**Economic Policy Paper**
**on**
**Anti-monopoly Competition and Anti-trust Policies**

## 1.0 The Context

1.1. Monopolies, mergers, anti-trust and matters like that may, on the face of it, appear to be of somewhat distant interest for the present market of Bangladesh and the consumers in general also seem to be rather unconcerned about these at the moment. True, there have been in existence a number of state owned natural monopolies in the utilities sectors like electricity, natural gas, water supply in municipal areas, tele-communications, railway, ports and so on, but somehow the consumers seemed to have got accustomed to the unredeemed inadequacies of their management and often high cost. On the other hand, state owned monopolies or quasi monopolies in the production sector even provided benefits to certain sections of the consumers through Government subsidies or cross-subsidies in prices of commodities like fertilizer, newsprints, certain counts of cotton yarn, high-speed diesel oil etc. The private sector having been weak so far, there have not been yet mentionable instances of growth of strong and abusive monopoly forces. However, malpractices and distortions of different sorts have always been present like those precipitated by the actions of both perfect and imperfect oligopolies, informal cartels, hoarding and black marketing of commodities, controlled imports and distribution by traders, creating artificial scarcity to jack up prices, smuggling etc. Cases like windfall gains having amassed by a lone mobile phone server taking advantage of a temporary monopolistic situation are not many.

1.2. Privatization, various economic reforms, liberalization of trade and investments, higher dependence on market-driven forces for the growth of the economy led by the private sector and rapid globalization of the economy have already started changing the scenario. Many local industries are now struggling for survival in the face of stiff external competition even in the domestic market. Although some consumers at the retail level have benefited, both the industries and national interests tended to be suffering in the short run. Creeping influence of the transnational companies are already visible and if they cannot be faced properly, they may assume overwhelming forces in course of time with heavy influence on the consumers and the national economy. It may also be seen that while liberalization and commitment to WTO mandates have thrown up great challenges, they have also created wide opportunities for those industries which are efficient and innovative. But their number is likely to remain limited while there are chances that at least in the domestic market, there may be considerable abuse of their market power to the detriment of the interests of the consumers. The phenomenon may become more pronounced as the process of shrinking of Government business accelerates with corresponding growth and empowerment of the private sector permitted by the liberal policies of the Government.

1.3. It is thus apparent that though cases of monopolies, anti-trust etc. have not emerged as serious issues today, that is, *not yet*, the likelihood of their gaining importance in future is certainly a strong possibility with the changes in the structure and behaviour of the market. The programme of Economic Reform and Research Advocacy (ERRA) cannot, therefore, overlook the issues surrounding monopoly, competition and the like. However, there is not much research or published materials on the market behaviour of Bangladesh which may provide useful guide to the future trends, hence the efforts to put together an Economic Policy Paper (EPP) in this regard necessarily has to depend largely on theoretical considerations, postulations of the likely influences of trade and industrial policies pursued by the Government, observed experience within and outside Bangladesh as well as certain empirical conclusions. *The ultimate aim of the future policy should be no doubt protection of the interests of the consumers.* However, while aiming for that in the context of Bangladesh, *the matter of protection of both competition and the competitors need also to be kept in mind.* Basically presented as an issue paper, the following brief sections will endeavour to refer to the salient features of the relevant Government policies which have bearing on what may lead to the growth of large business entities eventually likely to acquire monopolistic powers. They include general economic reform measures, industrial, export and import policies etc. having influence on investments, production and trade, the opportunities created for the growth and development of the opened up private sector side by side with the general behaviour of the Bangladesh market. It will be necessary to look at some notable examples of the behaviour of monopolistic forces in other countries and the provisions of the legal measures to counter the same. In deliberating on these, efforts will be made to highlight issues which may, in due course of time, stimulate thoughts and actions for framing necessary legislations and providing for appropriate regulatory and institutional arrangements for combating the harmful effects of monopolistic powers. While doing so, it may also be interesting to look at the viewpoint of some analysts that within limits and in the short-run, there may even be some beneficial uses of monopoly at times.

**2.0 Economic Environment**

2.1. Investments to produce tradable goods and services depend on many well-known factors, the most important amongst which is perhaps the general economic condition of the country, and in particular, the macroeconomic stability. It goes to the credit of the successive democratically installed Governments that their pragmatic economic policies resulted in having for over a decade strong and stable macroeconomic conditions, the fundamentals of which were not upset even by either the financial turmoils abroad or by long lasting natural disasters at home. Financial sector reforms as well as reforms aiming at decontrol, deregulation and liberalisation have made considerable progress inspite of deficiencies in the quality of governance, institutional and legal inadequacies and rather slow pace of reforms. The stigma of being a highly protected inward looking economy interested in import substitution at any cost has disappeared and anti-export biases have been largely removed.

2.2. Under the Financial Sector Reform Programme (FSRP), radical changes have been made in exchange rate determination and interest rate fixation. Exchange rate is a powerful instrument for reshaping the direction of the country’s economy through intersectoral allocation of resources and redistribution of wealth. Between 1990 and 1995 Bangladesh currency was depreciated in nominal terms against the US Dollar by 14.42% (From Tk. 34.569 to Tk. 40.278 per dollar). During the same period Indian currency was depreciated by 46.06% and Pakistani currency by 31.40%. As a result of reforms, the exchange rate is now flexible and market-determined and is meant to be competitive. Again in nominal terms between 1995 and 1999 Bangladesh currency was depreciated against US$ by 20.98% (from Tk. 40.278 to Tk. 51.050) compared to 25.6% depreciation by India and 38.20% by Pakistan. At present, the Bangladesh Bank maintains a competitive Real Effective Exchange Rate (REER) by following the exchange rate movement of a trade-weighted basket of currencies calculated on a daily basis and through periodic deprecation of the currency. There is also partial convertibility of the BD Taka in the current account. During the fiscal year 1999-2000, BD Taka was devalued twice, devaluation against US dollar being 4.90 p.c and against pound sterling 3.22 p.c. It is claimed that this has stimulated exports and encouraged workers’ remittance. However, during 2000 need was felt for devaluation of the BD Taka further, and in August 2000, another 6% devaluation was effected marking the largest devaluation since 1975. Thereby the buying rate of US$ became Taka 53.84 and selling rate Taka 54.15. The interest rate is also market-determined which replaced the earlier system of fixed interest rate determined by the Bangladesh Bank. However, the interest rate bands for lending to agriculture, export and cottage industries remain in force while freedom was given to the banks to fix interest rates on advances and deposits. The rediscount policy of the Bangladesh Bank for limited use of loans to banks continues to exist. It is a big achievement that the inflation rate has remained under control. Owing to the unprecedented flood during 1998-99, prices hence inflation rate had risen to 8.92 p.c. on the basis of 12 months’ average, but the rate since went down to 5.04 p.c. Good harvest assisted not only by favourable weather but also helpful agricultural credit and other support policies as well as careful monetary policy contributed to keeping the inflation down.

2.3. Inadequate capital formation is a formidable barrier to industrial investment in the country. Foreign direct investment (FDI) for capital, technology, management and marketing has been welcomed with open arms providing almost unparalleled incentives. Allowing foreign investment in all such sectors as are open to domestic private sector, allowing upto 100 p.c. foreign investment without any restriction regarding extent of ownership, protection against nationalisation, easy work-permits and easy facilities for repatriation of profits, dividends, capital gains and capital, avoidance of double taxation, full facilities for borrowing from local banks etc. are amongst many incentives available for foreign investment. Law has been enacted permitting setting up of Export Processing Zones and Industrial Parks in the private sector side by side with the government owned establishments. Efforts for development of the local capital market have also been going on by encouraging modernisation of the two stock exchanges functioning in the country, and improving the regulatory functions of the Security and Exchange

Commission. Due to the financial problems of the Development Financing Institutions (DFI) in the public sector, commercial banks are encouraged to give term loans upto a limited proportion of their deposits. A Tk. 100 crore Equity Development Fund is in the offing. Although not adequate, disbursement of industrial term loans stood at Tk. 1330.10 crore in 1998-99 which was up by 18.7% from the previous year. On the FDI front, there are encouraging increases of foreign investments in the energy sector, but in the industrial sector, although there are a lot of registrations, actual investments are not all that impressive. In the first 8 months of the fiscal year 1999-2000, out of total of 1065 projects registered with the BOI, 83 are reported to be foreign investment projects involving an estimated investment of US$ 511 million. It is not known when these are likely to mature. There are considerable interests for foreign investment in the tele-communication sector also.

2.4. It is gratifying that the macroeconomic scenario is quite satisfactory. In the recent past the Bangladesh Bureau Statistics introduced some changes in national income accounting procedure. On the basis of 1995-96 constant prices, the average GDP growth rates from 1996-97 to 1999-2000 registered 5.1% (which would have been 5.5% in terms of the old index). The BBS estimate for 1999-2000 growth rate is 5.5% (6.2% in terms of old index). Although Bangladesh really requires a double digit growth rate sustained over a few decades to get out of her poverty trap and to be on the road to economic take-off, even the 5.5% growth should be taken as satisfactory. There is a steady increase of the rates of domestic savings and national savings which increased respectively from 12.3% and 17.96% of GDP in 1992-93 to 17.78% and 22.60% in 1999-2000. With the policy of rolling back of the Government, private investments have been steadily increasing. In 1993, out of the total national investment of 17.95% of GDP, share of public and private sectors were respectively 6.48% and 11.47%. In 1999-2000 the investment increased to 22.41% of which 6.73% was public and 15.68% private. The rise of private sector's share in total investments from roughly 63% to 70% in 7 years shows a positive trend. Improvement of trade balance of US$ (-) 3063 million in 1995-96 to US $ (-) 2694 million in 1998-99 and US $ (-) 264 mln in 1999-2000 as well as that of current account balance from US$ (-) 1291 mln in 1995-96 to US$ (-) 394 mln in 1998 –99 and no deficit in 1999-2000 same period are also positive indicators. At the same time, the foreign exchange reserve which was US$ 2039 mln in 1995-96 though declined somewhat for food import etc. due to 1998 floods had again risen to acceptable US$ 1602 mln in June, 2000. The general economic indicators as may be seen from the table at *Annex-I & Annex-II* suggest that economic conditions have been quite favourable for new investments.

**3.0 Industrial Policy**

3.1. The urgency of bringing about quickly the required structural change in the economy through rapid industrialization is certainly well appreciated by the Government and its commitments for achieving the same are clearly spelled out in its latest Industrial Policy 1999. "The Vision of Industrial Development" articulated in the opening sentences of the said policy reads as follows:

"Bangladesh will have within a decade a sizable industrial sector where manufacturing will account for at least 25 percent of the GDP, and at least 20 percent of the workforce. This will mean considerable rise, from the figure of 10 percent around which the sector's share in GDP and employed population have hovered for most of the past two decades.

"A vibrant and dynamic private sector will be the principal actor in Bangladesh's industrial arena. The industrial sector will be competitive in the liberalized internal market as in the external market. The industrial sector of Bangladesh shall have a dominant export orientation.

"The goal of external competitiveness implies the pursuit of industrialization in accordance with the dynamic comparative advantage of the economy. Given Bangladesh's resource endowment, the principle of dynamic comparative advantage means production of labour intensive manufactures with skill up-gradation and productivity growth as its cutting edge. This, however, does not preclude the possibility of Bangladesh having a niche high-tech industrial sub-sector that may be externally competitive.

"Dispersal of small and medium industries will constitute an important element in the industrial policy approach.

Industrial development will be sustainable from the point of view of environmental concerns and resource availability.

"Industrial Policy 1999 aims at addressing these concerns building on earlier efforts and gains towards industrialization of Bangladesh economy".

3.2. How the Government intends to build up on the earlier efforts and gains are discernible from the "Objectives" and "Broad Strategies" of the Industrial Policy 1999 reproduced at Annex-III. These are self-explanatory and they clearly manifest the will of the Government to see a healthy growth of the private sector alongwith a dynamic and competitive industrial regime to play a key role for economic advancement of the country. All the stated objectives of the latest industrial policy have not yet started to be realised and there is no doubt that a lot of 'doings' will be needed for fulfillment of the "Vision of Industrial Development of Bangladesh". It must be understood that it took many years for the Government to develop even the realistic framework of this vision and understand clearly how desperate the situation is in the present globalized context for making the desired industrial development actually 'happen' rather than being content with only visions and policy statements. Historically, prior to independence and partitioning of the sub-continent, India under the British rule was the source for raw materials for development of industries in England. Soon after partition the then East Pakistan or the present Bangladesh had more textile mills and sugar mills than the other wing of the country which is now Pakistan. But East Pakistan soon fell behind due to disparities created by the policies of the Government of that time. True, during the 1960s a significant number of industries in the jute, textile, sugar and paper sectors were set up under the dominant sponsorship of the then East Pakistan Industrial Development Corporation which had assigned a rather minor role to the private sector. Be as it may, the then Government pursued a policy of the so-called 'mixed economy' which permitted only limited growth of the private sector. Changes in the government import, export and taxation policies had put the nascent private sector of the then East Pakistan at a tremendous disadvantage. The massive nationalization soon after independence of Bangladesh had made it an all public sector affair.

*3.3. The question of monopolies, mergers, anti-trust etc. becomes relevant only in the context of a growing and dominant private sector.* The process of rebirth of a noticeable private sector had actually started fairly soon after the historic nationalisation of 1972 and Government taking over of establishments abandoned by their non-Bangladeshi owners. Government had started slowly loosening its grip on the private sector but it was not until December 1975 that an industrial policy was delcared abandoning the solely public sector driven strategy of industrialisation. The culmination of that was seen with the announcement of the New Industrial Policy (NIP) in June 1982, and armed with earlier amendment of the Constitution permitting denationalization and disinvestment, one of the most massive disinvestments in history was completed by December, 1982 returning industries and businesses including textile mills and jute mills back to their former Bangladeshi owners. The main thrust of the NIP was industrialisation through the efforts of the private sector and many concessions were promised to the private sector for that purpose. This process kept on being improved gradually through the Revised Industrial Policy (RIP) of 1986, the Industrial Policy of 1991, revision of the same in December 1992 and the latest Industrial Policy 1999. *From the original regulatory role, Government had professed to assume a catalytic role in 1991 and of late, facilator's role in 1999*.

*3.4. Neither the facilitator's role of the Government has yet become fully effective nor has it been possible to create on the ground the enabling environment for the private sector to thrive in the desired manner.* The contribution of the manufacturing sector in the GDP in 1995/96 constant prices grew from Tk. 16,613 crores in 1990-91 to Tk. 24,635 crores in 1995-96 and Tk. 30,221 crore (provisional) in 1999-2000. During the past few years the share of manufacturing sector in GDP remained almost stagnant at around 15% (up only from 12.9% in 1990-91) and the compounded rate of growth of the manufacturing sector between 1990-91 and 1999-2000 has only been 1.06% (Bangladesh Economic Review, 2000 of Ministry of Finance, GOB). Recently the growth rate of the manufacturing sector registered an increase to 4.3% in 1999-2000, up from 3.2% in the previous year. The spectacular growth of readymade garments sector or the dynamism of the pharmaceuticals sector has also their weaknesses due to overwhelming dependence on import of raw materials thus limiting the net value addition. Apart from the lumpy foreign direct investment for a fertilizer factory or investments in the energy sector, the main foreign investments in manufacturing has been in the Export Processing Zones in relatively small foot loose industries. But the recent demand to allow trade unionism in EPZs has threatened to slow down even that pace. At the same time, non-tariff barriers of different kinds, challenges posed by the WTO mandates, unequal competition, ill effects of smuggling etc. also are considered as real threats by the domestic entrepreneurs and are believed to be important factors among many others which may be dampening industrial investments in the country. Growth rate of the industrial sector according to the Bangladesh Bank Annual Report, 1998-99 decreased substantially to 2.5% in 1998-99 as against 9.5% of the previous year (Bangladesh Bureau of Statistics recently changed the ways of national income accounting which may be a reason for variation between the figures of Bangladesh Bank and the Ministry of Finance). According to the provisional figures of B.B.S, the growth rate picked up to 4.3% in 1999-2000. One of the major strategies to boost the private sector has been to reduce the dominance of the public sector by privatising the State Owned Enterprises (SOEs) which have been collectively a perennial drag on the economy (annual loss of 18 SOEs in 1998/99 was Tk. 1223 crore and of 16 SOEs in 1999/2000 Tk. 3601 crore as reported in Bangladesh Economic Review 2000, Ministry of Finance). Although the Privatisation Board (now more powerful Privatization Commission) had earmarked 63 firms to transfer to the private sector, only 18 were actually transferred during 1993-99 (only 6 units transferred during 1996-99). New legislation has been enacted to make the privatisation objectives fulfilled faster. Although what has been actually invested in private sector industries is not readily known, from what can be observed from inquiries and registrations, the interest of the private sector for playing its due role in economic development seems to be encouraging. According to the Board of Investment (BOI), 1696 industrial units involving an investment outlay of Tk. 14,920 crores were registered during 1998-99, which included 161 joint ventures and 100% foreign investments with outlay of Tk. 9243 crores. This is undoubtedly a good sign.

## 4.0 Import, Export & Trade Policies

4.1. Keeping steps with the industrial policy, the import, export and trade policies and strategies of the Government have been continuously improving and being made conducive to private sector growth. During 1960s and 1970s the principal motto was import substitution and protection to domestic industries characterized also by highly regulatory import and export control practices. However, Government did recognize how behind the shield of protection, various inefficiencies continued to mount and how the growing anti-competitiveness was fundamentally hurting the economy. Examples of the gains reaped by the newly industrialized countries by following aggressive export oriented strategies as well as strong promptings from the donors *led to adopting outward looking export oriented trade strategies to replace the inward looking import substitution legacies*. 1980s and 1990s witnessed the progress made in decontrol, deregulation and liberalization, and reduction of the once most powerful office of the Chief Controller of Imports and Exports to administering only very routine functions. *The brilliant performance of the RMG and Knitwear sector to show how loosening controls can permit capturing opportunities in the global market made all policy makers think about accelerating the liberalization process*. This is, however, not to say that the dependence of the Government on customs duties and related taxes and levies to provide a major share of revenue income diminished significantly.

4.2. The chief objectives of the current trade policy of Bangladesh include the following:

- pursue an export-led growth strategy by providing incentives for increasing exports;
- remove anti-export bias in the economy by rationalising and harmonizing the tariff structure;
- promote domestic and foreign investments geared to augmenting export of goods and services

The trade policy has been restructured to facilitate development of free market economy and provide a liberalized import trade regime that will help economic development with emphasis on export. The situation when the Import Policy Order used to specify what one was permitted to import changed for the better a long time ago and was replaced by a negative list stating what could not be freely imported. The number of items under Quantitative Restrictions (QRs) have been reduced from 639 in 1986-87 to 193 in 1990-91, 121 in 1998-99 and to some 111 in 1999-2000.

4.3. As a part of the economic reform programmes of the Government, tariff structure was rationalised by bringing down the average tariff and reducing the number of slabs to only four, namely, 5% 15%, 25% and 37.5%. The trend in lowering of nominal protection before and after reform may be seen from below:

| | | (P.C. of Assessed Value) |
|---|---|---|
| | **1990-91** | **1995-96** |
| **Unweighted:** | | |
| Agriculture | 90.5 | 26.0 |
| Mining | 54.1 | 13.6 |
| Manufactures | 89.0 | 24.6 |
| All tradables | 88.6 | 24.6 |
| **Import Weighted:** | | |
| Agriculture | 20.9 | 10.1 |
| Mining | 24.0 | 13.6 |
| Manufactures | 51.8 | 21.9 |
| All tradables | 42.1 | 21.0 |

According to the budget speech of the Hon'ble Minister of Finance in June, 2000 "policy to increased export, help flourish local industries, discourage and prevent smuggling and make consumer goods available to the people at reasonable prices will continue", and this has, in effect, been the basis of trade and tariff reforms. It is claimed that the policy has been "consistent with the trends in international and regional trade and commerce".

4.4. The average tariff of Bangladesh has been one of the lowest amongst the SAARC countries and has also been low in international comparison as may be seen from the following table collated from World Bank sources (1998-99 values):

| **Country/Region** | **Unweighted Import** | **Weighted** |
|---|---|---|
| Bangladesh | 20.0 | 16.0 |
| India | 39.6 | 20.2 |
| Pakistan | 21.3 | 20.7 |
| Sri Lanka | 17.6 | 10.0 |
| Napal | 14.0 | 9.6 |

Post-reform average tariff of 1998 for other regions are found to be for South Asia 27%, SE & East Asia 14%, Africa 31% (1996) and Latin America 13%. It is to be noted that over 13-14, years African countries reduced their unweighted average tariff by 24%, SE & East Asian countries by 52%, South Asian countries by 66% and Latin American countries by 70%. Compared to this, *reduction of unweighted tariff of Bangladesh has been 80% in 10 years*. There has been the debate going on as to whether in Bangladesh there has too much liberalization in too short a time without regard to her own capacity for absorbing shocks.

4.5. In his budget speech, the Finance Minister himself quoted from the draft resolution of the 19$^{th}$ UNCTAD Conference held in Bangkok stating "The development impact of globalization has been mixed: while some developing countries have benefited, others have not. Economic disparities among countries have not been reduced, with the result that a number of developing countries, particularly the LDC's run the risk of further marginalization". *Be as it may, the trend for liberalization and globalization seems to be perhaps irreversible now, and there appears to be no other option but to acquire quickly the competence for survival in international competition in order to grow economically.* It is not only the question of gathering ability to produce exportable efficiently, but also overcoming the tariff as well as non-tariff barriers to be able to export. Experience so far of trade with EU, North America and even the regional countries, notwithstanding the SAPTA efforts, indicates that opportunities are perhaps many and there are a lot of promises also, but the country has yet to go a long way to lift its international trade level sufficiently to start giving the desired push to the economy.

4.6. As was stated earlier, the present industrial and trade policies are undoubtedly supportive of private investments. Replacement of the previous annual and biennial trade policy by a 5-year Import Policy and Export Policy (1997-2002) has given a stability to the system and procedural changes are being made continuously in order to reduce the hassles for the importers and exporters. The recent trends in merchandise imports and exports may be seen respectively at Annex-IV and Annex-V. Looking at a longer time series of trade movements starting from before the reform upto the recent published figures, the annual import volume between 1988-89 and 1999-2000 increased in value from US$ 3375 mln to US$ 8403 mln registering an annual compounded growth rate of 8.65%. During the same period, the export increased from US$ 1292 mln to US$ 5752 mln registering a robust growth rate of 14.54% per year. The trend is undoubtedly quite satisfactory. The structure of the import during the decade changed as follows:

| **Imports** | **1988-89** | **1998-99** |
|---|---|---|
| Primary Products | 18% | 18% |
| Manufactured Goods | 17% | 14% |
| Capital Goods | 32% | 43% |
| Others | 33% | 43% |
| **Total** | **1000%** | **100%** |

While the trend in the drop of import of manufactured goods indicate progress towards self-sufficiency in certain items like fertilizer, edible oil, cement, cotton yearn etc. the decline in the proportion of import of capital goods would indicate that the trend in new industrial investments has not been as desirable. It is to be noted that the high value of import of primary products in 1998-99 is primarily due to sudden increase in import of food grains following the devastating floods at that time. Compared to the above, the structure of the trend in exports, registering decline in export of primary products and increase of that of manufactured goods has been very healthy as may be seen below:

| **Exports** | **1988-89** | **1998-99** |
|---|---|---|
| Primary Products | 23% | 8% |
| Manufactured Goods | 77% | 92% |
| **Total** | **100%** | **100%** |

In the matter of external trade one should keep in mind that the Commodity Terms of Trade could be a matter of concern. According to the Annual Report of Bangladesh Bank 1998-99, with the base of 1979-80 = 100, the Commodity Terms of Trade had gone down to 62.9 in 1981-82 at the lowest and increased to 104.7 in 1987-88, dropping to 100.1 in 1994-95 and 97.0 in 1998-99.

4.7. However, for the need of the economy, the export performance requires very major improvements which are yet to come by. According to a report in the Financial Express of August 10, 2000, there are about 115 categories of products identified as exportables from Bangladesh of which only 6 products namely, readymade garments, leather and leather goods, jute and jute goods and frozen foods contribute nearly 92% of the total export earning. Looking at 1998-99 performance, over 75% of the total export earning coming from only one RMG sector speaking of a vulnerable situation as this sector is also highly import dependent. Looking back at the oil shocks of 1973 and 1982, there are reasons to be worried about the likely threats to the economy owing to the current high prices of imported petroleum because with modernization of the economy, its energy intensity is bound to increase adding further to the import burden. The ever-increasing import bills, which will be fueled further owing to currency devaluation has to be met by correspondingly increasing exports. Government sources as well as other analysts consider that the following are some of the sectors where there are export potentials which are not yet adequately exploited:-

i. Textiles, particularly yarn, woven and knit fabrics, and specialized textiles including silk fabrics and clothing;
ii. Leather and leather goods;
iii. High fashion readymade garments and knitwear;
iv. Artificial flower;
v. Frozen food (mainly shrimps including cooked/semi cooked shrimps);
vi. Toys (stuffed, electronic and mechanical);
vii. Jute goods (diversified items);
viii. Handicrafts (made from cane, bamboo, leather, textile);
ix. Tea (packet tea, tea bag, canned tea);
x. Agricultural products (processed);
xi. Engineering products;
xii. Chemical products (e.g. pharmaceuticals, cosmetics, toiletries etc.);
xiii. Jewellery, diamond cutting and polishing;
xiv. Computer software, data entry and processing;
xv. Gas and oil based petrochemical industries;
xvi. Tourism

Despite the controversies surrounding export of natural gas from Bangladesh, or the national debt service liabilities including foreign exchange payment obligations to the Independent Power Producers, most analysts think that it is possible to increase the export earnings to US$ 10 bln by 2010 and gather the ability to meet all this foreign exchange requirements.

**5.0 Reviewing Market Behaviour**

5.1. One way of classifying markets is by the degree of concentration that happens to be present on the supply side. Markets having high supply side concentration as in the case of monopolies and oligopolies having limited number of suppliers will obviously behave in a different way from those of low-concentration or competitive markets. The conduct and performance of the firms within a market will, to a large extent, depend on the structure of the market. Where there are many sellers and many buyers, no one of whom is large enough to affect the market price, one may expect to find sufficient competition, price being governed by market forces. In the real world, however, '*perfect competition*' is rare except perhaps in some agricultural products. One may observe that even for highly perishable vegetable products in Dhaka markets for which there are usually innumerable vendors, the margin of difference of price from one shop to another is practically negligible, as the vendors seem to maintain an invisible common datum which is governed by the price at which they buy from the wholesale markets, cost of transportation, paying capacity of the buyers of the locality and an 'understanding' or 'feel' about the market, however unstructured, subtle or even unspoken that might be. For higher and non-perishable products like rice, pulses, sugar, edible oil and other consumer goods things are better organised on the sellers' side. Even a minor groceries shop might be found to keep a telephone tucked away somewhere with which the owner continuously checks prices with the whole sellers or with other shops and adjusts his price tags accordingly.

5.2. Our discussions, however, are not about the above petty retailers which were mentioned merely to illustrate how even at that level shopkeepers tend to protect their interests inspite of low concentration and competition. What we would like to look for is the relationship between the concentrated market structures (monopoly, oligopoly) and public interest. The axiom that competition is good and monopoly is bad has at its back two important assumptions, namely, all firms have the objective of maximising their profits (which is generally true) and that cost structures are the same whether the market for a particular product is supplied by one monopoly or a large number of competing smaller firms (which is not usually tenable as it ignores the benefits of scale economies of larger firms which give them cost advantage over smaller firms). This point needs to be kept in view while considering *how big the Bangladeshi firms should be allowed to grow in order to enable them to become and remain globally competitive*.

The traditional view about monopoly has been that a monopoly situation should be defined purely in terms of market concentration and that monopolies so defined may or may not act against public interest depending on the objectives of the firm, its ability to capture benefits of scale economy etc. and pass on a part of the technical cost advantages to the ultimate consumers. In contrast, the modern concept takes into account the following view points, -

a. It is not purely the degree of concentration but the case with which new firms can enter the market and leave it is of paramount importance.
b. A monopoly situation should be defined as a situation in which a firm has a dominant situation and is protected against the entry of new firms by effective barriers.
c. Monopolies defined as above will probably be acting against the public interest, so investigations about them have to look for the anti-competitive devices employed by them.
d. Ease of exit is also important as in the first place new firms are unlikely to make heavy capital expenditures in order to become competitive unless they have the possibility of pulling out easily for investing the funds more profitably elsewhere, if so required.

General view is that if real monopoly power exists, it will probably be abused to maximise the profits, and higher profits will lure new entrants into the field to share some of those profits. *The test of the monopoly lies in whether new entries are blocked by them by putting up different kinds of anti-competitive devices and barriers*.

5.3. Due to absence of competitors, the monopolist may be thought to be free to charge any price he likes. But there is the deterrent that due to price elasticity of demand sales may fall with rising prices. Exceptions are of course, essential products like life saving drugs, certain novelties having strong appeal to affluent people, all kinds of essential utility services etc. As opposed to perfectly competitive market, there is also imperfectively competitive market with existence of some sort of monopolistic competition. In perfectly competitive market there are many sellers for a homogeneous product, while *imperfect competition* may exist for heterogeneous products also with many sellers. This is achieved mainly through branding which emphasises in the mind of the consumer the distinguishing characteristics of each firm's product. Talcum powder, toilet soap or toothpaste made by any firm has fundamentally the same basic ingredients with equal or equivalent physical and chemical properties serving the same purposes for all products of the same category. But by employing differentiated processes and additives to change colour, flavour, consistency etc. and adopting marketing and advertising techniques to associate the products with famous personalities, sexy film stars or highly masculine models, or emphasising luxury, vitality or appeal to religious sentiments (e.g. halal soap) etc. favourable product images are created for different brands and *non-price competition* is resorted to through heavy advertisement expenditure. Products having been rendered non-homogeneous in quality or character, and sold by non-standard weights, sizes, packaging make it difficult for the consumer to compare the value for money who then makes choices by brands. The question remains whether imperfect competition, which is pseudo competition is also in public interest or not. Brand loyalty for a product makes the demand for it inelastic allowing the producer to increase prices without suffering loss of sale, say upto a point. One may raise many questions of ethics, but in a free market possibly not much can be done about it easily. One may also recount that the practice of supplying limited varieties of consumer products in the while command and control economies was highly unpopular and that has eventually given way to free market practices now, so familiar in open economies.

5.4. Oligopolies also sell similar but differentiated products, but unlike in imperfect competition firms, the number of firms in oligopoly is small, in extreme cases only two (called duopoly). Like monopolies, oligopolies are also protected by many kinds of entry barriers. There may be legal barriers, barriers posed by need of huge capital expenditure, technology and sheer size (e.g. oil companies, motor car manufacturing), heavy advertising expenditure and so on. Sale of proprietary items like spare parts, components etc. of plant and machinery also demonstrate monopolistic or oligopolistic behavior at the cost of the consumers. Through tacit agreement amongst major suppliers, oligopolies may adopt *competitive price cutting* to prevent new entries or fix *predatory prices* as for monopolies. These are clearly not in public interest. The processes through which firms may increase their market dominance and acquire monopolistic (including oligopolistic) power are worth noting. The most natural process of growth is increasing turn over and business volume alongwith increase of assets and profits. Market power may also be acquired through new inventions and mastering new technologies facilitating quantum jumps and quick market supremacy. *Perhaps the most important and the most prevalent routes for achieving growth and acquiring market powers to-day are mergers and acquisitions which have many variations.* Firms may grow by expanding new areas of business, commonly known as *diversification* which increases security as the risks of putting all the eggs in our basket are reduced. This is also the fastest route to growth, limited only by the firms, internal finances and ability to borrow. When firms diversity into totally unrelated areas they are called *conglomerates*. On the other hand security and growth can also be achieved through *integration or better known as vertical integration*. Firms may expand backwards towards the source of now materials and forward towards retail sales through own outlets. There are many examples of diversification and integration in Bangladesh in ready made garments, textiles, pharmaceuticals, leather and such other sectors. It is worth remembering that both forward and backward integrations can often create barriers to entry of new firms into its existing markets and develop anti-competitive situations which is not in the public interest .

5.5. In the fast changing global economic scenario seldom any week passes without the news about either proposed or actual mergers as well as acquisitions of large significance designed to achieve faster growth in sales and profits as well as aiming at secure future Ostensibly all kinds of mergers (diversification, vertical integration and conglomeration) are supposed to gain from increasing economies of scale, reduction of costs, improvements in efficiency and profitability. To a lesser degree vertical integrations and to a greater degree diversification and conglomerations, specially acquisition of rival firms and competitors, lead to increase of concentration and market power. Whether the mergers or acquisitions in question would lead to *actual or potential anti-competitive behavior* of the firm is usually the most worrying concern of the government and its regulatory agencies. In practice , whether the proposed merger is *in the public interest or not* is judged among others, with the following important considerations:

- whether the merger would lead to an increase in market concentration,
- whether the merger would increase the ability of the firm to indulge in anti-competitive tactics,
- whether the value of assets taken over exceeds a certain stipulated sum ( it was set at £ 30 mln in the UK in 1984)

*In Bangladesh most cases of diversification have taken place by expanding into related or unrelated areas by establishing new entities by the owners rather than acquisitions and mergers and none has yet achieved enough dominance which may be considered as threat to competitive behavior.*

5.6. Whether the consumers are getting a fair deal both in the short and the long run depends on the pricing strategies of the concerned firms. In a monopoly situation, there is tendency of the monopolist firm to raise prices above the competitive level and earn ‘monopoly profits’ or ‘super-normal profits’. In an oligopoly when none of the firms has dominant or significant market share, there is tendency for the firms to act with tacit agreement with one another jointly maintaining prices above the competitive level as if they together was a single monopolist, not to indulge in competitive price cutting and maximise industry profits. This joint profit maximising behavior is nothing but a collusive practice. Charging abnormally high profits may lure new entrants into the field which is prevented by foregoing super-normal profits in the short run, opting for limit pricing which is low enough not to attract new firms and amass higher profits in the long run. An extreme variation of this is fixing predatory pricing by strong firms for driving out rivals out of business by offering in the short run very low prices, often below cost. Another collusive behavior is formation of cartels in which firms seemingly in competition collude with one another to carve up the market among them in a pre-arranged tendering system. When large firms having grown old, powerful and inefficient are unable to compete with newcomers with more efficient plant, equipment and management methods, they are confronted with options like attack the newcomers, pay them out, sell out to him collude with him etc. General experience is that they choose to attack through one or more predatory practices. Annex VI may be referred to for a longer list of monopolistic practices mentioned by author Charles E. Mueller (Antitrust Law and Economics Review)

(http://home.mpinet.net/cmueller/i-overvw.html?)

5.7. How governments should deal with industries becoming too large has been always a matter of serious study by students of economics, law, history and political science. There could have been obviously 3 (three) major approaches, namely, (a) laissez faire or leave it alone approach, (b) strict public supervision and in extreme case, public ownership, and (c) antitrust policy to assure competition among the private firms but otherwise not interfering in their price and output decisions. Both laissez-faire and public supervision, including public ownership of the more important key industries failed. The natural choice all over the world to-day has thus been private sector driven market economy with level playing fields for all in a liberalized and competitive environment. This calls for antitrust with the dual objective of assuring consumer low prices and high quality to be derived from competition as well as fairness for the entrepreneurs. Major issues emerged as to how would governments decide about (i) the requirements of effective competition, (ii) what would constitute entry barriers, and (iii) the requirements of minimum effective scale of production (MESP) alongwith what would constitute the natural or competitive price. It is difficult to fix straightforward dimensions for the above parameters, or draw clear lines where all requirements are met with fairness to everybody concerned. Interestingly, however, it is observed that though most developed countries have antitrust laws, there is considerable laxity in enforcing those laws. As a rule of thumb, it is believed that monopoly power starts to appear and consumer prices tend to exceed the competitive level when 4 largest firms in a market account for more than 40% of the total sales, and the share of the largest of those 4 begins to exceed about 12%. With only 5 or 6 firms for each product like breakfast cereals, beers, soft drinks, air lines or cigarettes in the USA , there is hardly any effective competition and they are able to charge as much as 30% to 50% higher prices above the genuinely competitive prices. Some experts estimate that monopoly power is present in about one-third of the US economy and with 30% monopoly overcharge, the cost to the nation is over $ 700 billion or 10% of the GNP equivalent to $ 3000 per person. It is, therefore, no wonder why monopoly and antitrust issues are so important in the USA.

5.8. In most sub-sectors it is possible to generate full competition with 10 or more firms none having more than about 12% market share. Accepting that bigness is essential for industrial efficiency and innovation and that there is no alternative to permitting the minimum efficient scale of production (MESP), it is generally believed that 10% of the market share is adequate to achieve desirable scale economies. In the USA in the automobile industry, a firm with 7.5% market share could produce a car at the lowest possible cost, meaning the auto industry could accommodate 13(thirteen) such firms all geared to produce at maximum efficiency. Japan with only half of the population of the USA has 9 (nine) auto firms, the smallest of which is more efficient than General Motors of the USA. *This is a clear indication that overly large market share is not necessary for firms to be efficient.*

**6.0 A Few Examples**

6.1. A notable case of predatory action was published in 1995 showing how a private company in the UK, Stagecoach Busways had forced the Council owned Darlington Transport Company ( DTC) out of business. Started in 1980 with only two second-hand coaches running from Dundee to London, Stagecoach had become in 15 years the largest bus operator of Great Britain with 6500 vehicles, commanding 12 p.c. of UK bus market and also the rail franchise for South West Trains. Investigations by MMC showed that Stagecoach Busways did the following to drive DTC out of business,

- Deliberately poached key persons and other work force of DTC over a short period of time disabling them to operate normally.
- Discouraged potential purchasers of DTC when put up for sale by registering its intention to own services on

all DTC routes,
- Ran free services on DTC routes.

MMC report of 1995 adjudged the above actions as " predatory, deplorable and against public interest". Stagecoach, however, considered those as perfectly legitimate business practice. Earlier once in 1994 also, MMC had to investigate the firm for its operations in Sussex and had forced the Company to give undertakings to limit fare increases and maintain the frequency of its services after it had driven away smaller operators by charging uneconomic fares.

6.2. In the days of unregulated business, giant monopolies like Standard Oil, AT&T, Alcoa and IBM had grown by engaging in predatory pricing. Standard Oil tried to monopolize oil production, refining and distribution and managed to drive competitors out of business by selectively cutting prices using cross subsidies, Alcoa protected its monopoly in aluminium production and AT&T tried to monopolize local and long distance transmission of telephone calls as well as manufacturing and sale of telephone handsets and other devices for connection to telephone lines. For decades IBM dominated the computer mainframe software and hardware market and practised selective price cutting through cross subsides. Intel has been trying to monopolize the manufacturing of hardware required to run personal computers. In course of time Standard Oil, AT&T, GE, IBM etc faced antirust actions and had to change their anticompetitive strategies of predatory price cutting. In recent times antitrust moves against the software giant Microsoft have made epoch making history. Launching of its Windows software some 15 year ago was a unique event that made Microsoft a $ 23 billion a year powerhouse and its architect William H. Gates III the richest man of the world. PCs and Windows became almost synonymous sweeping aside practically all other operating systems and softwares for everyday use. The power and glory Microsoft Windows achieved did not make Chairman Bill Gates and the CEO Steven A Ballmer content. From the pinnacle of Windows/Office they wanted to soar higher and become also the Internet superlord by *bundling their Internet Explorer with Windows and giving it free to the customers.* Department of Justice initiated antitrust suit against Microsoft whose stock price plunged by 15 pc and Bill Gates himself lost some $ 12 billion.

6.3. Windows Operating System ran 90 pc of world PCs which makes it not merely a monopoly but puts it in a highly strategic position to be able to launch many products from an unrivalled platform. The law does not ban monopolies but is against protecting monopoly and building new ones in a predatory way. Government charged that Microsoft engaged itself in "exclusionary anticompetitive and predatory acts to maintain its monopoly power." The verdict of Judge Thomas Penfield Jackson upheld this view and he concluded that by abusing its Windows monopoly in an attempt to rule the Internet , Microsoft literally broke the law inspite of their protest that what they did was 100 pc legal and 100 pc ethical The order was to split Microsoft into two by separating its browser from Windows in order to break the monopoly against which appeal was lodged. Microsoft insisted that it must have the right to continue to innovate by adding any functionalities it wanted (Microsoft Office was already a bundle of many features). Judge Jackson was of the view that innovation argument was being misused to extend the Windows monopoly into an Internet browser monopoly which was illegal. Almost all pc users are using Windows , and if they get an Internet browser free why should they buy another. Netscape Navigator which used to enjoy a virtual monopoly by commanding 80 pc of the browser market in 1996 had to take the knock as that market share plunged to about 30 pc in 2000. Microsoft's strength is based on standardization and connectivity. With that Microsoft had been planning to march ahead to the "next generation of the Internet" when one should be able to subscribe to Netbased Windows, Office and use the Web to access, manipulate data with enormously expanded possibilities linking thousands of web sites interactively. As action shifts from desktop to the Internet, Microsoft plans to deliver software as "a service" over the Net (.Net services) rather than a package bought in the store. Competition for Microsoft the giant has to come from other giants and they are not sitting idle. For example, American On Line ( AOL) having acquired Time Warner became the biggest Internet operator in the world; Netscape Navigator is being refurbished; Sony is waving Playstation 2 game console cum digital delivery systems, referring to itself as the " first broad band entertainment company" . Sun Microsystems claims that its languages Java and Jini will tie together all sorts of devices, ranging form network servers to intelligent home controls, making Windows irrelevant. And all over the world, mobile phone makers are adding web features in their equipment. To cap it all, after Judge Jackson's anti-MS verdict on the Federal case, Microsoft had to face also 120 other private antitrust lawsuits in 32 States.

6.4. The Microsoft antitrust episode throws up several important issues and puzzles worth pondering about in course of any study regarding antitrust legislations. For example,-

- If monopoly of knowledge is protected by patent laws, safeguards are provided for Intellectual Properly Rights etc, why there should be seeming prohibition against innovation and new knowledge that lead to natural acquisition of power.
- If development and growth of one firm spurs development initiatives in other competing firms, all of which may eventually yield social and economic good then why such situation needs to be adjudged illegal in the eyes of antitrust legislation.
- In the high-tech arena competition is seldom among identical products fighting for price but is for attainment of superiority by rival technologies ( eg, wireless communication competes with land lines, cable TV competes against satellite TV, Linux Operating System challenging Windows and so on). Efforts to thwart such struggle for dominance allowing the fittest to survive is a positive threat to new technology though one may term it is "technological predation". Is such stifling through interpretation of anti-trust legislation in public interest. The question is whether the Sherman Act passed in 1890 could foresee the importance and complexities in the technologies of the $20^{th}$ & $21^{st}$ century to be.
- In his some 75000 words findings no where did Judge Jackson state that Microsoft raised software prices. In a poll in April, 2000, 67 pc of the respondents stated that Microsoft was good for the consumers. What was good for the consumers must be in public interest, hence antitrust sanction against what is in public interest is against the fundamentals of antitrust legislation.
- Heavy investments are involved in Research & Development to innovate and to stay ahead in business. Strategies for recovering some of the R & D costs in the interest of the shareholders, and consequently raising the price is an unavoidable commercial need unless someone else finances R & D. However, the extent and speed of such recovery may involve some questions of ethical norms. Hence it begs the question should any legitimate price increase to recover investments be interpreted as " predatory price fixing"

6.5. It would appear that interpretation of some of the above matters and others might be seasoned by the political leadership. Bill Gate & Co did indeed do their public relationing at Washington D.C and reportedly contributed $ 1.8 million to the campaign funds during the last election, and also maintained 4 former members of the Congress in their lobbying staff. Republican leaders had gone out of their way to assure Gates that Microsoft would have a good future if the GOP returned to power. Whether it is a conciderce or not, with George Bush as the President, tide seems to be turning in favour of Microsoft. 7 Appeal Court Judges examined very critically the lawyers of both sides of the litigation. They found a number of faults in the judgement of Jackson ( eg. speaking to Reporters against MS while the trial was going on, comparing Bill Gates with Napoleon etc manifest biases). The judgement that MS acted illegally by tying its Web browser Internet Explorer with Windows is considered by the Appeal Judges as ‘erroneous’ and they considered ‘questionable’ the judgement that MS was trying to monopolize Web market at the expense of Netscape. They also expressed doubt about splitting Microsoft into two to be the correct solution. Above all, the fairness of the trial is now being questioned thus anti-trust judgement against Microsoft has gone into limbo, and fortune may be smiling again on Microsoft.

6.6. Besides technological quantum jumps, most important phenomena which engage attention of the anti-trust agencies of the governments are *mergers and acquisitions*. Obviously diversifications and integrations marking expansion into areas related to firm’s existing activities have greater potentials to develop monopolistic powers and act against public interest that require closer attention. The most important merger of all times, is the *AOL-Time Warner merger ( $ 350 billion).* This media-communication marriage has been the major challenge to all existing and aspirant major communication operators . To mention out of a long list a few other notable acquisitions /mergers during the last couple of years,

- *Vodaphone (UK) and Airtouch Communication (USA), 1999*
- Communication $ 60.3 billion.

- *British Prtroleum ( UK) and Amoco ( USA), 1998*
- Energy $ 48.2 billion.

- *Daimler-Benz ( Germany) and Chrysler ( USA), 1998*
- Automobile $ 40.5 billion.

- Zeneca ( UK) and Astra ( Sweden), 1999
- Pharmaceuticals $ 34.6 billion.

- Mannesman (Germany) and Orange (UK), 1999
- Metal products & Telecom $ 32.6 billion.

- Rhone-Poulanc ( France) and Hoechst ( Germany), 1999
- Pharmaceuticals $ 21.9 billion.

- Deutsche Telecom (Germany) and One to One (UK), 1999
- Telecommunications $ 13.6 billion.

6.7. It is important to note that mergers, particularly cross-border mergers between companies belonging to different countries and different cultures are not easy to accomplish . There have been many studies to show that a very large proportion of acquisitions and mergers resulted in decline in profit and did not build the expected synergy. There have been also many outright disasters owing to personality clashes in top management, heavy employee dislocations, uncurable incompatibilities in functioning and destruction of shareholders' value. Notwithstanding such disappointments, merger activities continue anabated. In 1999, the worldwide value of mergers and acquisitions increased by about 33% to $ 3.4 trillion. In Europe alone where usually largest number of mergers take place, the value had doubled to $ 1.2 trillion in 1999. During July-August, 2000, the Economist magazine of London carried out 6 case studies about how mergers went wrong and where they succeeded. Their leading article (The Economist, July 22, 2000) noted that their case studies were mostly about defensive mergers "meaning that they were initiated in part because the companies involved were under threat. Sometimes, the threat was a change in the size or nature of a particular market. McDonell Douglas merged with Boeing, for example, because its biggest customer, the Pentagon, was cutting spending by half. Occasionally the threat lay in that buzzword of to-day, globalization, and its concomitant demand for greater scale. Chrysler merged with Daimler-Benz because even as number three in the world's largest car market, it was too small to prosper alone ……." McDonell Douglas/Boeing marriage did not go well, though not as disastrously as AT&T purchase of NCR in 1991, which was eventually reversed after years of immense loss making. Daimler Benz/Chrysler merger was excuted meticulously inspite of many cross-border problems and started yielding positive results after 2 years. Enjoying the position of the world's largest PC maker, Compac took over Digital Equipment to buy a new future, but it went sour because the merger came too late. When Citibank merged with Travelers to form Citigroup, the world's largest financial services firms, it quickly reaped big profits from cost cutting . In Bangladesh when banks were nationalized soon after the Independence, different private banks were grouped together to create the NCB's by government orders. Those technical 'mergers' were merely for convenience of management and had nothing to do with creation of market power. The recent acquisition of ANZ Grindlays Bank by Standard Chartered Bank to create Standard Chartered Grindlays Bank stemmed partly from the desire of Grindlays to pull out from certain markets dictated by their global policy and partly from the desire of Stanchart to expand their business horizon perhaps with no ambition or possibility to wield monopoly power.

**7.0 Antitrust Legislation**

7.1. Study of the history of evolution of legal provisions in the USA for business regulation provides perhaps the most interesting clues to the development of antitrust legislation. For over 114 years, business in the USA was almost free from both Federal and State regulations. It was only in late 1800 that tired of the irresponsible behavior of some of the so-called Robber Barrons, public demands were voiced asking for reforms and also seeking public protection from "big business". The assaults on business led government to opt for regulation of business and promulgation of legislations, the most import of which are the Sherman Act, Clayton Act and the Federal Trade Commission Act. The cornerstone was passing of the *Sherman Antitrust Act* in 1890 which was passed by the Congress with the purpose of preserving the economic ideal of a *"pure-competition economy" (Pure-competition economy means an economy in which no single business has enough power to affect supply or demand and in which prices are set by the market in perfect equilibrium).* It prohibits combinations that restrain trade and attempts to monopolize any area of commerce. Violations of this Act can result in fines, imprisonment, injunctive relief and civil damages. *Clayton Act* was passed in 1914 expanding the list of condemned practices including price discrimination, exclusive dealings, mergers etc. *Federal Trade Commission Act* was passed the same year providing a broad area of prohibitions closing loopholes left by other statutes and creating an enforcing agency for antitrust laws.

7.2. *The Sherman Act* is a fairly short statute but its few words cover a large number of actions. Section 1 of the Sherman Act, states as follows:

*"Every contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among several States or with foreign nations, is hereby declared illegal."*

Since with literal interpretation almost every contract can be looked upon as a restraint of trade, the Act could virtually prohibit all business dealings affecting inter-State commerce. The Courts, therefore, developed the *"rule of reason"* for applying the provisions of Section 1. By this, not "every contract, combination or conspiracy," rather only those "contracts, combinations and conspiracies" that unreasonably restrained inter-State commerce is prohibited. The cognizable violations under the Sherman Act, Section 1 are as follows:

- ‘Horizontal Price Fixing’ (agreements on price among competitors)
- ‘Vertical Price Fixing’ (agreements on price among suppliers and customers)
- ‘Horizontal Market Divisions’ ( agreements among competitors on who can sell in which region)
- ‘Group Boycotts’ (agreements among competitors not to sell to particular buyer or to buy from a particular seller);

Joint Ventures and Strategic Alliances could also possibly violate Section 1 of the Sherman Act. Collaborative arrangement between two or more entities for research, development, production, marketing or distribution have many distinct advantages. But as they generally involve cooperation between actual or potential competitors, they could invoke antitrust sanctions. However, in USA there is National Cooperative Research Act to provide immunity to R & D while production, marketing, distribution collaboration is judged by this Courts under the rule of reason.

If the Courts find that there is "conscious parallelism" meaning intentional establishment of the price set by another indicating a form of tacit price fixing then violation occurs. On the other hand, if the conduct is "price leadership" denoting the power of a competitor and establishment of a price similar to that set by the competitor to avoid a price war then violation does not occur. Needless to mention, there is always protracted arguments about how to distinguish between conscious parallelism and price leadership.

7.3 Section 2 of the Sherman Act is also very brief but very broad as quoted below:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."

There are two important underlying issues worth noting here. Firstly, unlike in Section 1 which requires multiple parties (at least 2) to violate, Section 2 can be violated by even one person acting alone or by multiple parties working in concert. Secondly, Section 2 does not prohibit monopoly power as may be mistakenly assumed, the prohibition is against "monopolizing". This means that 'it is illegal to seek a monopoly or to attempt a keep a monopoly once one is attained, but it is not illegal to have a monopoly'. If a firm is found to dominate an industry, it is also found to possess monopoly power. As a rule of thumb 70 per cent of the 'relevant market' is deemed to be a monopoly. Here 'relevant market' denotes the area in which a product is sold, including geographic area and all competitive and substitute products.

7.4. If a Sherman Act violation can be proved, both criminal and civil remedies are available. An individual can be fined up to $ 100,000 and imprisoned for 3 years. A Corporation can be fined up to $ 1 million. A injunction may be issued against the prohibited conduct. A notable disincentive to violation is that any injured party can recover "treble damages" (damages multiplied by three) plus Attorney's fees which together can run very high.

7.5. The Sherman Act was 'remedial' in nature, for if a problem existed, Sherman Act could be used to help for correction of the same. There was no legislation to 'prevent' a problem from developing. In order to remove this regulatory deficiency Congress decided to enact some preventive legislation leading to promulgation of the Clayton Act in 1914. The Clayton Act has the following four major provisions-

**(a) Price Discrimination:** The practice of discriminating among competing customers by offering them the same product at different prices is prohibited (Section 2), unless, of course, it can be justified by difference in costs. Difficulty was encountered while enforcing this law which called for subsequent modification. For example, major purchasers demanded special prices from the sellers who would lose the business if they refused to agree to special price while on the other hand, would become guilty of violation of law if they agreed. Section 2 was thus amended in 1936 when Robinson-Patman Act came into force for prohibiting the buyers from knowingly accepting a discriminating price. The Act also prohibited allowing indirect benefits like dummy brokerage fees, promotional kickbacks etc.

**(b) Exclusive – Dealing Contract:** This is an agreement between two parties in which one party agrees not to do business with the other party's competitors but to deal exclusively with that party. Only a very powerful seller can enforce such agreement. A variation of this is 'tying arrangement' which denotes an agreement between parties in which one party's purchase of a product or service from the other party is contingent upon buying a second product or service from that other party.

**(c) Mergers:** Section 7 or the Clayton Act deals with mergers Originally only such merger was prohibited in which the effect of acquisition of the stock of another firm might be " substantially to lessen competition, or (to) tend to create monopoly". This prohibition was too narrow and could be easily evaded by merging firms. To broaden the scope of the law, Section 7 of the Clayton Act was amended in 1970 by passing Cellar-Kefauver Act. The amended Section 7 prohibits the acquisition of stock or assets of another firm that may tend to have negative effect on " any line of commerce." This encompassed any type of merger, horizontal, vertical or conglomerate.

**(d) Inter locking Directorates:** Section 8 of this Clayton Act prohibits interlocking directorates, that is, no one may sit on the Boards of Director of two or more competing corporations if either of the firms has capital and surplus in excess of $ 1 million, if a merger between them would violate any antitrust law.

*7.6. In 1914 Congress passed also the Federal Trade Commission Act addressing two important things , namely,*

- It created the Federal Trade Commission ( FTC) to enforce antitrust laws.
- It provided in Section 5 a broad area of prohibition closing the loopholes left by other statutes and banning unfair and deceptive trade practices.

For example, prohibitions covered *'unfair methods of competition'* and "*unfair and deceptive trade practices.*" The vagueness of the broadening process permitted the FTC to proceed against any commercial practice that seemed to them as unfair or deceptive '*under the circumstances'. "Deceptive advertising*" and *"bait-and-switch advertising"* (advertising certain product at a specially enticing price to get the customer into the shop and then talking the customer into buying a more expensive model) and *"misleading advertising"* are carefully monitored by the FTC to force truth in advertising. FTC has power to issue a *'cease-and-desist'* order when it notices the business practice to be unfair and deceptive. If the FTC is disobeyed, the challenging firm faces payment of fine @ $ 5000 for each day of violation, Some examples of unfair trade practices recognized by the FTC are,

- *'Palming off'* involving advertising, designing or selling goods as if they were the goods of another company. This tantamounts to fraudulently taking advantage of goodwill and brand loyalty of the imitated producer.
- *'Trade Secrets'* violations.
- *'Copyright'* violations.
- *'Trademarks'* misuse.

7.7. There are many *'exemptions'* of antitrust laws, such as -

- The Parker Doctrine allowing State action exemptions.
- The Noerr Doctrine permitting lobbying government officials for various ends which affect the ends of the competition.
- The Sovereign Immunity Doctrine providing immunity from antitrust laws for governmental actions by foreign sovereign governments, except the commercial activities.
- The Act of State Doctrine banning adjudication by courts of politically sensitive disputes.
- The Export Trading Company Act of 1982 allowing exports to have from the Department of Commerce *"certificate of review."*

7.8. *The European Community Competition Law* is also of great interest in the course of studies of antitrust legislation. *Article 85 and Article 86 of the Treaty of Rome* contains the antitrust laws for the European Community.

**Article 85 states, -**

*" All agreements ….which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market"* are void, and fines may be imposed on parties entering into such agreements.

**Article 86 provides, -**

Prohibition of entities with dominant market position in a substantial portion of the European Community from abusing that position.

7.9. The EC Competition Law has striking similarity with US antitrust laws as regards coverage as may be seen from the following comparison-

| ***EC*** | ***USA*** |
|---|---|
| Article 85 of the Treaty of Rome<br>(Concerted action that distorts competition) | Section 1 of the Sherman Act<br>(Contracts, combination and conspiracies in restraint of trade)<br>Section 3 of the Clayton Act<br>(Tying contracts, exclusive dealing and requirements contracts)<br>Robinson-Patman Act (Price discrimination) |
| Article 86 of the Treaty of Rome<br>(Abuse of dominant position) | Section 2 of Sherman Act<br>(Monopolization and attempts to monopolize) |

7.10. Differences of the EC law from US antitrust laws may also be noted. Conduct that might violate the Competition laws must be *"notified to"* the European Commission. The firm thus takes a position that it has not violated the law but at the same time gives the Commission an opportunity to examine the conduct and give a ruling on its legal effect. If in the opinion of the Commission the competition rules are not violated then it will give the party *"negative clearance".* While most US antitrust analysis is decided in the courts *after* this occurrence, the European Community has developed an administrative *pre-approval process* that allows the firm to avoid actions that may be declared later as illegal and void. Generally speaking, EC laws for antitrust are considered more lenient than the US ones.

7.11. One should also look at the antitrust practice in Great Britain, which is fully fledged market economy. In the UK, policy has been for providing for government intervention to protect individuals from the excesses of the market economy. The two important laws, the *Fair Trading Act, 1973* and the *Restrictive Trade Practices Act, 1976* as well as the role of *the Monopolies and Mergers Commission (MMC),* among others, are of greater interest, The concern of the government about the ultimate consumer interests in manifest in providing for establishing appropriate regulatory agencies after privatization of the state owned utilities and businesses [eg. Office of the Gas Supply (OFGAS), Office of Telecommunications (OFTEL), Office of the Water Services (OFWAT), Office of Electricity Regulation (OFFER), Office of Fair Trading (OFT) etc.] *The Fair Trade Act lays down that a monopoly arises when a company controls 25 p.c. or more of the supply of the product.* Merger of two large companies can thus easily lead to monopoly situation. It is expected that the two companies proposing to merge would refer the matter to the Director General of Fair Trade who will then recommend to the Secretary of State for Industry to decide whether the proposed merger should be referred to the Monopolies and Mergers Commission (MMC). Once the matter is referred to the MMC, all further action about the proposed merger has to pend. If the Companies themselves do not refer the matter, the Office of the Fair Trade may act to refer the matter to the MMC as may be advised by the inter-departmental merger panel. MMC examines whether the proposed merger is in public interest or not. The Secretary of State then issues the order either to allow the proposed merger or prevent it. While e*xamining the public interest issues, the MMC may investigate into other matters like the firm's price fixing behavior, various aspects of price and non-price competition, any alleged restrictions on competition and to on.* Besides mergers, existing monopolies may also be referred to the MMC. In 1993, the famous case of proposed merger between the Midland Bank and Lloyds Bank was considered against the public interest, so it was not permitted. According to tradition, in the UK most firms comply with the provisions of the Monopolies and Mergers Act on their own accord.

7.12. The provisions of the Restrictive Trade Practices Act provide important guides for dealing with monopolies and mergers cases. It lays sown four categories of agreements that must be registered with the Director General, Fair Trade,-

i. Restrictive agreements as to goods;
ii. Information agreements as to goods;
iii. Restrictive agreements as to services;
iv. Information agreements as to services.

The Director General takes the agreement to the Restrictive Practices Court to prove whether the agreement is in public interest or not. There are many escape routes or "gateways". For example, one such gateway is "The restriction or information provision does not directly or indirectly restrict or discourage competition to any material degree in any relevant trade or industry and is not likely to do so".

**8.0 Consumer Protection and Lessons for Bangladesh**

8.1. The ultimate object of anti-trust legislations is to protect the consumer and ensure safeguarding of public interest. There is no law in Bangladesh to provide protection against the injuries caused by monopolies. It is understood that Government of Pakistan had passed an anti-trust legislation in 1970 but it was not duly notified understood that Government of Pakistan had passed an anti-trust legislation in 1970 but it was not duly notified prior to the war of Independence of Bangladesh, hence in this country there was no continuity of it and it was possibly forgotten. To-day the available laws in Bangladesh that concern one way or the other the interests of consumers appear to include the following :

a. The Control of Essential Commodities Act, 1956
b. The Pure Food Stuff Ordinance, 1959
c. The Trade Mark Act, 1940
d. Essential Commodities Price & Bond Ordinance, 1970
e. Weights and Measures Ordinance, 1961 and its amendment of 1982
f. Drug Control Ordinance, 1983;
g. Breast Milk Substitutes Ordinance, 1983

Unfortunately enforcement of these laws and other provisions meant to protect the interests of the consumers has not been noticeably effective, and the ordinary consumers have always remained an the mercy of the producers, distributors and sellers of goods and services. Consumers of the State Owned Enterprises (SOEs), particularly the utilities have always remained at a tremendous disadvantage because there has never been any impartial regulatory authority to check the commissions and missions by the SOEs. Government performing the regulatory functions invariably tended to side with the enterprises owned by it. There has not been any consumer activist like Ralph Nader in this country and the efforts of a handful of consumers' associations have also been very feeble.

8.2. Cataloguing the prevalent and likely future trade practices that might go against the interest of the consumers, deficiencies in the existing laws and weaknesses of the enforcement systems, dimensions of sufferings of the consumers and matters like these are outside the purview of the present discourse. But the point to note here is that when focus on general consumers' interests are blurred, it becomes harder to draw committed attention to and elicit action on finer issues which are not so important to-day but are likely to be so only in future. Policy framing on Monopoly/Anti-trust matters may not, therefore, appear very urgent to-day to the administration busy with many other kinds of fire-fighting. Though political parties under democracy are supposed to be pro-people, there is no guarantee that the administration system charged with the responsibilities of implementation those policies are equally responsive or efficient. It may be argued that consumers suffering injury due to unfair trade practice may seek redress under existing Civil and Criminal laws, but usually it becomes extremely difficult to prove that the producer or the seller has broken a contract for which he may be brought to books. For example, many ordinary misrepresentations or vague advertisements regarding the high quality of a merchandise do not necessarily constitute an actionable breach of a contractual terms to be punished for say, cheating. For that violation of more specific terms like weights, measurements or ingredients have to be established. But unless there are laws to specify what type of advertisements can be published or what specific information must be supplied for the goods or what are the limitations of services, punishable breaches of contract cannot be proved and the consumer may continue to suffer.

8.3. There is also the question of cultural settings that may influence trade practices. In England it is commonplace to hear of about "Citizens' Rights", "Value for Money" etc which have heavily influenced the administrative reforms done there. Similarly consumers' rights also have been clearly established and effective action can be brought about against violation of those rights. Unfortunately Bangladesh is lagging behind in these kinds of reforms that touch the lives of common men. Where does a traveller in Bangladesh stand if departures and arrivals of state owned train are badly dislocated and causes serious losses to him. If the refrigerator or any other machinery of a consumer of the state owned utility burns out due to sharp under-voltage does he have any redress. Or for that matter, has any manufacturer of a life saving drug been hauled to the court due to a patient suffering serious injuries or death for being administered a drug produced with inadequate quantity of basic ingredients or using ingredients after their expiry date . *Having been an inward looking protected economy for many decades, it has been traditionally a suppliers' market,, the position of the consumers always remaining marginalised.* True, prices have started dropping after opening up of the economy and widening of consumers' choices. But where is the guarantee of the quality. The firm culture of merchandise transactions has been *"goods once sold cannot be to taken back."*

of the quality. The firm culture of merchandise transactions has been "*goods once sold cannot be to taken back.*" It seems obvious that *the starting point of any reform has to be to bring the consumer to the centre and protect his right to fair price, correct quantity and required quality for establishing the norms of fair trade and adopting measures to prevent restrictive and anti-competitive trade practices.*

8.4. Bangladesh has undertaken many kinds of reforms in varieties of sectors while also making substantial improvements in the external trade policies. General experience is that investments only for export does not gain momentum with the exclusion of the domestic market notwithstanding the relatively minor investments in footloose industries in Export Processing Zones and some small scale joint ventures. The large population of Bangladesh whose purchasing power is gradually improving happens to be one of the main attractions for the foreign investors to collaborate in this market keeping in view medium to long range interests. But long before such potential investments become realities, Trans National Companies ( TNCs) or Multi National Companies ( MNCs) as they are often called, started invading this market taking advantage of liberalization of the economy and lowering of import tariffs. Most of the MNCs have multiplant production arrangements in different countries for making use of comparative advantages of the respective economies. As a part of their global strategy, they may find it advantageous to shut down production of certain items in one country and have that market supplied from another plant by gong to scale in that country. This the MNC's are able to do because of their global market dominance , and for *Bangladesh, immediate danger lies is such potential threats from MNCs*. Predatory pricing policies, forceful advertisements using different kinds of electronic media etc. can make the consumers all the more vulnerable. This needs to be understood and countered by suitable actions to strengthen the position of the domestic consumers and protect their rights through providing legal safeguards against possible abuse of the market power of the MNC's . At the same time from the point of view of the national economy, actions are also needed for protecting and strengthening the local manufacturers, commercial houses so that they can effectively compete with the MNC's and diffuse their negative forces.

*8.5. In would appear that two pronged policy measures would be advisable for Bangladesh, one for strengthening the position of the consumers against the onslaught of the powerful sellers and the other for developing legal frameworks against acquiring and abusing monopolistic power.* A very wide range of activities are involved in the total process starting from organizing and motivating the consumers to speak up, listing likely malpracties by producers, distributors & sellers which should be discouraged, drawing up code of practices, making provisions for self-regulation, inducing actions by Trade Associations and Chamber of Commerce and Industry, adjusting State policies towards encouragement of new comers to the industry side by side with allowing the existing ones to grow, drafting consumer protection law and a suitable antitrust law and so on. Practical means have to be adopted to promote and sustain competition, ensure regulation of the so-called natural monopolies, providing for remedies in case of abuses, establishing advisory and implementing bodies, special courts for quick disposal of cases, making arrangement for appeals and reviews, mobilizing public opinion and organizing national debates etc . Future actions need to take into account future technological directions, particularly, electronic commerce, ramification of the externalities of the globalized economy and imperatives of modifying domestic polices, practices and legislations to bring them in line with current and future international laws, agreements, treaties etc.