

# A Study on the Performance of the Competition Commission and Competition Law in Bangladesh: Qualitative Content Analysis of the ‘Other Opinion’

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**Abstract:** *The researchers conducted a series of Key Informant Interviews among expert respondents having good experience in competition law and the Competition Commission of Bangladesh. After conducting a qualitative content analysis, the data of the first-of-its-kind study were later presented for research publications. While the questionnaire comprised of fixed questions was subject to publication in different journals, the data analysis results of ‘other opinion’ were chosen for this article. The respondents brought forward various issues our fixed questions did not address. Findings and recommendations were heavily drawn from the outcome of the qualitative data analysis of the ‘other opinion’. The authors also provided a legal background to co-relate the issues of ‘competition’ with the legitimate or illicit practice of ‘anticompetitive market behavior’.*

**Keywords:** Competition Commission, Competition Law, Bangladesh, Qualitative Analysis.

## 1. Introduction

There was a clear need to protect the ‘competition’ from the abuse of legitimate and illicit market behavior by monopolistic producers or producers occupying the major market share/power. The abuse of the dominant position by the intellectual property (IP) right owner and/or by monopolistic producers, or two or more producers forming cartels to control the market, are regulatory concerns. Bangladesh enacted the Competition Act in 2012 and established the Competition Commission in 2016 to ensure that the producers in the market do not abuse their market power to hinder access to goods and services by the general population at a reasonable cost and affordable means. It is a step towards recognizing and protecting the general population’s right to ‘quality of life’ and access to ‘essential goods and services’.

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This *self-funded* empirical research is an academic exercise conducted by the authors for the purpose of understanding how the competition law and the Competition Commission can contribute towards higher accessibility of goods and services for the general population while addressing the issues of legal (IP monopoly) and illicit (forming cartel, abusing dominant market position, etc.) anti-competitive market behavior by the producers of goods and services. The authors took this initiative to study the functioning of the Competition Commission of Bangladesh and the Competition Act 2012, in a novel and first-of-its-kind exercise to harness the knowledge acquired from this investigation so that it may assist in shaping the legal and policy framework.

This novel and original research is aimed at:

- a) exploring, gaining, and utilizing state-of-the-art knowledge, information, and developments in the field of competition law, and
- b) observing the performance and outcome of the newly established institution, i.e., the Competition Commission.

The article reports the Qualitative Content Analysis (QCA) results of one (01) question that is ‘other opinion’ of the Key Informant Interviews (KII) conducted among the eleven (11) respondents chosen for their expertise on intellectual property law, competition law, and involvement with the Competition Commission. Only nine (09) responses could be finally available for the data analysis, as two (02) respondents did not complete the process within the stipulated time of the study. While many of the respondents were independent legal professionals (lawyers and academics), the remaining were the mid- and higher-mid-ranked officials of the Commission. The questionnaire comprised of 10 questions, was split into three (03) writing projects for different law journals; only the ‘other opinion’ containing insightful observations of the interviewees was opted for the purpose of this publication. However, the questionnaire referred to as Appendix I was provided for the purpose of the review; not meant to be published with this paper.<sup>1</sup>

For interpretation of the Major Key Themes (MKT), summary, findings, and recommendations, the ‘words, phrases and sentences’ from the respondents derived from the ‘original responses in quotation’ were used without citing their names as the respondents/interviewees were anonymous for this investigation; however, in section 4.2 their code names (respondent number) appear in parenthesis.

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The following are the professional backgrounds of the respondents (the study report maintains anonymity and hence, refrains from identifying them individually by their ‘profession’ to prevent establishing a direct link with their ‘quoted response’):

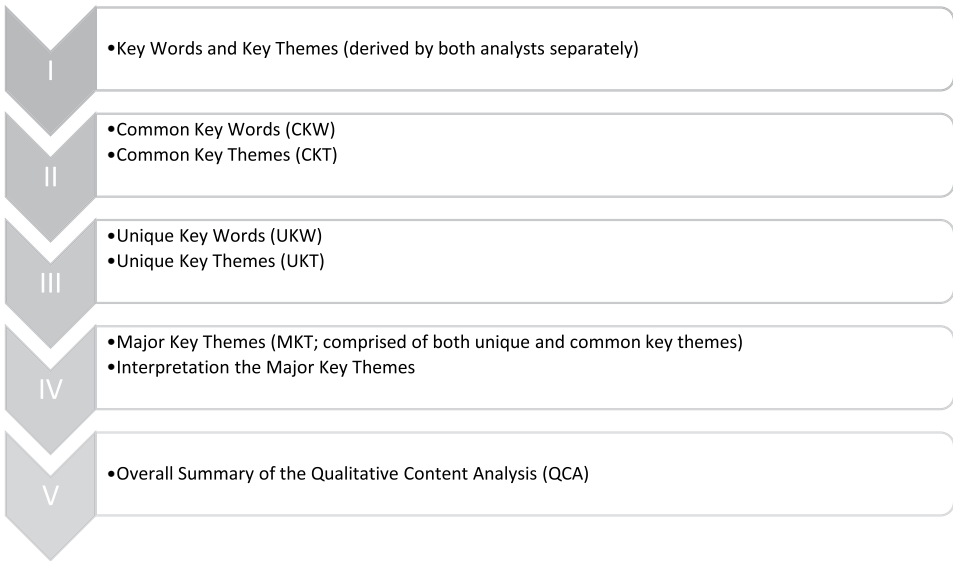
Legal Professional (law practitioner), Head of Legal Support (Corporate), Legal & Compliance (Corporate), Lecturer/Academic (University), Senior Judicial Magistrate (Government Service), Deputy Director (Commission), Assistant Director (Commission), Assistant Director (Commission), Legal Counsel (Corporate), Assistant Director (Commission), Assistant Director (Commission).

## **2. Reporting the Key Informant Interview: Data Analysis Methodology**

Our team conducted ‘face-to-face interviews’ from 29 March 2023, to 19 June 2023, for the KII. The informants/respondents were experts in the discipline relevant to the research. Their professional background includes lawyers, judges, academics, and the employees of the Commission. Respondent T1 expressed the intention to edit/modify his/her response and later never submitted the edited/modified response by email. Though 11 interviews were conducted, only 9 responses could be analyzed, as two responses could not be finalized from the respondents’ end on time. The questionnaire had a total of 10 questions, among which the last one was ‘other opinion’ which allowed them to say anything that our fixed questions did not address or if they wanted to raise as a concern or make a comment or observation. That last question made room for the respondents to comment as they wished. This article reports the outcome of that ‘other opinion’ analyzed according to the qualitative data analysis methods we applied. The questionnaire tested the performance of the Competition Commission, competition law, and the nexus between competition and intellectual property, explored means for fostering accessibility of the goods and services, tested mechanisms of price control, asked to make comparisons between other jurisdictions, and finally left an open-ended question (other opinion) to allow them to speak their minds.

The questionnaire, the separately derived ‘Key Words’ and ‘Key Themes’ by two analysts, and the Common Key Themes (CKT) and interpretation of the CKT in the separate file as appendices were supplied for the review. Original responses in quotation were also used in this paper where they form the interpretation of the MKT, Summary, and Findings without citing the names of the respondents.

The qualitative data analysis comprised of the following steps:



**Figure 1: QCA step by step**

Furthermore, the Common Key Word (CKW) indicates the word of the respondent quoted by both analysts, the Common Key Theme (CKT) means ‘key theme’ discerned by both analysts, Unique Key Word (UKW) indicates word of the respondent quoted by one analyst and Unique Key Theme (UKT) is the ‘key theme’ discerned by one analyst.

The article derived findings from the interpretation of the Major Key Themes and researchers’ observations within the purview of the QCA process, and added insights to it, leading to the formulation of the recommendations.

### **3. Legal Framework of Competition Regulation**

This section of the writing incorporates a discussion on important Bangladeshi laws relating to competition and intellectual property rights while establishing their connection with the international multilateral legal instruments and mentions certain examples of enforcement of competition law beyond the territory of Bangladesh.

The Competition Act 2012,<sup>2</sup> is an Act intended to regulate competition in the market and contains multiple important definitions relevant to abusive market behavior. The Act provides a detailed regulation on anti-competitive agreements (having an adverse impact on the market through deceptive prices, controlling

<sup>2</sup> The Bangladesh Competition Act, 2012 (Act No 23 of 2012). Available at < [https://www.dpp.gov.bd/upload\\_file/gazettes/20533\\_10683.pdf](https://www.dpp.gov.bd/upload_file/gazettes/20533_10683.pdf)> accessed on 12 November 2023.

or limiting production and supply, abnormal purchase and sale prices, dividing the market geographically or on the basis of goods and services) and abuse of dominant position (direct or indirect imposition of unfair or discriminatory condition or price in the purchase or sale of goods and services, limitation or restriction of production or development of goods and services, indulge in practice that prevents others' access to the market, using dominant position to protect market or enter into another one, the conclusion of contracts conditional upon the acceptance of unrelated supplementary obligations to the subject matter by the other parties) under sections 15 and 16.

Oligopoly, under section 2(1) (*ga*), is defined as a situation where the market of any particular product or service is controlled by an organization, entity, or group of persons. Section 2(1) (*uma*) outlines a cartel as any person or group of persons who control or attempt to do so, the manufacturing, dispersal, or sale of any particular product or limitation of such product or service in the market with the objective of establishing a monopoly in the concerned market. When the market of a product or service is regulated by a person or an enterprise, under section 2 (1) (*murdhonno*), such a scenario is defined as a monopoly. Additionally, collusion, under section 2(1) (*tha*), takes place when to control or to facilitate the dishonest intention of controlling and unsettling an otherwise healthy and competitive market, a written or unwritten contract is made.

Under section 15<sup>3</sup>, it is prohibited to manufacture a scenario of monopoly or oligopoly or to disrupt or cause disruption to the market of any product or service by entering expressly or impliedly into a contract concerning the production, supply, dispersal, storing, or acquisition of such product or service. Furthermore, this section deems prejudicial to the competition in the market of any goods or services, if any contract, practice, or decision is initiated by any person or association of persons concerning such good to expressly or impliedly a) determine the selling or purchasing price abnormally or fraudulently or through forgery in the tender or other matters, b) regulate manufacture, dissemination, technical development, investment or service facilities, or splits production facilities based on class, geographic market, market consumer quantity or other factors.<sup>4</sup>

Section 15(3) additionally considers the following behaviour as anti-competitive:

*Ka*) conditional arrangement<sup>5</sup> (while the buyer purchases any good or service from the vendor, an agreement to the effect that such buyer will accept goods or benefits from other persons employed by the vendor);

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<sup>3</sup> Ibid s 15 (1).

<sup>4</sup> Ibid s 15 (2).

<sup>5</sup> Ibid s 15 (3) (*ka*).

*Kha*) exclusive supply agreement<sup>6</sup> (agreement limiting the buyer to purchase goods and services from the seller only);

*Ga*) exclusive service agreement<sup>7</sup> (an agreement regulating for sale the supply, or quantity of any product or the territory in which it is to be sold);

*Gha*) refusal to deal<sup>8</sup> (agreement limiting the person purchasing or the person selling any good or service from buying or selling the same); and

*Uma*) reservation of resale price<sup>9</sup> (agreement wherein the seller fixes the resale price of a product purchased by the buyer unless a lower price is fixed for resale).

Section 16<sup>10</sup> defines ‘dominant position’ as an advantageous position that a business enjoys in the market which allows it to influence the market in its favor and to operate free of other market forces. A business enterprise or organization shall not abuse the dominant position it holds in the market.<sup>11</sup> Abuse of dominant position has been identified as the following circumstances<sup>12</sup>

*Ka*) in the purchase or sale of goods and services expressly or impliedly *imposing unfair, or discriminatory conditions or prices or artificially reduced or predatory prices* (product sale price lower than production cost to cut out competition);

*Kha*) *restricts or obstructs* the customer base, market, manufacture, technical, and scientific development of goods and services;

*Ga*) *to obstruct the access of others* into the market, adopts any practice to that effect, and continues it;

*Gha*) enters into *conditional contracts* wherein the other party is required to undertake supplementary commitments not forming nor related to the subject matter of the contract; or

*Uma*) *fortifies* a relevant market or enters into one utilizing its market dominant position.

On the other hand, The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)<sup>13</sup> under Article 40, acknowledges that

<sup>6</sup> Ibid s 15 (3) (*kha*).

<sup>7</sup> Ibid s 15 (3) (*ga*).

<sup>8</sup> Ibid s 15 (3) (*gha*).

<sup>9</sup> Ibid s 15 (3) (*uma*).

<sup>10</sup> Ibid s 16.

<sup>11</sup> Ibid s 16 (1).

<sup>12</sup> Ibid s 16 (2)

<sup>13</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement (entered into force on 23 January 2017) 3248 UNTS available at < WTO | legal texts - Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement> accessed 12 November 2023.

licensing practices or conditionalities concerning intellectual property rights may restrain competition, have an adverse impact on trade, and impede the transfer and dissemination of technology and thereby allow member States to undertake measures, appropriate and in consistency with the other provisions of this agreement, to prevent or regulate such abusive and anti-competitive practices in intellectual property rights licensing. Additionally, the Treaty on the Functioning of the European Union (TFEU)<sup>14</sup>, under Article 102 ‘prohibits the abuse of a dominant position. The implementation of these provisions is defined in the Antitrust Regulation (Council Regulation No 1/2003), which can also be applied by the national competition authorities.’<sup>15</sup> In 2022, the European Commission preliminarily ruled that Apple’s Apple Pay was anti-competitive because ‘it abused its dominant position in markets for mobile wallets on iOS devices’<sup>16</sup> by restricting access of ‘mobile wallet app developers’<sup>17</sup> to Near-Field Communication (NFC) technology used for contactless payments via mobile devices. The Commission further notes ‘Apple restricts competition in the mobile wallets market in iOS’<sup>18</sup> so that its ‘own solution, Apple Pay’<sup>19</sup> may benefit.

However, the Bangladesh Competition Act, 2012 makes exceptions on intellectual property rights under section 15(4).<sup>20</sup> It is pertinent to mention that the new patent law, i.e., Bangladesh Patent Act 2022<sup>21</sup> provides an exception to patent rights’ enforcement, discussed hereinafter in this article, acts as a provision to *allow restriction on patent monopoly* in certain cases rejecting *temporary injunction and specific relief* claimed by the patent owner.

Therefore, the Commission does not have to limit/curtail its authority in case of a patent, if the circumstances fit into the exceptions of the Bangladesh

<sup>14</sup> The Treaty of the European Union 2007 (entered into force on 1 December 2009) C 326/49 available at < [eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT)> accessed 5 December 2023.

<sup>15</sup> European Commission, ‘Antitrust: Commission sends Statement of Objections to Apple over practices regarding Apple Pay’ (*Press Corner*; 2 May 2022) available at < [Antitrust: Commission sends Statement of Objections to Apple \(europa.eu\)](http://Antitrust: Commission sends Statement of Objections to Apple (europa.eu))> accessed 5 December 2023; Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (Text with EEA relevance) Official Journal L 001 available at < [EUR-Lex - 32003R0001 - EN - EUR-Lex \(europa.eu\)](http://EUR-Lex - 32003R0001 - EN - EUR-Lex (europa.eu))> accessed 5 December 2023.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> The Bangladesh Competition Act, 2012 (Act No 23 of 2012) s 15, 15 (4), 16 Available at < [https://www.dpp.gov.bd/upload\\_file/gazettes/20533\\_10683.pdf](https://www.dpp.gov.bd/upload_file/gazettes/20533_10683.pdf)> accessed on 12 November 2023.

<sup>21</sup> Bangladesh Patents Act, 2022 (Act No V of 2022). Available at <<https://www.wipo.int/wipolex/en/legislation/details/21851>> accessed 17 July 2023.

Patent Act 2022<sup>22</sup> under section 24(11), because the patent owner does not have the legal remedy (injunction and specific relief) if those conditions (*apprehension of a serious breach of public interest, sold at price above the average purchasing power of the consumer, sold at a higher price for the absence or existence of a competitive product*) prevail in the mode of the commercial exploitation of the patented goods and services.

The drafting of section 37(2) of the Bangladesh Competition Act, 2012<sup>23</sup> is quite arbitrary and as an organization dependent on the Government for resources,<sup>24</sup> the Competition Commission needs some separation from the Government in terms of exercising its authority free from influences. Section 37(2) (Government's authority) acts as a limitation on the implementation of competition law. Therefore, the provisions on the Government's direct control and authority need to be amended or omitted. The appeal procedure under section 30 may also be viewed by legal scholars as flawed.<sup>26</sup> The impact of section 30(2)<sup>27</sup> on the 'finality of judgment' should be observed from the available data and should be amended if the statistical data analysis patterns indicate such necessity. Further research can be conducted covering this area (Appeal procedure/provision).

The laws on Intellectual Property Rights (IPR) are relevant here:

- for understanding *the association between 'legal monopolistic market behavior' and the 'anti-competitive impact'*; and
- for their (IP laws') pivotal role to explore/provide means to put restrictions on certain *abusive* exclusive commercial exploitations.

The Bangladesh Patent Act 2022, under section 24(11),<sup>28</sup> clearly does not allow *temporary injunction or specific relief* for the enforcement of the patent rights in the following circumstances:

- if *apprehension of a serious breach of public interest exists*, according to section 24(11) (*kha*) of the Bangladesh Patent Act 2022;
- if *the product is sold at a price above the average purchasing power of*

<sup>22</sup> Bangladesh Patents Act, 2022 (Act No V of 2022) s 24(11) Available at <<https://www.wipo.int/wipolex/en/legislation/details/21851>> accessed 17 July 2023.

<sup>23</sup> The Bangladesh Competition Act, 2012 (Act No 23 of 2012) s 37(2). Available at <[https://www.dpp.gov.bd/upload\\_file/gazettes/20533\\_10683.pdf](https://www.dpp.gov.bd/upload_file/gazettes/20533_10683.pdf)> accessed on 12 November 2023.

<sup>24</sup> Ibid s 32.

<sup>25</sup> Ibid s 37.

<sup>26</sup> Ibid s 30.

<sup>27</sup> Ibid s 30(2).

<sup>28</sup> Bangladesh Patents Act, 2022 (Act No V of 2022) s 24(11). Available at <<https://www.wipo.int/wipolex/en/legislation/details/21851>> accessed 17 July 2023.



*the consumer*, according to section 24 (11) (ga)(a) of the Bangladesh Patent Act 2022; and

- if *the particular product is sold at a higher price for the absence or existence of a competitive product*, according to section 24(11) (ga)(e) of the Bangladesh Patent Act 2022.

Since this law specializes in the exclusive commercial exploitation of patent rights and it is the latest one, *this provision can be interpreted to curtail the patent rights if the above market behavior is prevalent in the commercial exploitation of the patented goods and services in the markets of Bangladesh*. This is not a violation of TRIPS obligation, as the use without authorization (TRIPS Agreement, Article 31, ‘Other Use Without Authorization of the Right Holder’) is allowed under the TRIPS Agreement,<sup>29</sup> subject to coherent interpretation by the country making the application of the multilateral agreement in its domestic legal regime. This provision of the Bangladesh Patent Act 2022 seems to be in consistence with the international legal regime on intellectual property rights to prevent anti-competitive behavior by the legal monopolistic right owner abusing their privilege to make excessive profit at the cost of exclusion (deprivation) of the consumer from the essential goods and services.

#### **4. Data Analysis: Major Key themes of the Qualitative Content Analysis of the ‘Other Opinion’ and its Interpretation and Summary**

##### **4.1 Major Key Themes:**

- Skills of the Commission;
- Properly trained permanent staffs and employees;
- Delay in the trial procedure;
- Should take ‘proactive measures to ensure fair price of commodities’;
- Overlapping of power should be prevented;
- Priority for the ‘market specific regulator’;
- Commission should take preventative measures to control the prices;
- Equipped with ‘quasi-judicial powers’;
- ‘[H]uman rights’, ‘consumer rights’ and ‘health rights’;
- Other bodies should be involved;
- Commission cannot go beyond placing suggestions or recommendations;

<sup>29</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement (entered into force on 23 January 2017) 3248 UNTS available at < WTO | legal texts - Agreement on Trade-Related Aspects of Intellectual Property Rights as Amended by the 2005 Protocol Amending the TRIPS Agreement> accessed 12 November 2023.

- ‘[L]aw is sufficient for now’;
- Impact assessment;
- Importance of the coordination;
- How the ‘existing framework’ can be utilized;
- Skeptical about following foreign jurisdictions and international trend without taking into account local need and reality;
- Fund, strengthen, and promote the Competition Commission;
- Strong Competition Commission ‘will ensure social justice and strengthen the financial and social standing’;
- ‘[b]ringing about a bottom-up development in the societal structure and societal parameters’;
- ‘[D]ata and evidence-based decision’;
- The infrastructural development;
- Advocacy for the awareness;
- The Regulation;
- Appointment/recruitment on a temporary basis creates a knowledge gap;
- ‘Determining a competition policy’;
- ‘[T]raining of officers’;
- ‘MoU of [sic.; with] different countries[sic;] competition agency’;
- ‘[L]earning how to use different world recognized statistical tools’;
- Public awareness and contributions from the civil society.

#### **4.2 Interpretation of the Major Key Themes derived from the responses to question 10 (Other Opinion):**

Respondent (T2) emphasized improving the skills of the Commission. Respondent thinks that the Commission should have properly trained permanent staffs and employees. The respondent raised concerns regarding the delay in the trial procedure. Respondent mentioned that the Commission should take ‘proactive measures to ensure fair price of commodities’. Respondent referring to the telecom sector recommended that overlapping of power should be prevented and areas under active oversight of other regulatory bodies (e.g., BTRC for the telecom) should be left aside. Respondent mentioned that ‘if there exists a market specific regulator, such regulator should get priority’. Respondent demonstrated clear concern with regard to the perceived tension between the Telecom Act 2001<sup>30</sup> and the Competition Act 2012. Respondent thinks that the Commission

<sup>30</sup> The Bangladesh Telecommunication Act 2001 (Act No XVIII of 2001) available at < <https://www.itu.int/ITU-D/treg/Documentation/Bangladesh/BTRC-TelecomLaw2001.pdf> > accessed 12 November 2023.

should take preventative measures to control the prices, instead of filing the cases after the high consumption period (e.g., price hike during the Ramadan) is over.

Respondent (T4) underscored the areas the Commission may pay attention to, e.g., ‘human rights’, ‘consumer rights’, and ‘health rights’. Respondent thinks that ‘administrative and intelligence agencies and law enforcement agencies’ should be allowed to share some degree of authority and the whole affair should be well-coordinated. Despite this, the respondent thinks that ‘the law is sufficient for now’ and expressed that ‘[t]he Commission cannot go beyond placing suggestions or recommendations before the policy makers or cabinet’.

Respondent (T5) emphasized the impact assessment of the law and the Organization established for the purpose; more precisely, *‘instead of a priori enactment of the Competition Act 2012 and the establishment of the Commission, respondent emphasized on prior impact assessment’*. Respondent favors using existing laws and organizations to solve a problem than just establishing new organization and enacting new legislation. Respondent *underscored the importance of the coordination between the organizations*. Respondent is *skeptical about following foreign jurisdictions and international trend without taking into account the needs and realities of the Bangladeshi population*. In his words: ‘We are focusing ourselves to the foreign countries or international organization such as UNCTAD by enacting such law or establishing such organization without assessing the impact of the law and commission whether it will serve its purpose and the interest of the people.’

The respondent (T6) cited from personal experience: ‘[d]uring the seminar facilitated by the Asian Development Bank, an Emeritus Professor from the University of Hawaii, USA, presented a research output where he showed that if a part of the money spent by NGO’s could be used to fund, strengthen, and promote the Competition Commission, then the lower segments of the population will receive monetary benefit greater than that received from the NGO’s’. Respondent meant that a strong Competition Commission ‘will ensure social justice and strengthen the financial and social standing .... Bringing about a bottom-up development in the societal structure and societal parameters’. Respondent suggested further research on the Competition Commission, as he/she believes that it will ‘provide support for data and evidence-based decision to enrich the competition regime and policy decisions of the Government’.

Respondent (T7) thinks that the Commission, at present, is at the early stage of its life and suggested that the steps of priority and incremental progress should be: first, the infrastructural development, second, Advocacy for the awareness and third, the Regulation. Respondent stated: ‘At this stage, the responsibility of the Commission should be its *infrastructural development* [italics added] .... The

Commission should also focus on *advocacy* [italics added] to create awareness among the mass population and then proceed for a *sustainable regulation* [italics added] of competition in the market'. Regarding the technical know-how of the officials, the respondent reported:

Majority of the *high official posts* [italics added] of the Commission are filled up on *deputation* [italics added] .... The officials need to be aware of the market, of competition. Furthermore, placing someone here for 6 months or 1 year on a temporary basis also creates a knowledge gap which also hampers the development of the Commission.

Respondent (T8) made a few very important suggestions, such as, [d]etermining a competition policy', 'training of officers', 'MoU of [sic.; with] different countries[sic;]' competition agency' and 'learning how to use different world recognized statistical tools'. Respondent (T9) underscored the contributions of research, 'media, CSO, and NGOs'.

### 4.3 Overall Summary

Overall summary of the QCA of the question no. 10 *exhibits the respondents' additional comments (other opinion) not covered by the questionnaire.*

Respondent described the Commission as a 'hidden dragon with a lack of proper skillset'. Respondent suggests that the Government should evaluate the role of the Commission seriously while providing the Commission with *permanent staff, shortening the trial length, facilitating enhancement of their capabilities* over the subject-matter to develop their solution-providing skills. Equipped with 'quasi-judicial powers' (respondent believes), the Commission has 'the power to take proactive measures' which has remained largely unutilized so far. *Appropriate exercise of the proactive measures of the Commission would ultimately benefit both the market and the mass population.* Respondent further noted that the 'Commission should not overlap and interfere in [with] markets regulated by another regulator'.

Respondent expressed that the Competition Act 'is sufficient for now'. However, '[a] more nuanced approach to human rights or consumer rights is needed'. Furthermore, there is a lack of integration and 'coordination' as competition matters have been left solely to the domain of the Commission whereas other bodies ('administrative and intelligence agencies and law enforcement agencies') should also be involved to coherently address the sustainable maintenance of competition in the market. Respondent also specified that the 'Commission cannot go beyond placing suggestions or recommendations before the policy makers or cabinet.'

Respondent noted that there should be interagency coordination between various State entities and the Commission to address the ‘competition maintenance/balance’ in the market. Further noted that there is *necessity to assess why the law was needed* and that *before forming a new law or entity, it should be evaluated how the ‘existing framework’ can be utilized to address ‘the issue at hand’* [italics added].

Respondent recalled the research conducted by an Emeritus Professor of the University of Hawaii that showed that ‘if a part of the money spent by NGOs could be used to fund, strengthen, and promote the Competition Commission, then the lower segments of the population will receive monetary benefit greater than that received from the NGOs’. This finding according to the Respondent, bears economic significance as well, as it ‘will *ensure social justice and strengthen the financial and social standing .... bringing about a bottom-up development in the societal structure and societal parameters*’ [italics added]. Respondent put emphasis on conducting further research by ‘*[e]stablished knowledge creating institutions ...on this sector to raise awareness, provide support for data and evidence-based decision to enrich the competition regime and policy decisions of the Government*’ [italics added].

Respondent opined that the ‘Commission is at the initial stages of its life cycle’, a point in which its focus should be ‘its infrastructural development’ and ‘advocacy to create awareness’ rather than ‘regulating competition in market, that should come later in the future’. Furthermore, *appointment of ‘high official posts’ of the Commission ‘on deputation’ for a temporary period creates ‘a knowledge gap which also hampers the development of the Commission’* [italics added].

Respondent outlined that ‘a competition policy’ that has largely been absent till now needs to be worked out alongside ‘learning how to use different world recognized statistical tools’ and emphasized the adequate training of Commission officials in order to further the prospects of the Commission.

Respondent noted that public awareness and contributions from the civil society concerning heightened public awareness, enrichment of the competition regime, and overall effective management of the competition in the market are needed.

## **5. Findings and Recommendations from the ‘Other Opinion’**

### **5.1 Findings**

In the ‘other opinion’ segment, respondents made comments that were not covered by our fixed questions. Respondents’ opinion seems to have varied from the functioning of the Commission to the future directions of the law and the Commission.

Respondent underscored the importance of

- having properly trained permanent staffs and employees;
- overcoming the delay in the trial procedure;
- taking ‘proactive measures to ensure fair price of commodities’; and
- preventing the overlapping of power.

The respondent underscored the importance of *impact assessment* prior to the engagement and signaled that Bangladesh should *personalize its need/priority* and the domestic law should be reflective of its population’s need and reality; heavily emphasized *interagency coordination, prior impact assessment, and utilization of the existing frameworks*.

Respondent found from the professional and training experience that it is important to ‘fund, strengthen, and promote the Competition Commission’ which may have possible association with ensuring ‘social justice’, strengthening the ‘financial and social standing’, and securing the ‘bottom-up development in the societal structure and societal parameters’.

Reiterated by the respondent our study found that *public awareness and contributions from the civil society* concerning heightened public awareness, enrichment of the competition regime, and overall effective management of the competition in the market are needed.

## 5.2 Recommendations

The recommendations are drawn from the findings of the reasearch, researchers’ perceptions gleaned from the study, and respondents’ own recommendations.

Respondent recommended the Commission should first, focus on the ‘infrastructural development’, second, conduct ‘advocacy’ for the ‘awareness’, and third, pay attention to ‘Regulation’.

In line with the respondent’s opinion, it can be suggested that *providing the Commission with permanent staff, shortening the trial length, facilitating the enhancement of their capabilities, the appropriate exercise of proactive measures, settling down the issue of overlapping of power* (a concern raised by the respondent), among other areas can be addressed to achieve the desired outcome from the Commission’s performance.

The respondent suggested: “Price controlling measures, anti-competitive behavior assessment should not be left solely to the domain of the Commission, rather other bodies such as administrative and intelligence agencies and law enforcement agencies should share some liability”.

We conclude from our understanding of the current competition law regime and related intellectual property laws with the following:

- Identifying anti-competitive behavior of the ‘dominant producer of goods and services’;
- Dismantling and preventing the formation of cartels intended/engaged to abuse the dominant position in the market;
- Identifying and punishing any anti-competitive contracts between different (two) and among (multiple) manufacturers/producers that control larger market threshold;
- Addressing the abuse of monopolistic power in the market of essential goods and services, including healthcare goods and services is the duty and the job of the Competition Commission.

If the Commission needs response/support from other law enforcement agencies to maintain order and for the implementation of its decisions, it should get such support. But the authority that should play the pivotal role or do the job of the protagonist and catalyst to control anti-competitive behavior aimed at maintaining balanced cost/price of the goods and services, is the Competition Commission.

The Competition Act 2012 needs further modifications/amendments in section 15(4) (*ka*)<sup>31</sup> to allow the Commission to intervene to challenge the monopoly allowed by the intellectual property rights if it is required for access to the essential life-saving/care facility. Although the Bangladesh Patent Act 2022 (section 24(11))<sup>32</sup> has created that room, it is only applicable to patent monopoly. The law also should not allow the interference of the Government in the disposal of the matters/disputes before the Commission. The current framing of section 37 needs to be changed, particularly, section 37(2) should be repealed as that provision can be misinterpreted to influence the Commission’s neutrality.<sup>33</sup>

A strong and independent Competition Commission is supremely important as it plays a critical role in breaking and dismantling:

- the cartels and syndicates creating crisis;
- artificial demand in the market; and
- activities disrupting market behavior by manipulation of market trends and patterns.

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<sup>31</sup> The Bangladesh Competition Act, 2012 (Act No 23 of 2012) s 15(4) (ka). Available at < [https://www.dpp.gov.bd/upload\\_file/gazettes/20533\\_10683.pdf](https://www.dpp.gov.bd/upload_file/gazettes/20533_10683.pdf) > accessed on 12 November 2023.

<sup>32</sup> Bangladesh Patents Act, 2022 (Act No V of 2022) s 24(11). Available at < <https://www.wipo.int/wipolex/en/legislation/details/21851> > accessed 17 July 2023.

<sup>33</sup> The Bangladesh Competition Act, 2012 (Act No 23 of 2012) s 37. Available at < [https://www.dpp.gov.bd/upload\\_file/gazettes/20533\\_10683.pdf](https://www.dpp.gov.bd/upload_file/gazettes/20533_10683.pdf) > accessed on 12 November 2023.

Respondent recommended that appointment for a rather short term should be avoided and stated that recruitment ‘for 6 months or 1 year on a temporary basis ... creates a knowledge gap which ... hampers the development of the Commission.’

It has come to our attention that the tenure of the Commission’s chairman, members, and employees is only for 3 (three) years.<sup>34</sup> Competition law is an emerging legal regime and such a complex area often requires proper understanding/skills/knowledge of intellectual property rights and econometrics statistical data analysis. There is a dearth of experts in these areas in Bangladesh. Durable tenure is required to ensure that the Commission itself is conversant with the subject-matter and makes its judgment free from Government influences.

Respondent recommended/emphasized on the following:

- The need to determine ‘a competition policy’,
- The ‘Training of officers’,
- The ‘MoU of [sic.; with] different countries[sic;] competition agency’ and
- ‘Learning how to use different world recognized statistical tools’.

## 6. Conclusion

If the Commission can effectively play its part, it will save the marginal population’s unnecessary losses (incurred by paying unreasonable prices for essential commodities) and it will not only allow economic growth, but also *will reduce the disparity and create room for the cultural development and quality of life for the population which eventually will increase respect for the common goods*. However, the objects of ‘art’ can be excluded from the authority of the mandatory oversight body for price controlling.

It is worth mentioning that in response to a different question (not canvassed in this paper),<sup>35</sup> Respondent (T7) observed that the Competition Act 2012 shares similarities with the Competition Act 2002 of India recalling ‘exposure visits to the Indian Competition Commission’ to comprehend their approach in strengthening ‘the role of the Commission there.’ Discrepancy in terms of ‘manpower’ availability was identified as a key difference by the Respondent as the manpower of the Indian Competition Commission is ‘8 to 10 times the manpower that we have.’ Furthermore, in contrast to its Indian counterpart, the Competition Commission of Bangladesh is ‘behind in terms of utilizing technological advances’ and in terms of ‘the knowledge base and strengthening of the Commission to play a role in the Indian economy’. Respondent (T6) notes that ‘the Indian Competition

<sup>34</sup> Ibid s 7(6).

<sup>35</sup> Question 6: ‘Do you think that there are important lessons to learn from the anti-trust law enforcement in the European Union or other jurisdictions?’



Commission is being considered as a model' for the Competition Commission of Bangladesh to follow and that 'after 4 or 5 years' in the future, there will be 'enough development to set our own practice standards and become examples for forthcoming competition commissions.'

We are of the opinion that the Competition Commission of Bangladesh is a relatively new institution, and more time and empirical study may be required to observe how it evolves to serve the very purpose for which it was established. An institution such as the Competition Commission is absolutely essential— it should be strong, independent, and should embody certain elements of transparency and accountability.

### **Appendices<sup>36</sup>**

Appendix I: The Questionnaire

Appendix II: The Survey Table

Appendix III: Qualitative Content Analysis (Both Analysts)

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<sup>36</sup> We have included the respondent number, as it was required by the reviewer, in section 4.2 of this research paper. We refrained from mentioning the 'profession' of the respondents within the same parenthesis, though suggested by the reviewer to include, in order to prevent compromising the 'anonymity' of the respondents. The reviewer had full access to all the appendices. The appendices *cannot* be published with this article for the sake of brevity and confidentiality.

Furthermore, the content of the 'survey table' is a confidential information and *cannot* be published, although the reviewer and the editorial board had full access to it.