework for block exemptions for specific types of agreements and other practices nor for key economic sectors.

Section 15(4) of the BCA 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.⁴³

Table 1 below lists the prominent cases involving anti-competitive agreements:

⁴⁰ “Bid rigging” is described as: “any agreement which creates favorable condition for the parties to the agreement or, as the case may be, beneficiaries, by reducing competition for bids or adversely affecting the process of bidding.”

⁴¹ Bangladesh Competition Act (2012), sec. 15(1).

⁴² Bangladesh Competition Act (2012), sec. 15(3).

⁴³ Bangladesh Competition Act (2012), sec. 15(4).

Table 1 Cases involving Anti-Competitive Agreements

Horizontal	Vertical
<ol style="list-style-type: none"> 1. President, Bangladesh Association of Construction Industries 2. Mr. Abu Bakkar Siddique vs. Rangs Electronics Ltd. 3. LR Global Bangladesh vs. VIP Asset Management Company Ltd. 	<ol style="list-style-type: none"> 1. BCC vs. Alesha Mart 2. MGH Restaurant vs. Food Panda 3. Bangladesh Steel Re-rolling Mills Ltd. vs. Insurance Development and Regulatory Authority 4. Bangladesh Steel Re-rolling Mills Ltd. vs. Water Transport Cell (WTC) 5. Pacific International vs. Chittagong Customs Clearing and Forwarding Agents' Association 6. BCC vs. E-valy.com 7. BCC vs. Viquarunnessa Noon School & College 8. BCC vs. Rajdhani Ideal School 9. DNS Software Ltd. vs. Robi Axiata and Two Others 10. Barrister M. Saroar Hossain vs. Chairman, Executive Committee, Retired Armed Forces Officer's Welfare Association (RAOWA)

2.4 Abuse of dominant position

The BCA contains a general prohibition of abuse of dominance in Section 16(1) and a declaration of what the BCC considers an exclusive list of related offenses under Section 16 (2):

- “(1) No enterprise shall abuse its dominant position.
- (2) For the purpose of sub-section (1), it shall be deemed an abuse of dominant position if an enterprise –
 - (a) Imposes directly or indirectly unfair or discriminatory condition in purchase or sale of goods or service or discriminatory price or predatory price⁴⁴ in purchase or sale of goods or service;
 - (b) limits or restricts 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 continue to do practices which denies the market access of others;
 - (d) makes 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, other relevant market.

BCC officials have expressed a desire to expand the exclusive list to accommodate other conduct, either through the amendment of the BCA, or through the issuance of secondary regulations.

The BCA defines “dominant position” is defined as a “position of strength enjoyed by an enterprise in the relevant market which enables it to (1) operate independently of competitive forces prevailing in the relevant market; or (2) affect its competitors or consumers or the relevant market in its favour.

While several competition laws contain a market share threshold for the presumption of dominance, this is not required by the BCC. For a young competition regime like Bangladesh, having fixed thresholds for market dominance could help create legal certainty.⁴⁵

In the absence of a market share threshold that triggers a rebuttable presumption of a dominant position in the market, the BCC may consider the possibility of adopting guidelines on how it assesses market power, i.e., what type of factors it takes into consideration instead of market share. Experience shows that given the low level of competition expertise

⁴⁴ Defined by under Section 16(2) as means the sale of goods or provision of services at a price which is below the cost of production of the goods or provision of services with a view to reduce or eliminate competition.

⁴⁵ For further details, see the UNCTAD Model Law on Competition (2010), chap. IV.

in the developing world, this should be considered for the future development of the BCC or used as an alternative to market share, provided that it will not confuse users of the law. Based on interviews, BCC officials intend to incorporate the criteria for determining dominance either in Section 16 of the BCA (through an amendment of the law) or through the issuance of regulations.

The BCA does not provide a standard to determine when market dominance is abused.

In practice, the BCC considers several administrative undocumented factors to establish that a person does or does not have substantial market control in Bangladesh. Interview findings reveal that the BCC has several “points of interest” in evaluating abuse of dominant position cases, such as economic efficiency, innovation, growth, equity, and fairness. The BCC also noted having “presumptive rules on abuse of dominant position”, which involves an evaluation standard based on the “situation” or “merit of the complaints.” The BCC likewise follows the Evidence Act of 1872 governs rules regarding the burden of proof. It is not clear why the preceding practices have not been given legal force under Section 44 of the BCA, which authorizes the BCC to draw up regulations for implementing the BCA. This could establish a clear criterion for testing market dominance at least in the interim.

One prominent abuse of dominance case handled by the BCC is United Dhaka Tobacco Company Ltd. Vs British American Tobacco Bangladesh Ltd. There are other cases currently under investigation, but the BCC has not released details to the public. To date, the BCC has not applied any sanctions or remedies in relation to abuse of dominance.

2.5 Mergers and acquisitions

The legal text on merger control is found under 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”.⁴⁶

Section 21 also mentions that the BCC may approve a combination “on application” after assessing that it will not have an adverse effect on competition. Otherwise, it may forbid the operation.

In line with the BCC's mandate to issue regulations to determine which combinations require its approval,⁴⁷ the BCC is currently preparing the regulations regarding the notification and review process, including the criteria and thresholds for notification, local nexus rules, the deadlines for review, any special investigative processes that apply, and sanctions for non-compliance. The BCA is silent as to the type of merger notification regime that should be followed in Bangladesh – whether it is voluntary or involuntary, or whether notification is required a pre-consummation or post-consummation. Interview findings indicate that the BCC is leaning towards adopting a mandatory pre-merger notification regime.

There is still a need for more clarity, namely more certain provisions as to what constitutes a breach of merger control requirements, specifically as to what combinations would have an adverse effect on competition.

To date, the BCC has not reviewed nor prohibited any mergers; nor it has acted against non-compliance.

Interview findings indicate that the BCC is considering including in the Merger Regulations the following points:

1. Thresholds for the filing of a merger notification, leaving out of scrutiny small companies that seek to grow and improve their efficiency through mergers and acquisitions.
2. A binding requirement and a deadline for the notification of a notifiable consolidation.
3. System of notification of M&As - whether it is voluntary or involuntary, or whether notification is required a pre-consummation or post-consummation.
4. Possible exemptions from merger review for transactions that do not result in durable changes to the market and the grant of temporary authorization conditional to the merger benefits outweighing disadvantages.
5. The length of time to approve or reject the application or approve it on conditions. The lack of a fixed maximum review period may lead the Commission to be seen as the cause of delayed mergers by notifying parties whose interest is to get a decision in the shortest time possible.

⁴⁶ Bangladesh Competition Act, Section 2(h).

⁴⁷ Bangladesh Competition Act (2012)

6. Consequences of failing to notify a notifiable merger.

Persons aggrieved by orders of the BCC in relation to consolidations may apply to the BCC for a reconsideration or appeal to the Government (i.e., the Ministry of Commerce). The Ministry of Commerce currently does not have the technical capacity to review a merger case. Interview findings indicate that the MOC officials are willing to undergo capacity training to handle merger reviews and are considering engaging the Attorney General's Office for legal support.

2.6 Private Enforcement

The BCA does not contain a provision regarding the damages claims through private enforcement. Several stakeholders, including the BCC officials, think that such damages should be considered in the next amendment of the law.

2.7 Consumer protection

Consumer protection laws are designed to ensure the existence of fair competition and the free flow of truthful information in the marketplace. They are designed to prevent businesses that engage in fraud or specified unfair practices from gaining an advantage over competitors and may provide additional protection for the weak and those unable to take care of themselves. It is a law that regulates private relationships between individual consumers and businesses that sell those goods and services.

The Directorate of National Consumers' Right Protection of the Ministry of Commerce (Consumer Protection Directorate) is mandated by the Consumers' Right Protection Act of 2009 to protect the rights of consumers and prevent anti-consumer rights practices. Representatives of the Directorate does not see any concurrent jurisdiction with the BCC. The Directorate's written responses to interview questions indicate that it views its relationship with BCC as "complementary", especially since, like the BCC, it also works under the Ministry of Commerce.

The BCA does not have specific provisions on consumer protection, but the BCC has the power "to review the actions taken under any other law for the consumer rights protection and implementation,"⁴⁸ although it has not handled any case so far.

Interview findings indicate some interest in incorporating the consumer protection functions of the Directorate for Consumer Protection into the BCC, in line with the institutional design of competition agencies in other jurisdictions, such as the Australia Competition and Consumer Commission.

2.7.1 Comparison with the UNCTAD Model Law

This part of the report compares the BCA with the possible substantive elements for a competition law, commentaries, and alternative approaches in existing legislations, as recommended by UNCTAD for a model competition law.

⁴⁸ Bangladesh Competition Act (2012), sec. 8(j).

Table 2 Compatibility of the BCA with the UNCTAD Model Law

No	UNCTAD model law provision	Provision in BCA	Shortcomings	Recommendations
1	Title of the law	Section 1	-	-
2	Objectives or purpose of the law	Preamble	-	-
3	Definitions	Section 2	-	-
4	Scope of applications	Sections 3 and 4	<ul style="list-style-type: none"> Economy-wide with no limitations that provide for concurrent jurisdiction with sectoral regulators. 	<ul style="list-style-type: none"> Clarify the separation of jurisdiction over competition issues in regulated sectors through a Memorandum of Understanding
5	Anti-competitive agreements	Section 15	<ul style="list-style-type: none"> The legal standards for the assessment of the anti-competitive listed under Sections 15(2) and 15(3) are unclear. Exclusive list of prohibited anti-competitive agreements removes the flexibility to identify other possible anti-competitive agreements at the enforcement stage. 	<ul style="list-style-type: none"> Identify the legal standards for the assessment of the anti-competitive agreements listed under Sections 15(2) and 15(3) Clearly distinguish between agreements that are per se prohibited and those that fall under the rule of reason Clarify that the list of examples of anti-competitive agreements are non-exhaustive and can be expanded or introduce a catch-all provision for anti-competitive agreements not caught here. Consider using expressions such as: "among other possibilities", "in particular", "among others", "other cases with an equivalent effect" Clarify in secondary legislation that anti-competitive agreements with overall insignificant market share are of minor importance, being exempted under the de minimis concept.
6	Acts or behaviours constituting an abuse of dominant position of market power	Section 16	<ul style="list-style-type: none"> Exclusive list of conduct considered as abuse of dominant position removes the flexibility to identify other possible conduct at the enforcement stage. Does not provide for market definition or the level of market share that a firm must attain to be considered dominant 	<ul style="list-style-type: none"> Identify the legal standards for the assessment of the abuse of dominant conduct Consider revising the general prohibition of the abuse of a dominant position adding a non-exhaustive list of examples Discuss whether a rebuttable presumption of dominance based on a specific market share threshold should be introduced Consider adopting guidelines as to how BCC will assess market power and the types of factors to include
7	Notification, investigation, and control of mergers.	Section 21	<ul style="list-style-type: none"> Unclear if consolidations are required to be notified to the BCC pre- or post-transaction. The provision does not mention a time frame for the review of an application. Unclear if BCC has the power to (a) approve a concentration subject to conditions; (b) impose administrative penalties for failure to file a notification for notifiable mergers; and (c) 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 	<ul style="list-style-type: none"> Consider introducing a mandatory requirement for notification of mergers Consider introducing thresholds for notifiable mergers Consider including a reasonable binding time frame for merger review Consider including a provision on the power of the BCC to (a) approve a concentration subject to conditions; (b) impose administrative penalties for failure to file a notification for notifiable mergers; and (c) 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

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No	UNCTAD model law provision	Provision in BCA	Shortcomings	Recommendations
7	Notification, investigation, and control of mergers.	Section 21	<ul style="list-style-type: none"> Unlike the provisions on the prohibition of anti-competitive agreements and abuse of dominant conduct which are under Chapter 2, Section 21 on consolidation is found in a separate chapter (Chapter III) which creates confusion as to whether 	<ul style="list-style-type: none"> Consider possible exemptions from merger review for transactions that do not result in durable changes to the market and the grant of temporary authorizations conditional to the merger benefits outweighing disadvantages. 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 BCA.
8	Authorization of or exemption from agreements	N/A	<ul style="list-style-type: none"> The BCA does not yet provide the framework for block exemptions for specific types of agreements and other practices nor for key economic sectors. 	<ul style="list-style-type: none"> Study if block exemptions for specific types of agreements and other practices of CMSMEs are necessary.
9	Some possible aspects of consumer protection	N/A	<ul style="list-style-type: none"> BCA does not have specific provisions on consumer protection, but the BCC has the power "to review the actions taken under any other law for the consumer rights protection and implementation." 	<ul style="list-style-type: none"> Engage the Consumer Protection Directorate in discussions to better appreciate the respective mandates of the two agencies when it comes to consumer protection. Consider clarifying the separation of jurisdiction through a Memorandum of Understanding
10	Investigation procedures	Sections 17-18, 22-23, and 25-26	<ul style="list-style-type: none"> Lack of a timeframe for pre-inquiries to prevent legal uncertainty for the subject/s of the pre-inquiry. Lack of express provisions on dawn raids. Lack of express provisions on leniency programmes for cartel members. 	<ul style="list-style-type: none"> Include a timeframe for pre-inquiries to prevent legal uncertainty for the subject/s of the pre-inquiry. Introduce express provisions on conducting dawn raids. Introduce express provisions on leniency programmes for cartel members.
11	Relationship between competition authorities and sector regulators	Sections 14 and 37	<ul style="list-style-type: none"> Unclear separation of jurisdiction over competition issues in regulated sectors 	<ul style="list-style-type: none"> Clarify the separation of jurisdiction over competition issues in regulated sectors through a Memorandum of Understanding
12	Establishment, functions, and powers of the administering authority	Sections 8, 11, 37, 38, 43, and 44	<ul style="list-style-type: none"> BCC's independence is tempered by provisions that (1) it is bound by directions of the Government; (2) the Government may make rules to carry out the provisions of the BCA; (3) regulations drafted by the BCC have to be approved by the Government; (4) decisions of the BCC are appealable to the Government (Ministry of Commerce); (5) The BCC has to send the minutes of its meetings to the Government within 20 days. 	<ul style="list-style-type: none"> To allow more flexibility and increased efficiency of service delivery, enable the BCC to exercise independence to vary working tools such as operational guidelines, strategic programs, and organizational structure without Ministry's endorsement.
13	Sanctions and remedies	Sections 8(7), 19, and 24	<ul style="list-style-type: none"> Omission of some offences such as breach of a merger condition following conditional approval of a merger. 	<ul style="list-style-type: none"> Provide for the omitted offences as identified in the BCA

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No	UNCTAD model law provision	Provision in BCA	Shortcomings	Recommendations
14	Appeals	Sections 29 and 30	<ul style="list-style-type: none"> The BCC's orders may be reviewed by the BCC or appealed to the Government (Ministry of Commerce, considered to be the BCC's mother agency). As the prosecutor, adjudicator, and reviewer, the BCC may be tempted to confirm its own decisions. Lack of a specialized competition adjudication platform. The status of Commission at the appellate level is not provided for in the BCA but at the very minimum, it should be that of a necessary party in an appeal case. 	<ul style="list-style-type: none"> Consider the possibility of establishing a specialized competition appeals adjudication platform To create certainty and predictability as to what to expect in the proceedings at the Ministry of Commerce, consider clarifying in the BCA the status of the Commission at the appeals level.
15	Actions for damages	N/A	<ul style="list-style-type: none"> No provision regarding the damages claims through private enforcement. 	<ul style="list-style-type: none"> Consider the option of including a provision on private enforcement if such a course of action is not available under civil laws.

Source: UNCTAD⁴⁹

It can be seen from Table 2 that the BCA is only fully aligned with 3 out of 15 recommendations on substantive possible elements for a competition law, commentaries, and alternative approaches in existing legislation, as provided by UNCTAD.

Furthermore, 19 shortcomings have been identified related to the recommendations on substantive possible elements for a competition law, commentaries and alternative approaches in existing legislation provided by UNCTAD. 26 recommendations have been put forward in the present review.

⁴⁹ UNCTAD, Model law on competition, available at https://unctad.org/system/files/official-document/tdrbpconf5d7rev3_en.pdf.

3. INSTITUTIONAL ISSUES: ENFORCEMENT STRUCTURES AND PRACTICES

3.1 Competition policy institutions

The BCC was established under Chapter II of the BCA as a statutory body having perpetual succession with authority to acquire, hold, and dispose of property.

Section 7 of the BCA provides that the Commission shall consist of a Chairperson and not more than four (4) members. The Chairperson and the Members are appointed by the Government and must have “knowledge in economics, matters relating to market, public administration or similar subjects or legal profession or legal affairs activities in public-private offices or such other professional experience of not less than 15 (fifteen) years which in the opinion of the Government may be useful for the Commission,” provided that more than one person experienced in the same subject shall not be appointed as Members.

The Chairperson and Members are full-time and are accountable to the Government for discharge of their duties. They hold office for a term of 3 years with the possibility to be reappointed for additional three year-terms. The Chairperson concurrently serves as the Chief Executive of the Commission.

The BCA does not address the process for the nomination and appointment of the Chairperson and the Members. In practice, the Ministry of Commerce proposes nominees to the Prime Minister. The criteria for the selection of such nominees and whether the selection is scrutinized by other public bodies and relevant stakeholders is unclear.

The three-year duration of an appointment is generally deemed too short for members to learn and master the subject. Adding to this limitation is the fact there is no competitive selection process for the appointment of Chairperson and Members to at least ensure that they have the requisite knowledge to make decisions from the time they are appointed.

The BCA is silent on staggering the membership of the Commission, considering this short duration. This could result in a scenario where the Chairperson and Commissioners Members will all end their terms at the same time, causing the BCC to face difficulties in maintaining institutional memory as they shift into an entirely new set of officials.

The Chairperson or any other Member may, and subject to a prior written notice of 3 months, resign

Table 3 Comparison of Term Limits for Heads of Competition Authorities

Country	Organization	Term Limit	Eligibility for Re-Appointment
India	Competition Commission of India	5	Yes, eligible for re-appointment
	National Company Law Appellate Tribunal	5	Yes, eligible for re-appointment for another term of five years
El Salvador	Superintendency of Competition	5	Yes, may be re-elected
Peru	Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (INDECOPI)	5	Yes, may be appointed for an additional period
Philippines	Philippine Competition Commission	5 or 7	No.
South Africa	Competition Commission of South Africa	5	
	Competition Tribunal	5	Yes. No person may be appointed to the office of the Chairperson of the Tribunal for more than two consecutive terms
The Republic of Korea	Korea Fair Trade Commission	3	Yes. One-time renewal of term.

Sources: *Competition Act of India (2002)*, *Companies Act of India (2013)*, *the Republic of Korea's Monopoly Regulation and Fair-Trade Act (2013)*, *Peru's Decreto Legislativo N° 1033*, *Philippine Competition Act (2015)*, *El Salvador's Act No. 19412*.

from office. When the Chairperson or a Member dies or resigns or is removed, the Government shall, within 60 days of such vacancy of the post, appoint an eligible person in the vacant post.

Section 9 of the BCA provides that the Government may remove the Chairperson or any Member from his/her office if he/she is “(1) declared by a competent court to be an insolvent; (2) engaged in a post extraneous to his[her] own duties in consideration of remuneration; (3) has been declared unbalanced by a competent court to be [of] an unsound mind; (4) convicted of an offence involving moral turpitude; (5) becomes physically or mentally incapable of discharging his [/her] duties; (6) abuses his position as to render his continuance in office in the opinion of the Government [to be] prejudicial to the public interest.” A Chairperson or Member will not be removed without an opportunity to be heard.

Since the terms of the Chairperson and Members are short and the involvement of stakeholders in their selection is unclear, the provision may be abused by frequently changing the designated members. Doing so midway through the hearing of a lengthy competition case may impact the parties’ right to due process \

The ideal situation would be for the Minister of Commerce to appoint the Members following an independent competitive process that would produce a list of qualified candidates for appointment. The Prime Minister may be left to appoint the Chairperson, following an equally independent competitive process that would produce a list of qualified candidates for appointment.

Such a process would not diminish the ministerial powers of appointment but would ensure more transparency and the recruitment of suitable persons as Members than under the current system. The initial term should also be increased to between five and seven years, staggered among the members, to ensure that institutional memory is statutorily sustained and carried over to successive Members. The power to remove members should also have been statutorily provided to ensure more versatility in decision-making.

Section 11 of the BCA provides that the Commission must meet at least once in every 4 months and the date, time and place of the meeting shall be determined by the Chairperson. The Chairperson

may, for any special purpose, at any time, call an emergency meeting. Interview findings provide that, in practice, the BCC holds an average of 6 meetings in a quarter. Section 11(7) requires the minutes of the Commission meetings to be sent to the Government within 20 days of the meeting

3.1.1 Powers and decisions of the BCC

The BCC has the following responsibilities, powers, and functions:

1. Eradicate any practice which puts an adverse effect on the competition in the market and to encourage and maintain healthy competition in the market;
2. Investigate, upon a complaint or on its own initiative, all agreements, dominant position, or practice which impede competition;
3. Conduct investigations and to file and conduct any case for crimes committed under the BCA;
4. Approve or disapprove combination or matters related to combination, investigation related to combination, terms of combination,;
5. Compile and help the government to implement rules, guidelines, directions, or administrative directions regarding competition;
6. Set an appropriate standard for development and training related to competition activities;
7. Take necessary steps to raise awareness on issues relating to competition among different classes of citizens through publicity and publications;
8. Conduct research, hold seminars, symposiums, workshops and to take other steps in order to increase public awareness on anti-competitive measures or practice and to publish and publicize the result of the research works and to make recommendations to the Government to implement such recommendations;
9. Comply with, follow, or consider any matter relating to competition sent by the Government;

10. Review the steps taken for preservation or implementation of consumer protection under any law;
11. Sign and execute an agreement or Memorandum of Understanding (MoU) with foreign organizations, with prior approval from the Government, to carry out its duties and functions;
12. Determine the fees, charge, or any other expenses to fulfil the objective of the Act; and
13. Perform any other function under the rules framed under the BCA to achieve the objectives of the BCA.

Public stakeholders interviewed emphasized that the BCC 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 BCC 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:

1. Section 37 provides that the BCC, in the exercise of its powers or the performance of its functions under the BCA, is “bound by such directions of the Government on questions of policy other than those relating to the implementation [and] technical and administrative matters” in the BCA. The BCC shall, as far as practicable be given an opportunity to express its views before any direction is given by the Government. The Government’s decision as to whether a question relates to a policy or not is final. The extent of those general directions has not been defined and in the general context within which they are mentioned, they pose a huge potential for interference with the independence rather faintly contemplated under section 37 of the BCA. Interview findings indicate that the Government has not yet provided a “direction” under Section 37 but has sent BCC State Security Agency reports about anti-competitive activities, to be investigated by the BCC.

2. Section 43 states that the Government may make rules to carry out the provisions of the BCA. Such rules shall be published in the Official Gazette. Interviews indicate that these rules pertain to the legal and administrative systems that will be followed by the BCC. Considering the manner in which the Government is supposed to issue such rules, namely that they shall be in writing and published in the *Official Gazette*, they have a legally binding effect on the BCC.
3. Section 44 states that the BCC, subject to the approval of the Government, may create regulations that are not inconsistent with the BCA and the rules approved by the Government.
4. Section 29 provides that a person aggrieved by an order by the BCC may appeal to the Government. Interview findings reveal that the “appeal to the Government” refers to an appeal to the Ministry of Commerce.
5. Section 11 requires the BCC to send the minutes of its meetings to the Government within 20 days of such meetings.

Stakeholders from the private sector also pointed out that the generally close relationship between the officers of the different Ministries and the BCC might impact the BCC’s independence in its enforcement and policy work. BCC officials see that good relationship and proper coordination among different ministries and sector bodies are needed for easy enforcement and implementation of BCA. The possibility of collusion between political leaders and businesses has also been raised as an issue, with government influence making independence difficult for the BCC and hampering the implementation of the BCA.⁵⁰

To allow more flexibility and increased efficiency of service delivery, the BCC should be enabled to exercise independence to vary working tools such as operational guidelines, strategic programs, and organizational structure without the need for Ministry to endorse the same.

Section 38(2) of the BCA provides that the Commission may, subject to conditions specified by it, delegate any of its powers to any officer. This

⁵⁰ Tania and Bilkis (n 17) 174.

appears to mean that Commission is entitled to delegate its functions without limitation (including its duties to make decisions concerning anti-competitive agreements, misuse of market power and the regulation of mergers) to persons who are not members of the Commission.

The BCC considers the Ministry of Commerce as its “parent ministry” for purposes of administrative planning. The BCC’s independence in decision-making is set out under Section 4 of the BCA which states that it is a statutory body having perpetual succession and with the capacity to acquire, hold and dispose of property, corporate capable of suing and being sued in its corporate name. The BCC is to be treated not as part of the Ministry of Commerce as it has its own legal personality, that of a body corporate. As a body corporate, the BCC, unless otherwise provided, can be a party in civil proceedings arising from its administrative functions or as an employer.

Given the judicial functions of the BCC, it is not clear whether it can be sued “as a body corporate” during the adjudication of competition cases. Under Section 29, the BCA provides for an appeal route for the findings of the Commission. The status of Commission at the appellate level is not provided for in the BCA but at the very minimum, it should be that of a necessary party in an appeal case. Clarity in the BCA on the status of the Commission at the appeals level is necessary to create certainty and predictability as to what to expect in proceedings at the Ministry of Commerce.

These issues need to be looked into as a matter of priority, as some go to the root of the existence of the BCC and the properness of its constitution and conduct of its proceedings, which may, in turn, have consequential bearings on the decisions taken by the Chairperson and Members.

3.1.2 Investigative and adjudicative powers

The BCC’s investigative powers are highlighted several times in the BCA:

- Section 8(1)(b) - BCC has the power to “inquire into, either on receipt of any complaint or on its own initiative, all anti-competitive agreements, dominant position and practice of enterprises,”
- Section 8(1)(c) - BCC has the power to “inquire into other offences specified under [the BCA] and to sue and conduct them accordingly”.

- Section 18 - If BCC has reason to believe that any enterprise has entered into any agreement or misused its dominant position in a way that is harmful to the relevant market, it may, *suo-moto* or on receipt of complaint from anyone, inquire into the matter.

On top of its investigative powers, the BCC also has an adjudicative function. Section 8(6) of the BCA provides that all proceedings before the Commission shall be deemed to be judicial proceedings.⁵¹ Thus, the BCC is vested with powers to investigate, prosecute, and determine matters that fall within its jurisdiction. In the Bangladesh justice 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 BCC may be tempted to confirm its own decisions. This risk may be tempered by ensuring that the BCC’s decisions are appealable to an independent and impartial tribunal.

The BCC 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 Commission but BCC officials stress that the Commission does not interfere with the work of the Division. The BCC has adopted certain measures to protect the independence of this Division, such as:

1. The teams do not share any kind of information with the Commission before the submission of the final report.
2. Both Inquiry and Investigation reports are submitted to the Commission in a sealed envelope.
3. Only the Commission *en banc* can see the report. Commission Members are not allowed to view the reports on their own.
4. The BCC has asked the Ministry of Commerce for the amendment of its organizational structure, adding a Director-General, more officers, and staff members to the Inquiry & Investigation Division to foster independence.

⁵¹ Section 8(6) states that the BCC is deemed to be acting as a Civil Court in its proceedings.

3.2 Enforcement of the Bangladesh Competition Act of 2012

The BCA provides for a four-phased enforcement process, divided into the pre-inquiry, inquiry, investigation, and adjudication phase.

3.2.1 Pre-inquiry / Settlement

Should BCC find it “necessary” to immediately prevent any agreement, misuse of dominant position or collusion “which cause[s] or likely to cause [an] adverse [effect] on the relevant market” it may, after giving reasonable opportunity of for the concerned parties to be heard, settle the issue “with necessary directions” without opening an inquiry.⁵²

The BCA does not provide a timeframe for the pre-inquiry stage nor guidance as to the standard of analysis used by The BCC in such cases.

3.2.2 Inquiry

If the BCC has a reason to believe that any enterprise has entered into any agreement or misused its dominant position which is harmful to the relevant market, it may, *suo-moto* or on receipt of a complaint from anyone, inquire into the matter.⁵³

Section 18(2) of the BCA provides that BCC may make regulations regarding the procedures for the conduct of an inquiry. According to Section 7 of the draft Bangladesh Competition Complaints and Judicial Procedure Regulations of 2022 (“Draft Rules of Procedure”), 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.⁵⁴ The inquiry period may be extended for another 10 days upon request of the inquiry team,⁵⁵ and extended for a second time, if the Commission feels that further inquiry, examination, or analysis is necessary.⁵⁶

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.

During an inquiry, if the BCC determines that an enterprise entered into an anti-competitive agreement, abused its dominant position, or entered into anti-competitive consolidations, and that such offense continues or is like to continue,⁵⁷ 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 its implementation, until the conclusion of the inquiry or until further orders.⁵⁸ Parties may file an appeal with the Commission for the reversal of the interim order within 30 days of its issuance.⁵⁹

3.2.3 Investigation

According to the Draft Rules of Procedure, 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 through written or oral statements through previous notice.⁶⁰ The BCA does not grant the BCC 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.

The deadlines for the completion of the investigation are determined by the Commission.

The investigation team may hear the opinion of the persons related to the complaint they may allow them to present written or oral statements through written notice.⁶¹ Upon completion of the investigation, the investigation team shall submit a report to the Commission. The Commission shall thereafter share the Investigation Report with the parties, conduct a hearing in open court, and after such hearing, issue an order or judgment pursuant to Section 20 of the BCA.

3.2.4 Adjudication

After sending a notice, the Commission hears the case in the presence of the parties concerned at the court of the Commission.

⁵² Bangladesh Competition Act (2012), sec. 17.

⁵³ Bangladesh Competition Act (2012), sec. 18.

⁵⁴ Section 7, Draft Rules of Procedure.

⁵⁵ Section 8(2), Draft Rules of Procedure.

⁵⁶ Section 12, Draft Rules of Procedure.

⁵⁷ The BCC shall consider the importance of the matter and give the parties ample opportunity to be heard.

⁵⁸ Bangladesh Competition Act (2012), sec. 19(1).

⁵⁹ Bangladesh Competition Act (2012), sec. 19(3).

⁶⁰ Section 20, Draft Rules of Procedure.

⁶¹ Section 20, Draft Rules of Procedure.

If after the inquiry, it appears to the BCC that “any person entered into an anti-competitive agreement or misused his dominant position”, the BCC may take one or more of the following measures:⁶²

- (1) direct any person involved in such agreement or abuse of dominant position conduct to
 - (a) “discontinue his activities and not to re-enter such agreement or discontinue such abuse of dominant position; and (b) impose an administrative financial penalty as it may deem fit which may not exceed 10 per cent of the average turnover of the person for the last three preceding financial years;
- (2) if any cartel occurs under the agreements specified in Section 15, to impose upon every person included in that cartel an administrative financial penalty of up to 3 times of its profit for each year of the continuance of such agreement or 10 per cent of the average of his turnover for the last 3 preceding years, whichever is higher.⁶³ Failure to pay the foregoing financial penalties shall result in a fine of not more than 1 LAC for each day of delay;⁶⁴ and pass any other order that the BCC deems fit for the preservation of competition, including the “division of an enterprise enjoying [a] dominant position”.⁶⁵

3.3 Prioritization of enforcement activities

Setting priorities and strategically allocating resources are important to the effectiveness of competition authorities.⁶⁶ Many competition authorities, voluntarily or under an obligation, prioritize their work by identifying activities and sectors on which to concentrate their resources.⁶⁷ Petit⁶⁸ explains that prioritization involves one or a combination of the following practices:

- **“Detection discretion”**, which pertains to whether the competition authority will rely on complaints, leniency applications, and referrals from agencies to unearth anti-competitive practices, as opposed to detecting anti-competitive conduct proactively;
- **“Target discretion”** or the selection of investigation targets, focusing or staying away from particular sectors or practices;
- **“Process discretion,”** referring to the discretion in initiating infringement proceedings
- **“Outcome discretion,”** pertaining to the ability to terminate proceedings in a competition case.

Priority setting is a legal obligation in India.⁶⁹ The Philippine Competition Commission (PCC) has no such legal obligation but has issued prioritization guidelines and considers public interest, resource allocation, likelihood of a successful outcome, and other reasonable grounds in determining which enforcement actions to prioritize. The PCC also announces annual priority sectors,⁷⁰ based on market scoping and assessment of enduring, existing, and emerging issues and associated risks. Meanwhile, noting that it is “one of the economic role players,” the Competition Commission of South Africa recognizes its responsibility to “contribute solutions” to the country’s challenges. Against this objective the agency targets seven priority sectors (food and agro-processing, healthcare, intermediate industrial inputs, construction and infrastructure, banking and financial services, ICT, and energy) for proactive intervention. These sectors were chosen because of the country’s economic policies, the volume of complaints received

⁶² Section 20, BCA.

⁶³ Bangladesh Competition Act (2012), sec. 20 (a) and (b).

⁶⁴ Bangladesh Competition Act (2012), sec. 20 ©.

⁶⁵ Bangladesh Competition Act (2012), sec. 21©.

⁶⁶ UNCTAD (2013), Prioritization and Resource Allocation as a Tool for Agency Effectiveness. See https://unctad.org/system/files/official-document/ciclpd20_en.pdf.

⁶⁷ See PCC Commission Resolution 20-2018. Available at https://www.phcc.gov.ph/wp-content/uploads/2018/12/Commission-Resolution-20-2018_Prioritization-Guidelines.pdf.

⁶⁸ Nicolas Petit (2010), How Much Discretion Do, and Should, Competition Authorities Enjoy in the Course of their Enforcement Activities? A Multi-Jurisdictional Assessment,

Concurrences No. 1-2010, pages 44-62. Available at https://orbi.uliege.be/bitstream/2268/41080/1/1_pdfsam_Concurrences_Discretion%20ANC.pdf. See also Wils, Wouter P. J., Discretion and Prioritisation in Public Antitrust Enforcement, in particular European Union Antitrust Enforcement, World Competition: Law and Economics Review, Vol. 34, No. 3, September 2011. Available at SSRN: <https://ssrn.com/abstract=1759207>.

⁶⁹ UNCTAD (2013), Prioritization and Resource Allocation as a Tool for Agency Effectiveness, p. 5. Available at https://unctad.org/system/files/official-document/ciclpd20_en.pdf.

⁷⁰ For 2022, PCC announced that it will prioritize e-commerce, health and pharmaceuticals, food and agriculture, energy and electricity, insurance, construction, water, and telecommunications. See <https://mb.com.ph/2022/01/10/pcc-to-resume-review-of-exempted-ma-deals-in-2022/>.

in the sector, and market failures that have been identified through past scoping exercises.⁷¹

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

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

3.4 Sanctions

3.4.1 Administrative sanctions

Non-compliance with Sections 15 on anti-competitive agreements and 16 on abuse of dominant position is subject to the following sanctions and penalties (Section 20): (1) an order to discontinue the anti-competitive activities or agreements; and administrative fine in an amount not exceeding 10 per cent of the average turnover of the offending person for the last 3 years; (2) for cartels under Section 15, an administrative fine of up to 3 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 last 3 years, whichever is higher. Failure to pay financial penalties exposes the offender to additional fines of not more than 1 LAKH TAKA (approximately US\$ 1,160) for each day of delay; (3) any order as the BCC may deem fit for the preservation of competition, including the "division of an enterprise enjoying [a] dominant position". BCC officials noted that similar sanctions should apply to non-compliance with Section 21 on concentrations.

3.4.2 Criminal sanctions

Under Section 24, any person who, without reasonable cause, contravenes any order or direction of the BCC shall be penalized for imprisonment for a term not exceeding 1 year or a fine not exceeding 1 LAKH

TAKA (approximately US\$ 1,160) for each day of non-compliance. The BCC serves as the complainant in the court case and the penalty is imposed by the Magistrate of 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 liable for imprisonment for a term not exceeding 3 years or fine or both.

The Code of Criminal Procedure 1898 applies to investigations, trials, appeals and other ancillary matters relating to offenses under the BCA (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.

While the wording of Sections 24 to 26 appears to indicate that the anti-competitive conduct itself is subject to criminal penalties, BCC officials have clarified that this is not the case as criminal penalties are only imposed for contravening the orders of The BCC or interfering with the exercise of its powers.

3.5 Review and Appeal

Any person aggrieved by an order of the Commission may, within thirty (30) days, apply to the Commission for review, or the Government for appeal.⁷² The review or appeal must be disposed of within 60 days.⁷³ The order of the Commission or the Government shall be deemed final.⁷⁴

The High Court of Bangladesh has the power to judicially review decisions of the BCC should it deem that such case involves a "substantial question of law as to the interpretation of Constitution, or on a point of general public importance, the determination of which is necessary for the disposal of the case".⁷⁵

Two cases have reached the High Court, both still pending. One was appealed to the Ministry of Commerce which upheld The BCC's order to cease the anti-competitive agreement but reversed the BCC's decision to impose administrative penalties on only one of the respondents,⁷⁶ invoking the equality principles.

⁷² Bangladesh Competition Act (2012), sec. 29(a) and (b).

⁷³ Bangladesh Competition Act (2012), sec. 29(3).

⁷⁴ Bangladesh Competition Act (2012), sec. 29(4).

⁷⁵ Section 110, Constitution of Bangladesh.

⁷⁶ The BCC took a lenient approach and did not impose penalties on the other respondents considering their admission of their ignorance of the BCA.

⁷¹ Strategic goals of the Competition Commission of South Africa. See <https://www.compcom.co.za/our-strategic-goals/>.

Table 4 below summarizes the cases that have been submitted for reconsideration by the BCC or appealed to the Ministry of Commerce and the High Court of Bangladesh.

The BCC performs adjudicatory functions as per BCA. Establishment of an independent and specialized tribunal would narrow down the functions and powers of the BCC.

Table 4 Competition Cases Reconsidered or Appealed

No.	Case	Appellate body (BCC/MOC/High Court)	Outcome
01	BCC vs. Viqarunnisa Noon School & College	Ministry of Commerce	Partially upheld
	BCC vs. Viqarunnisa Noon School & College	High Court Division	Pending
02	Pacific International vs. Chittagong Custom Clearing and Forwarding Agents' Association	High Court Division	Pending

Source: BCC

Given the infancy of competition culture, limited competition jurisprudence in Bangladesh, and the fact that the BCC is both the prosecutor and adjudicator in competition cases, it might be useful to evaluate the feasibility of establishing 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.

The tribunal should be manned by a full-time secretariat, which could support the tribunal members in preparing decisions based on competition law and economics. Given budgetary restraints, it might be difficult to mobilize sufficient political support for a stand-alone competition tribunal for the reason given above. An alternative solution would be to limit the appeal to one jurisdiction of the High Court by creating a specialized competition chamber to deal with such appeals and regulate the admissibility of judicial reviews at the High Court to avoid duplicating platforms that can hear appeals.

3.6 Competition advocacy

The BCC's power and duty to advocate for competition can be found in Sections 8 (g) and (h) of the BCA. The BCC has been engaging its stakeholders with a view to creating awareness of competition law and policy, specifically by promoting its compliance through non-enforcement mechanisms. Since 2018, the BCC has organized 44 competition advocacy seminars and workshops

for different Ministries across divisional headquarters and districts, business communities, journalists, traders, and academics. To create awareness regarding the BCA among students at colleges and universities, the BCC organized an essay writing contest on the topic of competition.

The BCC and numerous stakeholders admit that its advocacy initiatives must be improved. After almost 10 years of BCA, the level of awareness of the BCA and the BCC is very low or even absent.

Among the many challenges faced by the competition agencies is the media's lack of technical knowledge of competition issues to enable them to do proper analysis and reporting. The BCC has sought to initiate publicity in different national daily newspapers and electronic media, which leads to unbalanced coverage. The BCC has no existing institutional arrangement with media organizations for the capacity building of media personnel.

3.6.1 Academia

There are currently no specific studies on competition at either undergraduate or postgraduate level in Bangladesh. Some universities teach competition as part of other courses law or economics courses.

- **East West University in Dhaka** – Undergraduate students studying economics can join a course in Competition Law and Economics. The course aims to provide students with an understanding of the role that economics plays in competition law and an understanding of when economic analysis is relevant to a particular competition law case.

The course is focused on the three areas of conduct in competition law, anti-competitive agreements, conduct directed at excluding a competitor from the market, and the regulation of mergers.

- **Bangladesh University of Professionals** offers a short course on Business and Competition Law as part of its Bachelor of Laws program.
- **University of Dhaka** – Both the Honours and master's programs in the Department of Law includes a course on Business Law which covers topics of competition law and the legal environment of business and consumer rights

The BCC requested the Bangladesh Civil Service (Law & Admin) Academy to introduce a Competition law & Competition Economics module in its training courses, as other training institutions and universities similarly.

3.6.2 Legal community

There is limited legal and economic expertise in competition law, which is shared by lawyers and judges who have to prosecute and decide cases on anti-competitive practices.⁷⁷

Interviews with legal practitioners showed that there was very little interaction between the BCC and the Courts; as such, no relationship has been established. With regard to competition law practice, several business law practitioners were seen to be possible candidates for specialization in competition law practice due to resemblance of the issues. Members of the legal community who have interacted with the BCC considered the authority to be proactive in its duties but noted that much work has to be done.

As in many countries, judges who hear competition cases are not specialized in this field. It is important to hold dissemination and training events for the judiciary with a view to providing them with more theoretical and practical tools for the analysis of anticompetitive practices and concentrations.

There is currently no program for the training of judges on the topic of competition law and policy in Bangladesh. Interview findings indicate that the curriculum of the training programs offered to judges

via the Judicial Administration Training Institute does not include a module on competition law. It would be advisable for the BCC to establish communication mechanisms and design advocacy and training programs for the judiciary. This would create awareness and understanding of how the courts operate and give the judiciary an opportunity to better understand and adjudicate competition cases.

The BCC has started publishing the text of its case decisions on its website. Since meaningful advocacy must be supported by either empirical findings or information on the enforcement of cases, the BCC should take advantage of its growing jurisprudence and use resolved cases as a means of advocating for pro-competition markets.

3.7 Agency resources, caseload, and priorities

3.7.1 Management

The BCC is headed by a Chief Executive Officer (who is concurrently the Chairman of the Commission). It is divided into directorates, namely: (1) Business trade, Economics and Research, (2) Information and Communications Technology, (3) Advocacy and Policy, (4) International Relations, (5) M&A, (6) Inquiry, (7) Investigation, (8) Intelligence, (9) Law, and (10) Implementation.

3.7.2 Resources

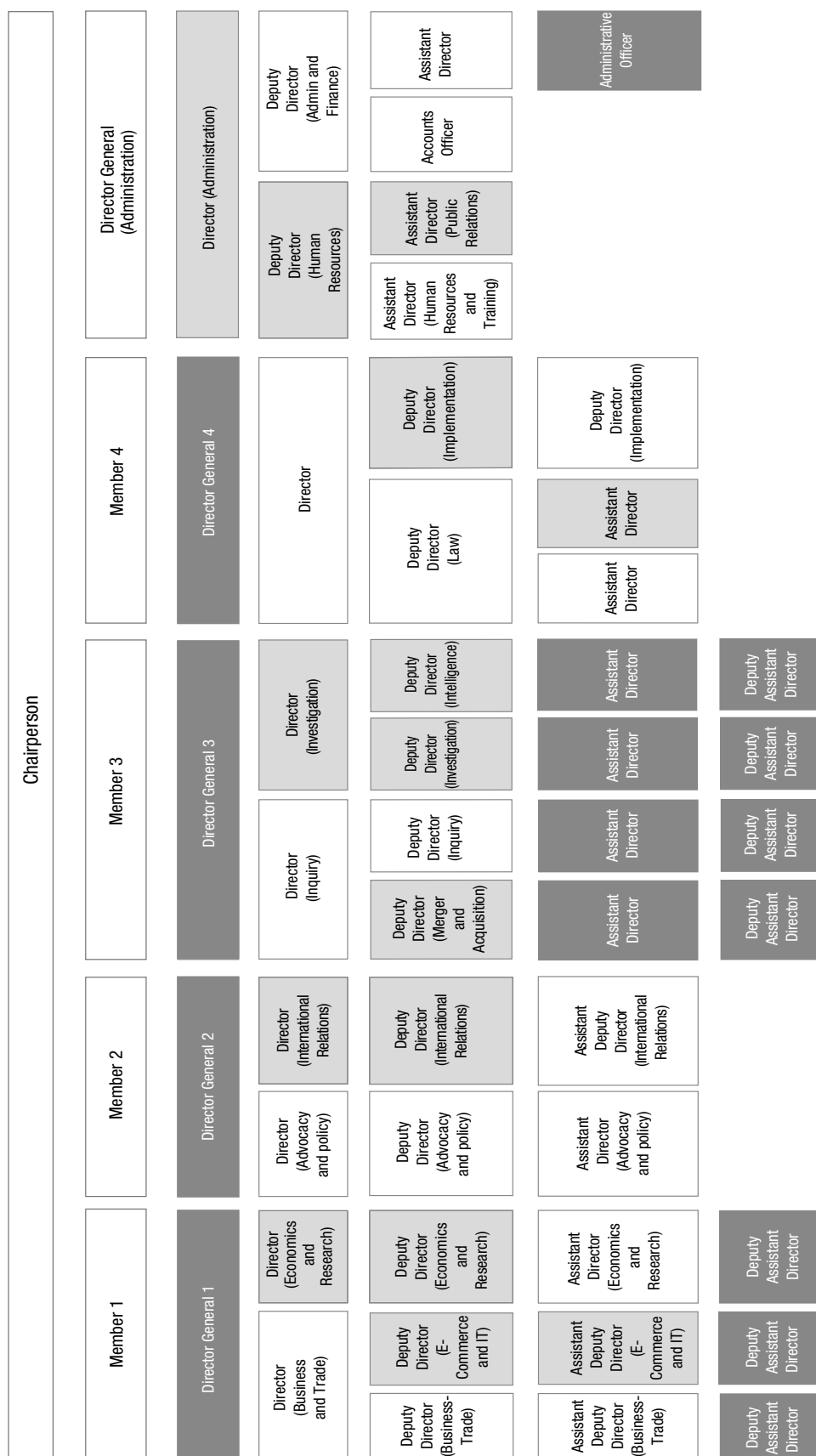
3.7.2.1 Human resources

The BCC has an approved human resources base of 78 staff. It supplements its staff component by hiring contractual employees who assist in administrative matters. A proposal to supplement its organizational structure is pending, seeking to increase full-time staff to 170 and accommodate more mid-level officers. Figure 2 illustrates the proposed changes to the staff composition of the BCC.

The BCC records show that most of the current senior staff (Directors, Deputy Directors, Assistant Directors, and other officials) are relatively new to the organization. BCC 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 included modules on industrial economics. There have not been enough comprehensive in-house training activities for staff.

⁷⁷ Tania and Bilkis (n 17) 174

Figure 2 Organizational Chart of the Bangladesh Competition Commission



Legend: Light gray – increase in existing post - Dark gray – newly proposed post)

Source: BCC

The Commission members and mid-level officers have attended short training courses spanning several days in international fora on issues related specifically to competition enforcement, including those organized by the ICN, UNCTAD, OECD, and KFTC. Some junior or entry-level staff have attended competition-related capacity building workshops, but these are not seen as sufficient.

Deepening the staff's knowledge of investigation techniques in cases of anticompetitive practices, inspection techniques, and analysis of legal and economic criteria in competition cases (what constitutes an anticompetitive practice, the relevant market, dominance, and anticompetitive effects) could be useful in improving BCC's capacity to handle cases. To this end, forging alliances with international organizations offering technical assistance and other, more experienced competition authorities could be beneficial.

According to the BCC, staff turnover in the agency is still low. However, interview findings indicate that frequent staff changes involving mid-level to senior-level officials of the BCC is expected, because of the Bangladesh government's policy of transferring administrative officials to new government agencies every three years. BCC officials noted that this policy is not always practiced. The challenge for the BCC is to ensure the retention of trained staff members to perpetuate the greatly needed institutional memory on competition.

According to information collected at the Commission and its corroboration from other stakeholders interviewed, staff members are paid salaries that are pegged at civil service scales. This scenario is highly capable of triggering staff turnover and other human resource problems; hence a prompt remedy is called for to normalize the situation, maybe by leveraging with other public institutions and the private sector.

3.7.2.2 Financial resources

The Commission has limited funds to carry out the broad mandate it has been statutorily given. The Competition Fund, comprising annual grants made by the government, fees and charges deposited under the BCA, interest of money deposited in a bank, and any other source not prohibited by existing rules and regulations, is the main source of funding for the BCC's operations.⁷⁸ Table 5 below details the BCC's budget expenditure from 2017 to 2021.

For Fiscal Year 2021-2022, the BCC, covering a country with 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, operating in a country with approximately 110 million people, had a 2018 budget that exceeded US\$ 9 million.

It is of particular interest to know whether any sources inside or outside Bangladesh vested in or accruing

Table 5 Bangladesh Competition Commission Budget from 2017 to 2021

Fiscal year	Number of Staff employed	Budget Expenditure (BDT)	Budget Expenditure (US\$)
2021-2022	61	3,46,38,000 (For Salary) 8,74,14,000 (Total Budget)	415,672.63
2020-2021	53	3,56,73,000 (For Salary) 6,38,00,000 (Total Budget)	428,093.12
2019-2020	30	2,08,00,000 (For Salary) 4,60,00,000 (Total Budget)	249,609.98
2018-2019	30	1,48,43,000 (For Salary) 3,71,00,000 (Total Budget)	178,123.12
2017-2018	15	1,04,43,000 (For Salary) 3,38,00,000 (Total Budget)	125,321.01

Source: BCC

⁷⁸ Bangladesh Competition Act, Section 31.

to the Competition Fund are consistent with integrity standards acceptable in terms of the BCA. Unless carefully defined, the provision on accepting “any other source not prohibited” can be construed too broadly to accommodate sources inconsistent with the spirit and objectives of the BCA. It needs therefore to be limited to issues consistent with the intentions of the BCA to ensure that the integrity of the institution is and remains uncompromised by questionable sources of income.

3.7.2.3 Information and communications technology resources

The BCC has a dedicated Information and Communications Technology (ICT) Wing. The BCC has a functioning website and has established its own email domain. Currently, the ICT infrastructure needs to be improved for case-handling purposes through additional government funding.

There is limited use of ICT in the electronic documentation of proceedings, or the deposit or retrieval of archives at the Commission, a situation that may lead to avoidable delays in the implementation of its activities. There are no electronic business processes involving the lodging of documents required in dealing with competition issues, such as mergers and authorizations. The Commission currently uses a hybrid system where complaints are submitted to the Commission both physically and online, and a physical file is opened. Documents are kept as both physical and soft copies.

The notifications to parties, proceedings of meetings of members of the Commission, decisions on cases, documentation of meetings and decisions, as well as the Inquiry and Investigation reports and final orders of the Commission are also preserved as physical and soft files.

With respect to the case management system, the retrieval of files and decisions, the Commission still keeps a manual case management system, whereby a unique file is opened for every case investigated. All files related to cases are kept in the manual library. The Commission does not have an electronic library.

Given the diverse nature of ICT requirements, there is a justifiable demand for additional full-time personnel to complement the existing competencies and skills. Additional financial resources are another limiting factor to such facilities.

Despite the progress observed, there is room for improvement in ICT usage that may lead to a more efficient implementation of activities at the Commission.

3.7.3 Technical Assistance Project

To supplement its initial capacity building efforts, the BCC, through the Ministry of Commerce, submitted a Technical Assistance Project Proposal⁷⁹ to the Ministry of Planning (Industry and Energy Division, Planning Commission). The 3-year proposed project for July 2021 – June 2024, set out the following objectives: (1) create public awareness about the BCC in various divisions and districts in the country; (2) improve the capacity of BCC staff members; (3) strengthen the BCC’s ICT capabilities, including setting up ICT software, databases, and connecting with the Bangladesh 4TR Data Centre of Information and Communication Technology Division, to help the BCC deal with emerging issues of the digital economy; (4) help discover anti-competitive activities in the market through research and market studies of relevant economic sectors; (5) organize seminars and workshops to disseminate, knowledge, experience sharing, and gather insights from different stakeholders, to strengthen the capacities of the BCC; (6) build its 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.

As a new competition authority, capacity-building and training of staff should be accorded priority, including staff needs assessment to guide the training programs to be developed. The Commission should be granted the flexibility to mobilize resources and organize a tailor-made training program aimed at addressing knowledge and skills gaps for both Commission Members and staff.

⁷⁹ The proposed project had an estimated cost of 1389.32 Lac Thaka. The proposal indicates that the project was to be funded by the Government of Bangladesh. According to the BCC, the Ministry of Planning has explored getting external resources for this project but did not manage to do so. The Ministry of Commerce then decided to implement the project through internal funding, but the Ministry of Finance did not agree with such approach. BCC representatives are open to funding the project from external sources.

3.8 Caseload

3.8.1 Anti-competitive agreements

Since 2018, the BCC received 8 complaints and initiated 4 *suo-moto* investigations related to anti-competitive agreements. Table 6 below shows how the cases handled by the present group of Commission Members have been disposed.

Out of these 12 cases, 4 have been settled pre-inquiry under Section 17 BCA and by providing advice to the government agencies involved in the dispute, pursuant to Section 8(e).

BCC imposed sanctions in two cases, both of which have been appealed to the High Court.

3.8.2 Abuse of dominant position

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

3.8.3 Mergers and acquisitions

As mentioned, the BCC has not reviewed any mergers, nor imposed sanctions for non-compliance with merger provisions. This is attributed to the gaps in the BCA and the lack of regulations, which are still being prepared by the BCC, regarding the procedure for merger review - 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.

Operationally, there is no separation of duties as to cartel, abuse of dominance and merger control cases. The BCC does not yet have Key Performance Indicators (KPIs) to measure its own performance.

Related to the lack of local expertise in competition in Bangladesh, there is a perceived lack of empirical and codified standards to determine the presence of adverse effects on competition. This is complicated by the BCC's dual function as an investigating body as well as a judicial body in deciding cases. This may put into question the BCC's capacity to evaluate cases on the merits, in line with the principle that 'one cannot be the judge of one's own cause'.

3.9 Competition and regulated sectors

Under combined Sections 3 and 4, the BCC is deemed to have jurisdiction over all regulated sectors, including telecommunications and energy, except those not yet open to the private sector due to national security purposes. However, sectoral regulators are also mandated by their laws to deal with competition issues, as is the case for telecommunications.

The BCA does not provide for sector-specific exemptions, other than those provided in its Section 3 as quoted above. Furthermore, the BCA applies to and binds the Government, since Section 2(m) definition of enterprises covers "any person or economic body or a department of the Government, who or which is, or has been engaged in any activity relating to the production, storage, supply, distribution, acquisition or control of goods, or the provision of services of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any body corporate, either directly or through one or more of its units or divisions or subsidiary, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a

Table 6 BCC Caseload related to Anti-Competitive Agreements (2018-2022)

Status of case	2018	2019	2020	2021	2022
Number of cases investigated and concluded	1	1	0	5	0
Number of cases handled through advocacy (Under Section 17 of Competition Act, 2012)	0	0	0	4	0
Number of cases under ongoing investigation	0	0	0	0	4

Source: BCC

different place, but does not include any activity relating to the currency or defence of the Government.”

On its face, this definition should be construed as a conscious choice that Bangladesh has made against the alternative of having a regime of competition with concurrent jurisdiction between the competition authority and the sectoral regulators. However, as discussed below, this does not appear to be the appreciation of certain sector regulators.

3.9.1 Telecommunications

The Bangladesh Telecommunication Regulatory Commission (BTRC) regulates and develops the telecommunications industry of Bangladesh. Sec. 30(e) of the Bangladesh Telecommunications Regulatory Commission Act of 2001 (BTRCA) provides that one of the functions of BTRC is to “maintain and promote competition among the service providers in order to ensure high-quality telecommunication services”.

Section 29 of the BTRCA provides that one of BTRC’s objectives is to ensure competitiveness and scale down discriminatory practices. The BTRC has issued Significant Market Power Regulations to tackle issues affecting competition in the Bangladesh telecommunications sector.

Representatives from the BTRC believe that BTRC is the primary agency responsible for the promotion of competition in the telecommunications sector since it has specialized knowledge of the technical aspects of the sector. Interview findings indicate that during the 2016 merger between two telco operators,⁸⁰ the evaluation of the market was done by the BTRC with independent consultants from the University of Dhaka and Bangladesh University of Engineering and Technology. The BCC maintains that Section 21 of the BCA on the prohibition of combinations authorizes the BCC to approve or disapprove M&As in the telecommunications sector.

3.9.2 Energy sector

Anent the energy sector, Section 22 of the Bangladesh Energy Regulatory Commission Act states that among the functions of the Bangladesh Energy Regulatory

Commission (BERC) are “(h) to encourage to create a congenial atmosphere to promote competition amongst the licencees”.

BERC representatives claim that it has the primary responsibility to evaluate mergers of energy companies. There have been no discussions with the BCC with respect to possible overlaps of BERC’s and BCC’s functions.

3.9.3 Securities and Exchange Commission

Under Section 8(2)(h) of the Securities and Exchange Commission Act of 1993, the BSEC has the authority to regulate the holding of shares of stocks, takeovers, and acquisition of companies. In 2018, the BSEC issued the Bangladesh Securities and Exchange Commission (Substantial Acquisition of Shares and Takeovers) Rules which govern mergers and acquisitions.

BSEC representatives recognize that the BSEC and the BCC have overlapping tasks with respect to the mergers and acquisitions of listed companies, but the combinations involving all other companies would be under the jurisdiction of the BCC, as defined under Section 21 of the BCA.

The BCC maintains that Section 8(2)(h) of the Securities and Exchange Commission Act only authorizes the BSEC to “deal with acquisition and control issues” and does not authorize the BSEC to approve or forbid merger cases.

Sections 228 and 229 of the Companies Act of 2004 provide that the High Court Division has the power to, after an application has been filed before it, order (a) the transfer of the undertaking and properties or liabilities of any transferor company to the transferee company; (b) allot shares, or (c) “the continuation by or against the transferee company of any [pending legal proceedings.]” The application must show that a compromise or agreement would lead to or was entered into for the purpose of an amalgamation of two or more companies.

In a case involving the amalgamation of Summit Narayanganj Power, Summit Uttaranchal Power Company [,] and Summit Purbanchol Power Company with Summit Power the High Court explained that its power over mergers and acquisitions is only supervisory in nature and that shareholders ultimately decide on the valuation of any amalgamation scheme.

⁸⁰ “Bharti Airtel completes merger of Bangladesh arm with Robi Axiata”, The Hindu Business Line, 16 November 2016. See [https://www.thehindubusinessline.com/info-tech/bharti-airtel-completes-merger-of-bangladesh-arm-with-rob-axiata/article9353767.ece#:~:text=Bharti%20Airtel%20Ltd%20\(Airtel\)%20on,will%20hold%2025%20per%20cent.](https://www.thehindubusinessline.com/info-tech/bharti-airtel-completes-merger-of-bangladesh-arm-with-rob-axiata/article9353767.ece#:~:text=Bharti%20Airtel%20Ltd%20(Airtel)%20on,will%20hold%2025%20per%20cent.)

3.9.4 Arrangements with sector regulators

The BERC, the BTRC, and the BSEC have acknowledged the Bangladesh competition regime and the BCC in particular, although they were not extensively familiar with the functions and duties of the BCC or the broad scope of the BCA. According to interview findings, BCC and sectoral regulators recognize that they are not competitors but partners which 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. In the absence of a good relationship between the relevant offices, the coexistence in professional harmony of the two sectoral regulators with the BCC could be in jeopardy because of the unavoidable mutual relations between them that have not been properly legislated for. This could lead to clashes between the Commission and the three institutions.

Section 14 of the BCA details the procedure for the exchange of opinions between the BCC and statutory bodies. When a person raises an issue that a proceeding or decision of the statutory authority would be contrary to any of the provisions of the BCA, then such statutory authority may, on its own motion, refer the issue to the BCC (and suspend its own proceedings). BCC must act on the referral within 60 days. A counterpart procedure may be triggered against proceedings or decisions of the BCC alleged to contravene laws implemented by other statutory bodies.⁸¹

In line with Section 14 of the BCA, the BCC 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 the Ministry, Commission, and other Regulatory Bodies. BCC intends to utilize this regulation to coordinate and share information among different Ministries and regulatory bodies in Bangladesh. This initiative is a positive step toward developing a relationship of consultation or cooperation between sectoral regulators and the BCC when anticompetitive cases involve the regulated sectors at stake, for better appreciation of their mandates and to clarify jurisdiction.

In other jurisdictions, potential clashes between sector regulators and the competition authority are avoided through the execution of a Memorandum of Understanding that details the division of tasks between the relevant agencies with respect to addressing competition concerns. The BCC and the three sector regulators could foster harmonization between sector regulation and competition legislation, to promote uniformity in sectoral legislation on the treatment of competition issues in the regulated sectors.

The coexistence of sectoral regulators with the BCC could be further improved through a structured cooperation framework, namely memoranda 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.

⁸¹ Where in the course of a proceeding before the Commission, an issue is raised by any person that any decision or proposed decision of the Commission is or would be contrary to any provision of this Act and whose implementation is entrusted to a statutory authority, then the Commission may, on its own motion, send the issue suspending the proceeding for taking proper action on it. On receipt of a reference from the Commission, the statutory authority shall give its opinion within 60 (sixty) days of receipt of such reference to the Commission and the Commission shall take necessary action or conduct the proceeding in accordance with the opinion.

4. ROLE OF COMPETITION IN THE PROMOTION OF COTTAGE, MICRO, SMALL AND MEDIUM ENTERPRISES IN BANGLADESH

4.1 Importance of CMSMEs and challenges faced

The 2016 National Industrial Policy of the Government of Bangladesh classifies enterprises as Cottage, Micro, Small and Medium Enterprises (CMSMEs) according to the amount of investment and the number of employed workers, as summarized in Table 7:

CMSMEs, making up 99.9 per cent of all enterprises in Bangladesh, have been heralded as a key element in the reduction of poverty in the country.⁸² The Bangladesh SME Foundation reports that there are approximately 7.8 million CMSMEs in the country.

SMEs play a crucial role in the creation of jobs as they are generally more labour-intensive than bigger enterprises.⁸³ In Bangladesh, CMSMEs employ 86 per cent of the labor force outside of agriculture and the public sector and contribute 25 per cent to the country's GDP.⁸⁴

Recognizing the importance of SMEs to the Bangladesh economy, the Ministry of Industry issued

in 2019 an SME Policy⁸⁵ to help strengthen the CMSME 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. Under the policy, the Government set to increase the contribution of the SME sector to the country's GDP from 25 per cent to 32 per cent, to help implement the country's development goals. Among the objectives in the SME Policy were creating the necessary infrastructure and women entrepreneurship development and support policies for financial and non-financial development and expansion of the SME sector, and making effective coordinated arrangements to bring all ministries, government organizations, trade bodies under a single platform and strengthen core institutions to solve existing and emerging problems in the SME sector.⁸⁶

These strategies are built upon six factors that were deemed necessary for SME development: access to finance, access to technology and innovation, access to market, access to education and training; access to business support services, and access to information.

Table 7 CMSME Definition Adopted from the 2016 Industrial Policy

Type of Enterprise		Amount of Investment (in Bangladeshi Taka)	Number of Employed Workers
Cottage Enterprise		< 1 million	Maximum of 15
Micro Enterprise		1 – 7.5 million	16 – 30
Small Enterprise	Manufacturing	7.5 – 150 million	31 – 120
	Service	1 – 20 million	16 – 50
Medium Enterprise	Manufacturing	150 – 500 million	121 – 300
	Service	20 – 300 million	51 – 120

Source: National Industrial Policy, Government of Bangladesh (2016), as cited in World Bank (2019), p.2, Table 2: Unified MSME Definition Adopted under the 2016 Industrial Policy; ADB SME Monitor 2021

⁸² ADB Asia Small and Medium-Sized Enterprise 2021: Volume I p. 45

⁸³ Schaper and Lee (2016), Competition Law, Regulation, and SMEs in Asia Pacific, ISEAS Publishing, page 19.

⁸⁴ Ministry of Industry, SME Policy 2019.

⁸⁵ Ministry of Industry, SME Policy 2019, available at http://bscic.portal.gov.bd/sites/default/files/files/bscic.portal.gov.bd/page/7a956433_c02e_483d_9c17_db194d9f4a23/2020-01-01-19-01-8029ba8887b407ce0836783a9424a605.pdf.

⁸⁶ SME Policy, pages 5 to 6.

4.2 Stakeholders in the Bangladesh MSME ecosystem

The institutions involved in policy-setting for Bangladesh's SMEs are found across the public and private sectors. Government stakeholders include the Ministry of Commerce (MOC), the Ministry of Industry (MOI), and the Bangladesh Bank. These government offices have also established specialized bodies for SME support, including the SME Foundation (SMEF), the Bangladesh Small and Cottage Industries Corporation (BSCIC), the Bangladesh Industrial Technical Assistance Centre (BITAC), the Bangladesh Council of Scientific and Industrial Research (BCSIR), the Business Promotion Council (BPC), and the MSME Department of Bangladesh Bank.

Two policy-coordination committees were created under the SME Policy: National SME Development Council (NSDC), the highest SME-related policy-making body composed of more than 30 members from the public and private sectors,⁸⁷ and the National

SME Task Force (NSTF),⁸⁸ which acts as the executive committee that identifies priorities and reviews action plans under the SME Policy. Section 6.2.5 of the SME Policy notes that the NSDC is empowered to "co-opt any competent person as a member; or invite him/her to participate in a meeting."

The SME Policy also identified BSCIC and SME Foundation as the organizations responsible for the "overall implementation of strategic goals and action plans" described in the SME Policy. The Ministry of Industries regularly monitors and evaluates the progress and implementation of the action plans of BSCIC and the SME Foundation. About its strategic action plans. Both the BSCIC and SME Foundation have the duty to create an effective supportive environment to accelerate the development of the SME sector. To avoid the duplication of efforts, BSCIC and the SME Foundation coordinate with the following government and non-government organizations including the organizations listed in Table 8 below.

⁸⁷ The SME Development Council is a 32-member council composed of the following: Minister of MOI; State Minister of MOI; Governor of the Bangladesh Bank; Secretaries of MOI, MOC, MOF, MOP, MFA, Ministry of Local Government and Rural Development, Secretary of Labour and Employment, Ministry of Labour and Employment, Ministry of Agriculture, Ministry of Jute and Textile, Ministry of Education, Ministry of Women and Children Affairs, Ministry of Fisheries and Livestock, Ministry of Science and Technology, Ministry of Environment, Forest, and Climate Change, Ministry of Cultural Affairs, Ministry of Power, Ministry of Posts, Telecommunications and Information Technology; Chairmen of the National Board Revenue, BIDA, Bangladesh Tariff Commission, BSCIC, BITAC, and SME Foundation; 5 representatives from the private sector (including the FBCCI and NASCIB).

⁸⁸ The SME Task Force is headed by the Secretary of the MOI and have representatives from the Bangladesh Bank, National Board of Revenue

Table 8 List of Stakeholders involved with SMEs

Government	Mandate
Bangladesh Investment Development Authority (BIDA)	The BIDA is mandated by the BIDA Act of 2016 to promote investment and provide facilitation services to accelerate the industrial development of Bangladesh. ⁸⁹
Bangladesh Economic Zones Authority (BEZA)	Under the BEZA Act of 2010 (Act No. 42 of 2010), the BEZA is mandated to establish, operate, control, and manage economic zones to encourage rapid economic growth. ⁹⁰ BEZA has no direct program for SMEs, but it can allot plots to SMEs and facilitate sub-contracting with large industries in the economic zones.
Bangladesh Industrial Technical Assistance Centre (BITAC)	BITAC is an organization under the Ministry of Industries which promotes technology-related innovation and skill development for entrepreneurs. BITAC is mandated to develop products, processes, and skilled manpower for national development. ⁹¹
Bangladesh Council of Scientific and Industrial Research (BCSIR)	BCSIR is a scientific and industrial research organization, regulatory body, and national laboratory under the Ministry of Industries, mandated to engage in scientific research and development for the improvement of the lives of Bangladeshis. ⁹²
National Productivity Organization (NPO)	Under the Ministry of Industries, the NPO's objectives are to promote productivity and accelerate economic development through the formulation and implementation of productivity policy and create productivity awareness and development programs. ⁹³
Bangladesh Institute of Management (BIM)	The BIM is a specialized training institute under the Ministry of Industries, mandated to promote productivity through research, training, and development of managers of all levels in both the public and private sectors. ⁹⁴
Public-Private Organizations	
Business Promotion Council (BPC)	BPC is the facilitating agency under the Ministry of Commerce. BPC's mandate is to diversify exports, ⁹⁵ undertake market research, and promote businesses by improving their capacity. ⁹⁶
SME Foundation	The SME Foundation, organized under the Companies Act of 1994, is mandated to promote, manage, and support the SME sector. ⁹⁷
Non-Government	
Federation of Bangladesh Chamber of Commerce and Industries (FBCCI)	FBCCI is the top business organization in Bangladesh. It is composed of all the national and rural trade bodies and associations, including women entrepreneur-led associations. Its key mandate is to advocate to the government on behalf of the private sector. FBCCI was created to promote, represent, and safeguard the interest of the private sector before the government and other autonomous bodies. ⁹⁸
National Association of Small and Cottage Industries Bangladesh (NASCIIB)	NASCIIB is the leading MSME-led association. It has branches in every region. Its key mandate is to undertake training, capacity building, policy advocacy and market development of its members. NASCIIB promotes the interest of the small and cottage industries. ⁹⁹

⁸⁹ <https://bida.gov.bd/mandate-and-activities> See: <https://bida.gov.bd/storage/app/media/pdf/BIDAAct2016.pdf> (Bangla)

⁹⁰ BIDA Act (2010), sec. 19 <<http://beza.gov.bd/wp-content/uploads/2015/06/BEZA-Act-English.pdf> >; <https://www.beza.gov.bd/about-beza/beza-services/>

⁹¹ <http://www.bitac.gov.bd/site/page/615d83a5-066b-43da-8642-898b92e3b66f/> See: BITAC Law (2019) http://www.bitac.gov.bd/sites/default/files/files/bitac.portal.gov.bd/law/828954d9_f301_443a_8a4a_7cc4a89b1ee5/2019-12-19-14-32-ea3efec6930faac4fcd1a6bc7b724b77.pdf (Bangla)

⁹² <http://www.bcsir.gov.bd/site/page/0de681f1-82bd-4c9c-abe7-a1c44ebce01c/> - See: BCSIR Resolution (1973) http://www.bcsir.gov.bd/sites/default/files/files/bcsir.portal.gov.bd/page/5b4697a6_b71c_46bc_83ff_0fa3eeaae4a/2021-09-29-04-39-6abf6e8166c2654317c0a6cbf405db56.pdf (English)

⁹³ <http://www.npo.gov.bd/site/page/62813ea3-021a-49e8-8abe-3f97ddb00b4/> -

⁹⁴ <http://bim.gov.bd/site/page/1e8bcd4f-10ca-48d1-8ed1-74e654cf0d56>

⁹⁵ <https://bpc.org.bd/about/>

⁹⁶ <https://bpc.org.bd/role-of-bpc/>

⁹⁷ <http://www.smef.gov.bd/site/page/05f7dbfa-1457-44a0-b92c-1f04f788889d/> -

⁹⁸ http://fbcci.org/?page_id=2418 See: Trade Organization Ordinance 1961, and Companies Act, 1913.

⁹⁹ https://nascib.org.bd/?page_id=295

Bangladesh Agro Processing Association (BAPA)	BAPA is the only food and agro-processing sector-based business association. Its key mandate is to conduct capacity building activities and promote the market expansion of its members. It represents, supports, and safeguards the interests of processors of agricultural products and industries. ¹⁰⁰ It is Dhaka-based, with members from other regions.
Metropolitan Chamber of Commerce and Industries (MCCI)	MCCI is the oldest trade organization in Bangladesh. Most of its members are corporate entrepreneurs. It mainly works on policy advocacy. It provides research and analysis services related to doing business in Bangladesh, as well as investment facilitation, legal services, and information dissemination. ¹⁰¹
Dhaka Chamber of Commerce and Industries (DCCI)	DCCI is the key SME-based business association in the Dhaka division. It undertakes training, capacity building, policy advocacy, and research. Organized under the Companies Act of 1913, DCCI supports SMEs that would like to enter new markets. It also promotes private businesses by spreading awareness and offering policy recommendations to the government. ¹⁰²
Chittagong Chamber of Commerce and Industry (CCCI)	CCI is the key business association based in Chattogram, the second largest port city of Bangladesh. ¹⁰³ It undertakes policy advocacy, prepares policy recommendations, receives trade inquiries both locally and abroad, arbitrates disputes, and offers facilities for export promotion and import. ¹⁰⁴
Women Entrepreneurs Association of Bangladesh (WEAB)	Established under the Federation of Bangladesh Chamber of Commerce and Industry, WEAB supports women entrepreneurs through technical training, facilitation of loans, and the creation of market linkages in Bangladesh and abroad. ¹⁰⁵ WEAB is the leading and pioneer women entrepreneur-led business association of Bangladesh. It is mainly Dhaka-based, with partner associations outside of Dhaka. It undertakes training, capacity building and market expansion for its members.

Sources: BCC and SME Foundation

4.3 Challenges faced by SMEs in Bangladesh

Most MSMEs in Bangladesh are informal and unregistered with the government. This phenomenon is more common with smaller firms. In 2019, the World Bank reported that 90 per cent of microenterprises and 95.5 per cent of small enterprises in Bangladesh were providing informal services domestically.¹⁰⁶ This informality hampers these enterprises' access to financing, due to their low capitalization, insufficient assets, and the rate at which these businesses close down.

These challenges were exacerbated by the COVID-19 pandemic. Around 50 per cent of CMSME firms experienced either permanent or temporary closures, the fashion and clothing sector having the highest share.¹⁰⁷ Despite Bangladesh's high economic growth,

78 per cent of SME firms still suffered cash shortage; 57 per cent experienced temporary exit; and 50 per cent met a combination of both.¹⁰⁸

To support CSMEs during the pandemic, the Government provided a total of US\$ 2.36 billion as working-capital facilities, half of which was for refinancing schemes.¹⁰⁹ It was however reported that only 0.4 per cent of firms received them from banks due to the lack of awareness of the available financial schemes. This is consistent with the findings of the International Trade Center that globally, during the pandemic, MSMEs were less likely to be aware of government support programs.¹¹⁰

A recent UNCTAD-led study urged governments and public bodies to monitor the impact of the financial support provided to MSMEs, to ensure that public funds are used efficiently and in investments that promote growth and innovation. This will prevent the use of public funds to artificially maintain non-viable firms, a practice which distorts competition.¹¹¹

¹⁰⁰ <http://www.bapabd.org/home/objective>

¹⁰¹ <https://mccibd.org/brief-history-of-the-chamber/> ; <https://mccibd.org/vision-mission/>

¹⁰² <https://www.dhakachamber.com/> ; <https://www.dhaka-chamber.com/about-us>

¹⁰³ https://www.chittagongchamber.com/about_us.php

¹⁰⁴ https://www.chittagongchamber.com/trade_service.php

¹⁰⁵ <http://www.weabbd.com/details/view/aims-objectives>

¹⁰⁶ World Bank (2019), Financing Solutions for Micro, Small, and Medium Enterprises in Bangladesh, p. 2,

¹⁰⁷ UNCTAD, The Covid-19 Pandemic Impact on Micro, Small and Medium Sized Enterprises (2022), p. 15

¹⁰⁸ ADB, The Impacts of the Covid-19 Pandemic on Micro, Small, and Medium Enterprises in Asia and their Digitalization Responses (2021), p. 9

¹⁰⁹ IFC - Introduction (2020), p. 13.

¹¹⁰ International Trade Council (2020) SME Competitiveness Outlook 2020: COVID The Great Lockdown and its Impact on Small Business, ITC: Geneva, p 40.

¹¹¹ UNCTAD (2021), The COVID-19 Pandemic Impact on Micro, Small, and Medium-Sized Enterprises, page 35.

4.4 Competition and SMEs

Competition law and policy are important to SMEs. Pro-competitive laws and policies allow small and new enterprises to operate in a market based on the merit of their goods and services. A competitive business environment prevents larger operators from hindering innovations and preventing more affordable and better-quality products and services produced by CMSMEs from entering the market. Open market competition benefits both the CMSME operators and consumers, especially strengthening the resilience and supporting the recovery of CMSMES post-pandemic.¹¹²

It is relevant to enhance CMSME's competitiveness post-crisis, building back better and designing policies that will enable them to be more sustainable, efficient, and resilient after the pandemic. Competition authorities such as the BCC have the tools to ensure that competition policy and law supports and do not stand in the way of this objective.

4.4.1 Support to, engagement with, and providing guidance to CMSMEs

While competition law usually applies only to significant restrictions of competition in the market and it is possible that CMSMEs' behaviours do not infringe competition, competition authorities should engage with them given their importance to economic development. This allows competition authorities to foster CMSMEs' awareness of competition law and policy, while at the same time developing a better understanding of the operations and challenges faced by CMSMEs.¹¹³

It is important for competition authorities to provide CMSMEs with concrete and clear guidance on the types of business activities that they can undertake without violating the BCA. Depending on the market characteristics in the jurisdiction, these guidelines could include the setting of thresholds below which agreements or conduct entered by CMSMEs are not considered to raise competition concerns. This will help improve legal certainty and predictability, allowing CMSMEs to make future decisions without fear that they may break the law.¹¹⁴

Interview findings indicate that the BCC has interacted with several CMSME-related public and private stakeholders. The SME Foundation and the BCC have met several times to discuss issues that are relevant to CMSMEs, such as access to market, access to finance, and access to technology. The BCC has also organized a seminar on the role of business leaders in maintaining competition in the market. The seminar, which featured the President of FBCCI as a special guest and included officials and members of NASCIB as participants, discussed the importance of ensuring CMSMEs' access to markets. The BCC will also hold workshops to enhance competition law awareness among the personnel of the SME Foundation and NASCIB.

While the BCC's mandate involves working with CMSME-related stakeholders, it has not been made part of the CMSME policy-coordination bodies NSDC or the NSTF. The BCC's initial efforts to collaborate with partners on these issues discussing CMSME-related policies and issues have been limited, informal, and done on an ad-hoc basis. Many CMSMEs and related organizations are still unaware of the BCA and the BCC, or unsure if or how competition law applies to or benefits them, and the few familiar with them do not consider competition a priority.

The BCC needs to continue raising awareness among the MSME-related public and private stakeholders about how competition law and regulation affects them. Small firms need to understand when the BCA applies to them, the benefits of competition policy for CMSMEs, and how they can actively utilize the BCA for their benefit. Since there are already existing cooperation frameworks within the CMSME community, the BCC need not reinvent the wheel. Instead, it may consider leveraging its relationship and establishing cooperation with the SME Foundation and BSCIC to ensure that it is consulted, and competition principles are considered in the design of CMSME-related policies. In the longer term, the BCC's involvement in the design of CMSME-related policies could be formalized and NSDC may consider including the BCC as an additional regular member or at the very least, a regular participant in NSDC's meetings.

The BCC can continue to familiarize itself with the concerns of the SME sector by establishing SME-specific consultation mechanisms, to identify

¹¹² UNESCAP (2021), Competition Policy and Strengthening MSMEs in ASEAN, page 6.

¹¹³ UNCTAD (2021), The COVID-19 Pandemic Impact on Micro, Small, and Medium-Sized Enterprises, page 35.

¹¹⁴ UNCTAD (2021), The COVID-19 Pandemic Impact on Micro, Small, and Medium-Sized Enterprises, page 35.

new ideas and issues for consideration, and help promote competition advocacy to the SME community. Doing so will also help the BCC and the MSME-related stakeholders determine if block exemptions for specific types of agreements and other practices of CMSMEs are necessary.

4.4.2 Promoting CMSMEs' access to digital markets

To contain the spread of COVID-19, many countries have imposed mobility restrictions as a public policy response. To survive during the pandemic, many small firms in Bangladesh shifted to using e-commerce to diversify sales outlets and stabilize sales.¹¹⁵ Studies indicate that using digital technologies, such as digital finance, could help MSMEs in Bangladesh recover faster from the socio-economic impact of the pandemic by ensuring a stable supply of raw materials and sales.¹¹⁶

To facilitate the resurgence of MSMEs post COVID-19, it is important to understand how competition policies can impact the development of and access to new technologies and new digital business models, particularly for MSMEs. Competition and digitalization policies should not only promote competition and access to technologies for MSMEs, but they should also encourage MSMEs to innovate so they can boost their recovery from the pandemic.¹¹⁷

CMSME agencies in Bangladesh, in cooperation with the BCC, may consider organizing training on the key emerging competition issues in digital markets that may affect CMSMEs' access to market and economic recovery in the wake of COVID-19.

¹¹⁵ Maurizio Bussolo and Sidarth Sharma (2022), E-Commerce is Creating Growth Opportunities for Small Businesses in South Asia, World Bank Blogs. Available at <https://blogs.worldbank.org/endpovertyinsouthasia/e-commerce-creating-growth-opportunities-small-businesses-south-asia>. The World Bank found that the total e-commerce revenues in Bangladesh increased by 70-80 per cent during the first few months of 2020.

¹¹⁶ Hossain, M. and T. T. Chowdhury (2022). COVID-19, Fintech, and the Recovery of Micro, Small, and Medium-Sized Enterprises: Evidence from Bangladesh. ADBI Working Paper 1305. Tokyo: Asian Development Bank Institute, p.18-19. Available: <https://www.adb.org/publications/covid-19-fintech-and-the-recovery-of-micro-small-and-medium-sized-enterprises-evidence-from-bangladesh>

¹¹⁷ UNCTAD (2021), The COVID-19 Pandemic Impact on Micro, Small, and Medium-Sized Enterprises, p. 36.

5. INTERNATIONAL COOPERATION

The BCC is aware of the benefits of international cooperation and is active in international fora organized by UNCTAD,¹¹⁸ OECD,¹¹⁹ and the International Competition Network. It is also working on a number of agreements with competition authorities in other jurisdictions, such as the Korea Fair Trade Commission (KFTC), Japan Fair Trade Commission, and the Competition Commission of India. Selected BCC staff members have also participated in an internship program arranged by the KFTC.

Bangladesh can take further steps in expanding and deepening its cooperation with other countries on competition matters as its competition regime matures. While the BCA has existed for 10 years, the Commission is still in its infancy. Expectedly, there have been no joint investigations or exchange of information between Bangladesh and other agencies for the detection of anticompetitive conduct.

¹¹⁸ The BCC has been participating in the UN Set Conference, IGE meetings on Competition Law & Policy, Cross Border Cartel Working Group, Peer Review working group and other programs.

¹¹⁹ The BCC has been participating in OECD Global Competition Forum, other high-level meetings of OECD-KPC providing written contributions. It has also participated in the Peer Review Process of Eurasian Economic Union (EAEU)

6. POLICY RECOMMENDATIONS

6.1 Recommendations to the Government

The BCC has made considerable efforts despite its scarce resources and the limitations of the BCA. Still, it is challenging for a young and small competition authority, with limited staff, to achieve the objectives of the BCA. Improvements could be made in a number of areas, at both regulatory and institutional level, to create a more robust system for the promotion of competition in Bangladesh.

The following recommendations can contribute to reforms that can help the Bangladesh economy resume sustainable growth and job creation by enhancing competitiveness, encouraging investment, and stimulating productivity in the country. The Government may wish to consider the following recommendations.

6.1.1 Proposals for amending the competition law

The law may be complemented as follows:

6.1.1.2 Section 15 on anti-competitive agreements

It is recommended that Section 15 of the BCA be amended to: (1) identify the legal standards for the assessment of the anti-competitive agreements listed under Sections 15(2) and 15(3); (2) clearly distinguish between agreements that are per se prohibited and those that fall under the rule of reason; (3) clarify that the list of examples of anti-competitive agreements are non-exhaustive and can be expanded or introduce a catch-all provision for anti-competitive agreements not caught here. Consider using expressions such as: “among other possibilities”, “in particular”, “among others”, “other cases with an equivalent effect; (4) clarify in secondary legislation that anti-competitive agreements with overall insignificant market share are of minor importance, being exempted under the de minimis concept.

6.1.1.3 Section 16 on abuse of dominant position

It is recommended that Section 16 of the BCA be amended to: (1) identify the legal standards for the

assessment of the abuse of dominant conduct; (2) consider revising the general prohibition of the abuse of a dominant position adding a non-exhaustive list of examples; (3) discuss whether a rebuttable presumption of dominance based on a specific market share threshold should be introduced; (4) consider adopting guidelines as to how the BCC will assess market power and the types of factors to include

6.1.1.4 Section 21 on consolidation

It is recommended that Section 21 of the BCA be amended to: (1) consider introducing a mandatory requirement for notification of mergers; (2) consider introducing thresholds for notifiable mergers; (3) consider including a reasonable binding time frame for merger review; (4) consider including a provision on the power of the BCC to (a) approve a concentration subject to conditions; (b) impose administrative penalties for failure to file a notification for notifiable mergers; and (c) 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; (5) 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 BCA.

6.1.1.5 Section 17 on pre-inquiry procedure

It is recommended that Section 17 of the BCA be amended to consider including a timeframe for pre-inquiries to prevent legal uncertainty for the subject/s of the pre-inquiry.

6.1.1.5 Other gaps and issues

It is recommended that the BCA be amended to address the gaps and other issues identified in the present report, as follows:

1. the scope of the law in relation to regulated sectors and the interaction between the BCC and sector-specific regulators when applicable;
2. the objective requirements for the appointment of the Commission and the enhanced transparency of the selection process;

3. the restrictions on the operational autonomy of the BCC and the prerogatives given to the Ministry of Commerce vis-à-vis the decision-making powers of BCC, including the appeal of the BCC's decisions to the Ministry of Commerce which may negatively affect the independence of the BCC.
4. the need for additional investigative tools for a more effective law enforcement the BCC, such as inspections of business premises and leniency.
5. The option of including a provision on private enforcement if such a course of action is not available under civil laws.

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.

6.1.2 Institutional framework and resources

6.1.2.1 Budget

The Government should consider increasing the budget of the 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.

6.1.2.2 Human resources

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

6.1.2.3 Operational independence

To allow more flexibility and increased efficiency of service delivery, the Government should enable the BCC to exercise independence to vary working tools such as operational guidelines, strategic programs, and organizational structure without Ministry's endorsement.

6.2 Recommendations to the Bangladesh Competition Commission

While acknowledging the undoubted virtues and quality of Bangladesh's competition law and policy as well as the admirable commitment of BCC's leadership and staff, a number of recommendations are made below in order to further improve the enforcement of competition law in the country.

BCC may wish to consider the following recommendations.

6.2.1 Enforcement, institutional framework, and resources

- Promptly publish guidelines for merger control, abuse of dominance, horizontal or vertical agreements, and sanctions to increase legal certainty, facilitate compliance and promote competition.
- Ensure that market definition, the assessment of market power, and anti-competitive analysis tools follow international best practices, namely through the drafting of guidance also used in the reasoning of decisions.
- Considering the many institutional, human resource, and financial challenges faced by a young agency, develop a strategic plan identifying annual or biannual priority activities.
- The BCC should consider adopting a formal procedure clearly separating investigative from decision-making functions-.
- Strengthen the existing ICT wing and develop the automation of complaint forms, applications, workflows, electronic documentation of proceedings, archives, and an electronic library. Strengthen the existing ICT wing and develop the automation of the complaint forms, applications, workflows, the electronic documentation of proceedings, the archives, and an electronic library.

6.2.2 Advocacy

- Engage sectoral regulators in discussions for better appreciation of respective mandates, to clarify jurisdiction and establish structured cooperation through memoranda of

understanding (with BTRC, BERC, and BSEC) to promote harmonization in the treatment of competition issues in the regulated sectors in sectoral legislation

- Develop competition culture among different stakeholders, in cooperation with public and private partners through nationwide awareness programs (meetings, seminars, workshops, awareness-raising through electronic and print media, among others), and establish relationships to advocate for competition, in particular with business communities and media organizations
- BCC internship programs may encourage students to pursue studies or future careers in competition law and economics.

6.2.3 CMSMEs

- Continue raising awareness among the MSME-related public and private stakeholders about the benefits of competition. Consider establishing cooperation with the SME Foundation and BSCIC to ensure it is consulted in the design of CMSME-related policies.
- Continue to familiarize itself with MSMEs challenges by establishing specific consultation mechanisms to gather a dedicated perspective, gather new ideas and issues to consider, and launch competition advocacy campaigns with the MSME community.

6.3 Recommendations to the Government and BCC

It is recommended that the Government and BCC:

- Provide tailored training on competition and training of trainers to staff, commissioners, other officials, and magistrates (handling appeals from the BCC decisions), sectoral regulators' staff and practitioners on a regular basis. These activities may include:
 - Consultative workshops for the formulation of rules and regulations, legal instruments, policy documents, and guidelines for

effective development and implementation of the BCA.

- Staff exchanges or secondment programs with other competition authorities, international organizations, and development partners.
- Continued participation in different trainings, seminars, workshops where participants can learn from the experiences and other practices of other matured competition regimes.

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

6.4 Recommendations to CMSME Agencies

- Consider formalizing the BCC's involvement in the design of CMSME-related policies by including the BCC as an additional regular member of, or at the very least, a regular participant in, NSDC's meetings.
- Monitor the impact of financial support provided to CMSMEs to ensure that public funds are used efficiently to promote growth and innovation and do not distort competition by maintaining firms that are not viable in the medium to long-term.
- In cooperation with the BCC, consider organizing trainings on the key emerging competition issues in digital markets that may affect CMSMEs' access to market and economic recovery in the wake of COVID-19.

6.5 Recommendations to the judiciary

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

Finally, Table 9 below summarizes all the recommendations suggested in this report according to their short-, medium- or long-term perspective.

Table 9 Summary of Peer Review Recommendations

Recommendation	Short to Medium Term	Medium to Long Term
Legal framework		
Political and legislative agenda	Comprehensive study to examine the economic and legal aspects of the competition regime based on Bangladesh's social, economic, and political contexts.	
		Amend and align the BCA with international guidelines and good practices as a priority in legislative period 2019-2024. ^[1]
Substantive and procedural standards	Publish guidelines for merger control, abuse of dominance, horizontal or vertical agreements, and sanctions	
	Ensure that market definition, assessment of market power, and anti-competitive analysis tools follow international best practices by issuing guidelines.	
	Adopt a formal procedure clearly separating investigative from decision-making functions of the BCC.	
Emerging issues (competition issues in digital markets)		Update provisions of the BCA, as necessary, to accommodate new trends and developments in digital markets
Institutional Framework		
Government	Allow the BCC to exercise independence in varying working tools	
	Consider exempting BCC personnel from the practice of following a 3-year maximum tenure	
	Consider increasing the budget of the BCC	
	Consider increasing the salaries BCC personnel	
BCC	Develop a strategic plan for annual or bi-annual priorities	
	Strengthen the ICT Wing	
	Forge bilateral agreements with other competition authorities in the region and beyond for technical assistance and staff exchange.	
Government and BCC	Tailored training for BCC staff and officials, MOC officials, magistrates, sector regulators, and practitioners.	
	Establish competition law and policy courses at local universities.	
CMSME agencies	Monitor the impact of the financial support provided to MSMEs	
	In cooperation with BCC, organize training on the key emerging competition issues in digital markets that may affect CMSMEs' access to market and economic recovery in the wake of COVID-19.	
	Consider formalizing BCC's involvement in CMSME policy design	
Judiciary	Attend workshops on competition law enforcement and interact with other judges handling competition issues	

[1] The current Parliament, which first sat on 30 January 2019, has a 5-year tenure. See <http://www.parliament.gov.bd/index.php/en/about-parliament/tenure-of-parliament>.

ANNEX A: LIST OF INSTITUTIONS AND INDIVIDUALS CONSULTED FOR THE FACT-FINDING MISSION

Name	Institution
Mr. Md. Mofizul Islam, Chairperson	Bangladesh Competition Commission
G. M. Saleh Uddin, Member	Bangladesh Competition Commission
Dr. A F M Manzur Kadir, Member	Bangladesh Competition Commission
Nasreen Begum, Member	Bangladesh Competition Commission
Mr. Md. Abdus Samad Al Azad, Joint Secretary	Ministry of Commerce
Mr. Devabrata Chakraborty, Commercial Counsellor, Geneva	Ministry of Commerce
Mr. Md. Selim Hossen, Deputy Secretary	Ministry of Commerce
Mr. Md. Nuruzzaman ndc, Joint Secretary	Ministry of Industries
Mr. Mrityunjoy Saha, Joint Secretary	Financial Institutions Division, Ministry of Finance
Mr. Wasfi Tamim, CEO, BCE	Chittagong Chamber of Commerce
Mr. Md. Abdur Rahim Khan, Coordinator and Joint Secretary	Business Promotion Council
Mr. Mahmudur Rifat Khan, Executive Officer	National Association of Small and Cottage Industries of Bangladesh
Mr. Md. Azhar Uddin Bhuiyan, Lecturer, Dept. of Law	Bangladesh University of professionals
Professor Shibli Rubayat-Ul-Islam, Professor & Chairman, BSEC	University of Dhaka
Dr. Md. Mafizur Rahman, Managing Director & Other Officials	Small & Medium Enterprise Foundation
Mr. Sirajul Islam, Executive Chairman	Bangladesh Investment Development Authority
Mr. Md. Ariful Hoque, Director	Bangladesh Investment Development Authority
Md. Munir Chowdhury, National Trade Expert	Connectivity Project, Ministry of Commerce
Mr. Md. Nuruzzaman ndc, Joint Secretary	Ministry of Industries (National SME Taskforce)
Mr. Md. Minhazul Islam, Deputy Director	Microcredit Regulatory Authority
Mr. Khalid Abu Naser, Former Director	Bangladesh Competition Commission
Ms. Mita Bose, Goose Ltd. (Leather Entrepreneur)	SME Entrepreneur
Mr. Rashedul Karim Munna, Diversified Jute Producer & Exporter (Virtual)	SME Entrepreneur
Mr. Sami Ahmed, Managing Director	Start-Up Bangladesh

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Name	Institution
Mr. A.H.M Shafiquzzaman, Director General (Additional Secretary) and Other Officials	Directorate of National Consumers' Right Protection
Barrister ABM H. Mishbah, Advocate, Supreme Court	Supreme Court of Bangladesh
Mr. Arup Barai, Senior Assistant Director	Bangladesh Telecommunication Regulatory Commission
Mr. Md. Maidul Islam, Deputy Director	Bangladesh Telecommunication Regulatory Commission
Mr. Md. Firoz Zaman, Deputy Director	Bangladesh Energy Regulatory Commission
Professor A. K. Enamul Haque, Professor, Department of Economics	East West University
Barrister Mafruha Murphy, Advisor	Bangladesh Competition Commission
Mr. Md. Jaker Hossain, General Manager	Bangladesh Bank - SME Department
Ms. Liza Fahmida, DGM, SMES'PD	Bangladesh Bank - SME Department
Syed Abdul Momen, Deputy Managing Director & Head of SME	Brac Bank
Ms. Farida Yasmeen, director (MEA)	Ministry of Foreign Affairs
* Mr. Jahangir Alam Shovon, General Manager	e-Commerce Association of Bangladesh (e-CAB)
Prof. Dr. M. Shamsul Alom, Senior vice chairman	Consumers Association of Bangladesh
Dr. Mesbahuddin Ahmed, Assistant General Manager	Palli Karma Sahayak Foundation

