**Himachal Pradesh National Law University, Shimla (India)**
**JOURNAL OF LAW, BUSINESS AND ECONOMICS (JLBE)**

Journal Articles | ISSN: 2584-0436 | JLBE

Volume II (2023)

# THE BATTLE FOR FAIR MARKETS: Evaluating Theoretical Approaches to the Competition Law

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Volume II | *ISSN: 2584-0436* | April 2022 - March 2023

# THE BATTLE FOR FAIR MARKETS: Evaluating Theoretical Approaches to the Competition Law

***Shubham Singh Bagla**[*] & Kalyani Acharya**[**]***

[Abstract: *Competition law, also known as antitrust law, plays a crucial role in maintaining market efficiency by preventing monopolistic practices and promoting fair competition. This study critically examines the theoretical approaches to competition law, focusing on their application in India. The research is rooted in classical and neoclassical economic theories, which emphasise minimal government intervention and the importance of competitive markets in ensuring consumer welfare and resource allocation. Key theories such as the Chicago School and the Neo-Brandeisian approach are analysed to understand their impact on market dynamics and regulatory policies. The classical economic theory advocates for the consumer welfare standard, aiming to enhance consumer benefits through lower prices and higher quality products. Historical cases like Standard Oil and Microsoft illustrate the application of this theory in antitrust enforcement. The Chicago School, on the other hand, emphasises economic efficiency and is sceptical of government intervention, arguing that many business practices deemed anti-competitive may benefit consumers by enhancing efficiency and innovation. This theory's influence is evident in cases like the IBM and Staples-Office Depot mergers.*

*Furthermore, the research delves into the Essential Facilities Doctrine, which mandates that owners of crucial infrastructure must provide access to competitors on fair terms, thereby preventing monopolistic control that stifles competition. Notable cases, such as AT&T and Microsoft in the US and the European Commission's rulings, highlight the application of this doctrine. In the Indian context, competition law is examined through its theoretical underpinnings and practical implementation, identifying challenges and proposing recommendations for improvement. The study emphasises the importance of adapting competition policies to address contemporary issues such as digital market dominance and global competition. The study examines various competition law theories from the USA and UK, assesses their implementation in India, and identifies challenges and limitations. By*

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The author(s) is indebted to the guidance and discussions with Prof. (Dr.) Nishtha Jaswal, Prof. (Dr.) Chanchal Kumar Singh, Prof. (Dr.) Girjesh Shukla, Dr. Arun Klair and Mr. Tijender Kumar Singh. Views expressed are personal.

*integrating traditional and modern economic insights, this research aims to contribute to the development of a dynamic legal framework that promotes market efficiency, innovation, and consumer welfare.*]

*"People of the same trade seldom meet together,*
*even for merriment and diversion,*
*but the conversation ends in a conspiracy against the public,*
*or in some contrivance to raise prices."*

– Adam Smith
*An Inquiry into the Nature and Causes of the Wealth of Nations*

# I

## Introduction

Competition law also referred to as antitrust law in the United States, is a body of legislation that promotes competition and regulates anti-competitive behaviour in the marketplace. Its primary objective is to ensure a fair and competitive environment that benefits consumers, businesses, and the economy as a whole. By preventing monopolistic practices, abusive conduct by dominant firms, and anti-competitive mergers and agreements, competition law seeks to maintain market dynamics that strengthen innovation, efficiency, and consumer welfare.

Competition law has developed under different historical and economic contexts in various countries, including India, leading to distinct but sometimes overlapping theoretical approaches. These theories provide the foundation for interpreting and enforcing competition law, influencing regulatory policies and judicial decisions. This study critically examines the theoretical approaches to competition law, focusing on their application in India. The research is rooted in classical and neoclassical economic theories, which emphasise minimal government intervention and the importance of competitive markets in ensuring consumer welfare and resource allocation. Key theories such as the Chicago School[1] and the Neo-Brandeisian approach[2] are analysed to understand their impact on market dynamics and regulatory policies. The classical economic theory advocates for the consumer welfare standard, aiming to enhance consumer benefits through lower prices and higher quality products.[3] Historical cases like Standard Oil[4] and

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1 Ryan R Stones, *The Chicago School and the Formal Rule of Law*, Volume 14, Issue 4 JOURNAL OF COMPETITION LAW & ECONOMICS 527-567 (2018).

2 Timothy J. Muris, *Neo-Brandeisian Antitrust: Repeating History's Mistakes*, No. 2023-02 AEI ECONOMICS WORKING PAPER (2023).

3 Thomas Sowell, ON CLASSICAL ECONOMICS (Yale University Press, 2006).

4 *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911).

Microsoft[5] illustrate the application of this theory in antitrust enforcement. The Chicago School, on the other hand, emphasises economic efficiency and is sceptical of government intervention, arguing that many business practices deemed anti-competitive may benefit consumers by enhancing efficiency and innovation. This theory's influence is evident in cases like the *IBM*[6] and *Staples-Office Depot*[7] mergers.

Furthermore, the research delves into the Essential Facilities Doctrine, which mandates that owners of crucial infrastructure must provide access to competitors on fair terms, thereby preventing monopolistic control that stifles competition. Notable cases, such as AT&T and Microsoft in the USA and the European Commission's rulings, highlight the application of this doctrine. In the Indian context, competition law is examined through its theoretical underpinnings and practical implementation, identifying challenges and proposing recommendations for improvement. The study highlights the importance of adapting competition policies to address contemporary issues such as digital market dominance and global competition. The study examines various competition law theories from the USA and UK, assesses their implementation in India, and identifies challenges and limitations. By integrating traditional and modern economic insights, this research aims to contribute to the development of a dynamic legal framework that promotes market efficiency, innovation, and consumer welfare.

# II

## Theories of Competition Law

Theories of competition law encompass a range of perspectives that have evolved to address the regulation and promotion of competitive markets, reflecting both economic principles and legal frameworks. Traditionally, competition law is grounded in the principles of classical economics, as articulated by Adam Smith and other early economists. They advocated for minimal government intervention, believing that free markets, driven by the "invisible hand" of self-interest, would naturally lead to efficient resource allocation and consumer benefits. This laissez-faire approach significantly influenced early antitrust laws, particularly in the United States, where the Sherman Antitrust Act of 1890 sought to curb monopolistic practices and promote market competition.

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[5] *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[6] *United States* v. *I.B.M.*, No. 69 Civ. 200 (S.D.N.Y. 1982).

[7] *F.T.C.* v. *Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

In the 20th century, neoclassical economic theories further refined the understanding of market dynamics, introducing more sophisticated analyses of market structures such as perfect competition, monopolistic competition, oligopoly, and monopoly.[8] Neoclassical theorists emphasised the importance of marginal utility, cost, and equilibrium, advocating for regulatory interventions to correct market failures like externalities, information asymmetries, and public goods.[9] This theoretical framework underpinned major legal developments in the USA and the UK. In the USA, the Clayton Act of 1914 and the Federal Trade Commission Act of 1914 expanded the scope of antitrust regulations to address anti-competitive mergers and unfair business practices. In the UK, the Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948 and subsequent legislation evolved to incorporate neoclassical insights, focusing on preventing abuses of market power and ensuring consumer welfare.

Modern competition law blends these traditional theories with contemporary economic insights, reflecting a balanced approach to market regulation. Current antitrust policies in the USA and the UK aim to promote competition, innovation, and consumer protection through rigorous analysis and enforcement of competition rules.[10] The integration of classical and neoclassical theories has resulted in a dynamic legal framework that adapts to changing market conditions and addresses new challenges, such as digital market dominance and global competition. This evolution demonstrates the enduring relevance of economic theories in shaping effective competition law and policy.

These competition law theories provide the intellectual and economic foundations for understanding and regulating market competition. These theories have evolved over a substantial period, reflecting changes in economic thought and legal practice.

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[8] Z. Seyda Deligönül & S. Tamer Çavuşgil, *Does the comparative advantage theory of competition really replace the neoclassical theory of perfect competition?*, 61.4 JOURNAL OF MARKETING 65-73 (1997); John A. List, *Testing neoclassical competitive theory in multilateral decentralized markets*, 112.5 JOURNAL OF POLITICAL ECONOMY 1131- 1156 (2004); Lefteris Tsoulfidis *et. al., Competition: Classical and neoclassical*, CLASSICAL POLITICAL ECONOMICS AND MODERN CAPITALISM: THEORIES OF VALUE, COMPETITION, TRADE AND LONG CYCLES 197 -245 (2019).

[9] Lefteris Tsoulfidis *et. al., Competition: Classical and neoclassical*, CLASSICAL POLITICAL ECONOMICS AND MODERN CAPITALISM: THEORIES OF VALUE, COMPETITION, TRADE AND LONG CYCLES 197 -245 (2019).

[10] Jeffrey L. Snyder, *International Competition: Toward a Normative Theory of United States Antitrust Law and Policy*, 3 BU INT'L LJ 257 (1985).

## *The United States Perspectives on Competition Law*

The development of competition law in the United States demonstrates the channelling of different theoretical inputs on market regulation issues. Classical economic theory is based on free markets and consumer welfare, insisting that markets work best when little intervention exists. The Chicago School is interested in economic efficiency, meaning minimal government intervention, and most of the time, it perceives market practices as self-correcting. The tough issues of hard-wired anti-competitive behaviours are handled by sophisticated economic models in the Post-Chicago School, espousing finely nuanced antitrust enforcement. It is its view that the working class or Neo-Brandeisian approach not merely recalibrates the ambit of competition law to encompass the broader and variegated social and political consequences of concentrated economic power but does so by arguing for strident measures to cut corporate dominance down to size. The Essential Facilities Doctrine insists that those companies enjoying a monopoly over essential facilities make them accessible to their competitors fairly so that no one will be able to stifle any market. Here are the main theories that have influenced competition law:

### *The Classical Economic Theory*

The classical economic theory of competition law, rooted in the principles of free-market economics, posits that markets function most efficiently when left to operate without undue interference, relying on the invisible hand to regulate prices and quality through competition. This theory emphasises the consumer welfare standard, which asserts that the primary goal of antitrust law should be to enhance consumer welfare by ensuring competitive markets.[11] By nurturing competition, this approach aims to achieve lower prices, increased output, and higher quality products for consumers. Classical economic theory argues that monopolies and anti-competitive practices harm consumers by reducing market efficiency and increasing prices, thereby justifying antitrust interventions to prevent such outcomes.[12]

*Standard Oil Co. of New Jersey* v. *United States*[13] is an example of the US government's antitrust case against Standard Oil in the early 20th century. The company's monopolistic practices, such as predatory pricing and exclusive contracts, were found to stifle competition and harm consumers by maintaining high prices and limiting choices. The Supreme Court's decision to break up Standard Oil into smaller entities was based on the belief that such a move would restore competitive market conditions and protect consumer interests. The

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[11] Keith N. Hylton, ANTITRUST LAW: ECONOMIC THEORY AND COMMON LAW EVOLUTION (Cambridge University Press, 2003).

[12] Shorey Peterson, *Antitrust and the classic model*, 47.1 THE AMERICAN ECONOMIC REVIEW 60-78 (1957).

[13] *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911).

classical economic theory also underpins modern antitrust enforcement, such as the US Department of Justice's lawsuit against Microsoft in the late 1990s. The case focused on Microsoft's bundling of its Internet Explorer browser with its Windows operating system, which was deemed an anti-competitive practice intended to maintain its monopoly in the operating system market. The court ruled that Microsoft's actions violated antitrust laws, as they restricted consumer choice and innovation in the software market.[14]

*The Chicago School Theory*

The Chicago School theory of competition law emphasises economic efficiency and is characterised by a sceptical view of government intervention in markets. This approach, which gained prominence in the late 20th century, asserts that many business practices traditionally viewed as anti-competitive can enhance efficiency and benefit consumers. The Chicago School argues that antitrust enforcement should focus narrowly on practices that demonstrably harm consumer welfare, particularly through higher prices or reduced output.[15] It posits that markets are generally self-correcting and that monopolistic practices often reflect superior efficiency or innovation rather than anti-competitive intent.

An example of the Chicago School's influence is evident in the US antitrust case against IBM in the 1970s. The government alleged that IBM engaged in anti-competitive practices by bundling software with its hardware, thereby stifling competition in the mainframe computer market. However, reflecting Chicago School principles, the case was eventually dropped in 1982 after more than a decade of litigation, with the realisation that IBM's practices could be seen as pro-competitive and efficiency-enhancing, contributing to innovation and benefiting consumers by providing integrated solutions.[16]

Another significant application of the Chicago School theory is the US Department of Justice's handling of the merger between Staples and Office Depot in the late 1990s. Initially blocked on grounds that it would substantially reduce competition in the office supply market, the case was re-examined with a Chicago School perspective. This re-evaluation considered potential efficiencies and consumer benefits resulting from the merger, such as lower costs and improved service, though ultimately, the merger was still blocked.[17]

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[14] *United States* v. *Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

[15] William Davies, *Economics and the 'nonsense' of law: The case of the Chicago antitrust revolution*, 39.1 ECONOMY AND SOCIETY 64-83 (2010).

[16] *United States* v. *I.B.M.*, No. 69 Civ. 200 (S.D.N.Y. 1982).

[17] *F.T.C.* v. *Staples, Inc.*, 970 F. Supp. 1066 (D.D.C. 1997).

*The Post-Chicago School Theory*

The Post-Chicago School theory of competition law emerged as a response to the Chicago School's emphasis on economic efficiency and scepticism towards government intervention. This theory incorporates more complex economic models and game theory to better understand the nuanced market behaviours of firms. Unlike the Chicago School, which often views market practices as self-correcting, the Post-Chicago School acknowledges that certain anti-competitive behaviours can persist even in ostensibly efficient markets.[18] It posits that some business practices, such as predatory pricing, exclusive contracts, and vertical restraints, can harm competition and consumer welfare even if they appear efficiency-enhancing on the surface.[19]

An illustrative example of the Post-Chicago School theory is the US antitrust case against American Airlines in the early 2000s. The government alleged that American Airlines engaged in predatory pricing by setting prices below cost to drive competitors out of the market. The Post-Chicago analysis supported the view that such behaviour could harm competition and consumers in the long run by enabling the dominant firm to recoup its losses through higher prices once competition was eliminated.[20]

Another significant case reflecting Post-Chicago principles is the European Commission's antitrust investigation into Intel's rebates and discounts to computer manufacturers. The Commission argued that Intel's practices were designed to exclude competitors from the market, thus harming competition. This case highlighted the Post-Chicago perspective that such vertical restraints can have anti-competitive effects, contrary to the Chicago School's emphasis on their potential efficiency benefits. Intel was fined, and the decision underlined the need for a more nuanced understanding of market dynamics.[21]

Post-Chicago School theory advocates for antitrust enforcement that considers the potential anti-competitive effects of business practices, even those that might initially seem pro-competitive or efficiency-enhancing. This approach aims to ensure that markets remain competitive and that consumer welfare is protected in the face of complex and potentially harmful market strategies.

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[18] Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW 2145-2169 (2020).

[19] Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST LJ 241 (2012).

[20] *United States* v. *A.M.R. Corp*., 335 F.3d 1109 (10th Cir. 2003).

[21] European Commission Decision of 13 May 2009, Case COMP/37.990 – Intel; *Intel Corp*. v. *European Commission*, Case COMP/C-3/37.792 (2009).

*The Populist Theory*

The Populist or Neo-Brandeisian approach to competition law emphasises the social and political dangers of concentrated economic power. Named after Justice Louis Brandeis, this theory goes beyond the traditional economic focus on consumer welfare and efficiency, advocating for broader considerations such as market structure, fairness, and the impact of corporate power on democracy and society.[22] The Neo-Brandeisian perspective argues that large corporations can wield undue influence in the marketplace, politics, and society. Thus, antitrust laws should actively work to prevent such concentrations of power.[23]

An example of the Neo-Brandeisian approach can be seen in the antitrust actions against Big Tech companies in the 21st century. For instance, the US Federal Trade Commission's (FTC) lawsuit against Facebook in 2020 accused the company of maintaining its monopoly through anti-competitive acquisitions and exclusionary practices. The Neo-Brandeisian framework supports this action by highlighting how Facebook's market dominance can harm consumer welfare in terms of higher prices or reduced quality, stifle innovation, limit consumer choice, and exert disproportionate influence over public discourse and privacy norms.[24]

Another illustrative case is the scrutiny of Amazon's business practices. Critics argue that Amazon's dominance in e-commerce harms small businesses and local economies, even if it offers low prices to consumers. The Neo-Brandeisian approach supports stricter antitrust measures against Amazon, emphasising the need to protect smaller competitors and maintain a diverse and resilient market structure that prevents any single entity from becoming too powerful (House Judiciary Committee, Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, 2020).

These examples highlight the Neo-Brandeisian approach's broader view of antitrust enforcement. It prioritises the preservation of competitive market structures and checks on corporate power, viewing these goals as essential for protecting democratic values and ensuring a fair economy. This perspective advocates for robust antitrust policies that address economic harm and the wider social and political impacts of market concentration.

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[22] Manuel Wörsdörfer, *Louis D. Brandeis and the New Brandeis Movement: Parallels and Differences*, 68.3 THE ANTITRUST BULLETIN 440-459 (2023); Kenneth G. Elzinga & Micah Webber, *Louis Brandeis and Contemporary Antitrust Enforcement*, 33 TOURO L. REV. 277 (2017).

[23] Carl Shapiro, *Antitrust: What went wrong and how to fix it*, 35 ANTITRUST 33 (2020).

[24] *F.T.C.* v. *Facebook, Inc.*, No. 20-cv-03590 (D.D.C. 2020).

### *The Essential Facilities Doctrine*

The Essential Facilities Doctrine in competition law posits that owners of essential facilities must provide access to these facilities to competitors on fair and reasonable terms. An "essential facility" is typically an infrastructure or resource so critical that its denial would prevent competition in a downstream market. This doctrine aims to prevent monopolistic entities from leveraging their control over crucial inputs to stifle competition and maintain market dominance.[25]

An illustrative example of the Essential Facilities Doctrine is the US case against AT&T in the 1980s. AT&T controlled the only nationwide telephone network, considered an essential facility for telecommunications services. Competitors needed access to AT&T's network to offer local and long-distance telephone services. The US government argued that AT&T's refusal to grant access to its network on reasonable terms constituted anti-competitive behaviour, leading to the landmark breakup of AT&T into multiple smaller companies.[26]

Another significant example is the European Commission's antitrust case against Microsoft. The Commission found that Microsoft had abused its dominant position by refusing to provide interoperability information necessary for competitors to develop software compatible with the Windows operating system, which was deemed an essential facility. As a result, Microsoft was fined and ordered to disclose the necessary information to ensure competition in the software market.[27]

## *The United Kingdom Perspectives on Competition Law*

The theoretical foundations and principles guiding UK competition law share similarities with those in other jurisdictions, but they also have unique aspects tailored to the UK's legal and economic context. Here are the main theories supporting UK competition law:

### *The Consumer Welfare Standard*

The Consumer Welfare Standard is a foundational theory in competition law that prioritises the impact of business practices on consumer welfare. This approach posits that the primary goal of antitrust law should be to enhance consumer welfare by ensuring competitive markets that lead to lower prices, higher quality products, increased innovation, and greater consumer choice.[28] It

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[25] Gregory J. Werden, *The law and economics of the essential facility doctrine,* 32 LOUIS ULJ 433 (1987).

[26] *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

[27] European Commission Decision of 24 March 2004, Case COMP/C-3/37.792 – Microsoft.

[28] Philip Marsden & Peter Whelan, *Consumer Detriment" and its Application in EC and UK Competition Law,* 27.10 EUROPEAN COMPETITION LAW REVIEW 569 (2006).

focuses on tangible economic benefits to consumers rather than broader social or political concerns.[29] An illustrative example of the Consumer Welfare Standard in action is the Competition and Markets Authority's (CMA) intervention in the proposed merger between Sainsbury's and Asda, two of the UK's largest supermarket chains. In 2019, the CMA blocked the merger on the grounds that it would lead to higher prices, reduced quality, and less choice for consumers. The CMA's decision emphasised that the merger would significantly diminish competition in the grocery market, harming consumer welfare by potentially increasing prices and reducing service standards.[30]

Another significant application of the Consumer Welfare Standard is the CMA's investigation into pharmaceutical companies Pfizer and Flynn Pharma in 2016[31]. The CMA found that these companies had charged excessive and unfair prices for an anti-epilepsy drug, phenytoin sodium, after its de-branding. This practice was deemed to harm consumers by significantly increasing the medication cost for the National Health Service (NHS) and ultimately affecting patients' access to affordable treatment. The CMA fined the companies and ordered them to reduce their prices.[32]

The CMA's focus on how mergers, pricing strategies, and market behaviours impact consumer prices, quality, and choice reflects the standard's central objective: to protect and enhance consumer welfare by ensuring robust competition in the market. This approach ensures that consumers benefit from fair pricing, high-quality products, and a variety of choices, reinforcing the importance of competition in driving positive economic outcomes for the public.

### *The Ordoliberalism*

Ordoliberalism, a theory significantly influencing European competition law, including the UK, emphasises the importance of maintaining a competitive order and preventing any concentration of economic power that could threaten individual freedom and the market's integrity. Originating in Germany,

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[29] Ma Joy V. Abrenica, *Balancing Consumer Welfare and Public Interest in Competition Law,* 13 ASIAN J. WTO & INT'L HEALTH L & POL'Y 443 (2018).

[30] Competition and Markets Authority, ANTICIPATED MERGER BETWEEN J SAINSBURY PLC AND ASDA GROUP LTD, (2019) *available at https://assets.publishing.service.gov.uk/media/5cc1ec1340f0b 64031cfa6f0/Final_reportSA.pdf* (last visited 22 February, 2024).

[31] *Pfizer Inc.* v. *Competition and Markets Authority*, Case No. 50223 (2016).

[32] Competition and Markets Authority, C.M.A. FINES PFIZER AND FLYNN £90 MILLION FOR DRUG PRICE HIKE (2016) *available at https://www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs#:~:text=The%20Competition%20and%20Markets%20Authority,phenytoin%20sodium%20capsules%2C%20an%20anti%2D* (last visited 20 February, 2024).

Ordoliberalism advocates for a strong regulatory role for the state to ensure that markets remain competitive, fair, and efficient. It posits that monopolistic and anti-competitive practices harm consumer welfare and pose broader threats to social and economic order.[33]

An illustrative example of Ordoliberalism in action within the UK context is the Competition and Markets Authority's (CMA) investigation into the energy market. In 2016, the CMA conducted a comprehensive review of the retail energy market, concluding that the "Big Six" energy companies had been overcharging customers who failed to switch suppliers. This lack of competition led to higher prices and reduced market efficiency. The CMA's intervention, which included recommending price caps and measures to enhance competition, reflected Ordoliberal principles by aiming to dismantle the concentrated market power of these large firms and protect consumer welfare.[34]

Another significant example is the CMA's action against pharmaceutical companies for anti- competitive agreements. In 2018, the CMA fined Pfizer and Flynn Pharma for entering into anti-competitive agreements that restricted the supply of an anti-epilepsy drug, resulting in excessively high prices. This action was based on Ordoliberal principles, focusing not just on consumer prices but also on maintaining competitive market structures and preventing abuse of market dominance.[35]

### *The Essential Facilities Doctrine*

Within the legal context of the United Kingdom, the Essential Facilities Doctrine pertains to the principle that certain facilities or resources essential for effective competition should be accessible to all market participants on reasonable terms. It is grounded in recognising that monopolistic control over vital infrastructures or facilities can stifle competition, impeding consumer welfare and economic efficiency. In the UK, the doctrine is rooted in common law and competition law. Under common law, the doctrine emerged from case law, notably *British Oxygen*

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[33] Conor Talbot, *Ordoliberalism and balancing competition goals in the development of the European Union*, 61.2 THE ANTITRUST BULLETIN 264-289 (2016); Pınar Akman, *The role of 'freedom' in EU competition law,* 34.2 LEGAL STUDIES 183-213 (2014).

[34] Competition and Markets Authority, ENERGY MARKET INVESTIGATION (2016) *available at https://assets.publishing.service.gov.uk/media/5773de34e5274a0da3000113/final-report-energy-market-investigation.pdf* (last visited 22 February, 2024).

[35] Competition and Markets Authority, C.M.A. FINES PFIZER AND FLYNN £90 MILLION FOR DRUG PRICE HIKE (2016) *available at https://www.gov.uk/government/news/cma-fines-pfizer-and-flynn-90-million-for-drug-price-hike-to-nhs#:~:text=The%20Competition%20and%20Markets%20Authority,phenytoin%20sodium%20capsules%2C%20an%20anti%2D* (last visited 20 February, 2024).

*Co Ltd* v *Minister of Technology*[36], where the House of Lords recognised the obligation of entities possessing monopolistic control over essential facilities to grant access to competitors. Subsequently, the Competition Act 1998 and the Enterprise Act 2002 further codified the principles of fair competition and prohibited anti-competitive behaviour, providing legal mechanisms to address essential facility abuses. Also, regulatory bodies such as the Competition and Markets Authority (CMA) play a crucial role in enforcing these laws and ensuring fair access to essential facilities. Through its enforcement actions and merger reviews, the CMA safeguards competition in the UK market, upholding the Essential Facilities Doctrine principles. These theories collectively guide the formulation, interpretation, and enforcement of competition law in the UK, ensuring that markets remain competitive and fair and that consumers benefit from robust competition.

# III

## Implementing the Theories to the Indian Context

The Competition Act, 2002, and the institutional framework of the Competition Commission of India come to the fore in ensuring that the pitch created for a fair and competitive market in India is centred on consumer welfare. In exercise of its powers under this Consumer Welfare Standard, very prominent steps have been taken like the 2018 penalty by the CCI on Google for putting unfair conditions on Android device manufacturers, thus safeguarding consumer choice and innovation. Hence, in a sense, keeping with Ordoliberal principles, the CCI has in-built provisions for the prevention of any abuse of dominant position and monitoring merger and acquisition cases to prevent monopolies or disproportionate competitive advantages.[37]

The research further elaborates on how the different competition theories influence India's Competition Law. For instance, the emphasis that the Post-Chicago School places on economic analysis and game theory is prominent in cases such as the Cement Cartelization Case[38]. Behavioural economics informs the approach of the CCI toward misleading advertisements and deceptive marketing practices. The

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[36] *British Oxygen Co Ltd* v *Minister of Technology*, [1971] AC 610.

[37] Sairam Bhat & Rohith R. Kamath, *Competition Law: The New Consumer Choice*, 3 IUP LAW REVIEW 4 (2013); Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, 4.3 JOURNAL OF COMPETITION LAW AND ECONOMICS 609-638 (2008).

[38] *Builders' Association of India* v. *Cement Manufacturers' Association & Ors*., Case No. 29 of 2010; 1 COMP.L.R. 1 (2012).

Essential Facilities Doctrine, most vividly by *Reliance Jio Infocomm Ltd* case[39], ensures that access to infrastructure is availed in a manner that will be fair and equitable. The Populist or Neo-Brandeisian view contributes to a more general concern with the public interest having to do with data privacy issues and widening income gaps. These conceptual frameworks contribute to a very well-supported, dynamic competition law regime for India. Let us see the impact of these theories individually.

### *The Consumer Welfare Standard*

The Competition Act, 2002, which governs competition law in India, primarily focuses on promoting and sustaining competition for the benefit of consumers.[40] The Competition Commission of India (CCI) is tasked with ensuring fair competition, preventing anti-competitive practices, and promoting consumer welfare. In 2018, in the case of *Google LLC* v. *Competition Commission of India*,[41] the CCI fined Google for abusing its dominant position in the online search market by imposing unfair conditions on Android device manufacturers, thus harming consumer choice and innovation. This theory can be seen from the realm of the protection of the consumer and in numerous cases, the CCI have protected the rights of the consumers.

### *The Ordoliberalism*

Indian competition law reflects elements of Ordoliberalism, particularly in its emphasis on preventing the abuse of market dominance and promoting a level playing field. The CCI closely monitors concentrations of economic power, scrutinising mergers and acquisitions to prevent the creation of monopolies or dominant market positions. When the Competition Commission of India (CCI) scrutinises mergers and acquisitions (M&A) in sectors like telecommunications and retail, it aims to ensure that such transactions do not result in a significant concentration of market power that could harm competition and consumer welfare.

In the telecommunications sector, mergers and acquisitions can have significant implications for competition and consumer choice. The CCI closely examines proposed transactions to assess whether they would lead to the creation of a dominant player that could potentially abuse its market power. In the retail sector, mergers and acquisitions can similarly raise concerns about the concentration of market power, particularly if they involve large retailers or chains. In the retail

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[39] *Reliance Jio Infocomm Ltd*. v. *Bharti Airtel Ltd. & Ors*., Case No. 03 of 2017.

[40] Amit Kashyap & K. Thajudheen, *Competition law and consumer welfare in India,* 6.1 JOURNAL OF ECONOMICS AND INTERNATIONAL BUSINESS MANAGEMENT 1-9 (2018).

[41] *Google L.L.C.* v. *Competition Commission of India* Case No. 07 of 2015; 170 CCH (CCI) 5 (2018).

sector, mergers and acquisitions can similarly raise concerns about the concentration of market power, particularly if they involve large retailers or chains.[42] For instance, if a dominant retail chain were to acquire a significant competitor, it could potentially eliminate competition in certain markets, leading to higher prices and reduced consumer choice.

*The Chicago School Theory*

While the Indian competition regime is grounded in promoting consumer welfare, there are instances where efficiency considerations come into play, especially in assessing the impact of business practices on market competition.[43] However, the Chicago School's scepticism towards government intervention is not as prominent in India, given the country's historical and socio-economic context. While not as prominently applied, efficiency considerations may be relevant in cases involving mergers or vertical agreements where potential efficiencies are weighed against any adverse effects on competition.

*The Post-Chicago School Theory*

The Indian competition authorities, including the CCI and the National Company Appellate Tribunal (NCLAT), formerly the Competition Appellate Tribunal (COMPAT), have demonstrated a nuanced understanding of market dynamics, incorporating economic analysis and game theory in their assessments of anti-competitive conduct and mergers. The CCI's investigation into allegations of cartelisation and price-fixing among cement manufacturers, where economic analysis and game theory are employed to assess the impact on competition and consumer welfare.[44]

*The Populist or Neo-Brandeisian Approach*

India's competition law framework increasingly considers broader public interest objectives alongside consumer welfare. The CCI has taken actions to address issues such as data privacy, digital market dominance, and concerns related to income inequality, aligning with the Neo- Brandeisian perspective.[45] The CCI's examination of the impact of digital platforms such as Facebook and WhatsApp on data privacy, competition, and consumer choice reflects broader public interest considerations alongside consumer welfare.

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[42] Ritu Birla, *Jurisprudence of emergence: Neo-liberalism and the public as market in India,* 38.3 SOUTH ASIA: JOURNAL OF SOUTH ASIAN STUDIES 466-480 (2015).

[43] Deven R. Desai & Spencer Waller, *Brands, competition, and the law,* BYU L. REV. 1425 (2010).

[44] *Builders' Association of India* v. *Cement Manufacturers' Association & Ors*., Case No. 29 of 2010; 1 COMP.L.R. 1 (2012).

[45] Aditya Bhattacharjea, *India's Competition Policy: An Assessment,* ECONOMIC AND POLITICAL WEEKLY 3561-3574 (2003).

### *The Behavioral Economics*

While traditional economic principles guide competition law enforcement in India, there is growing recognition of the insights offered by behavioural economics. The CCI considers behavioural biases and consumer perceptions in its market behaviour and consumer harm assessments.[46] In cases involving misleading advertisements or deceptive marketing practices, the CCI considers behavioural biases and consumer perceptions in determining whether such practices harm competition and consumer welfare.[47]

### *The Essential Facilities Doctrine*

The CCI has applied the essential facilities doctrine in cases involving access to infrastructure and essential inputs.[48] For example, in the telecom sector, the CCI has intervened to ensure fair access to essential facilities such as spectrum and network infrastructure. The CCI's intervention in the telecom sector ensures fair access to essential facilities such as spectrum and infrastructure, preventing incumbent operators from denying access to new entrants.[49]

The case of *Reliance Jio Infocomm Ltd*. v. *Bharti Airtel Ltd. & Ors*[50] is a notable example that demonstrates how the Competition Commission of India (CCI) intervenes to ensure fair access to essential facilities and promotes competition in the telecommunications sector. Bharti Airtel filed a case against Reliance Industries and Reliance Jio, accusing them of violating competition laws by sharing information and collaborating to offer superior services to their customers, thus breaching Sections 3 and 4 of the Competition Act 2002.[51] Bharti Airtel alleged that Reliance Jio Infocomm Limited was leveraging its dominant market position to engage in predatory pricing. Reliance Jio, a telecom subsidiary of Reliance Industries launched on September 1, provided VoLTE services. Airtel described Jio's activities as predatory and filed a complaint with India's Competition Commission (CCI). Bharti Airtel argued that Reliance Industries financially supported Reliance Jio during its initial operations, which allowed Jio to sustain losses while offering free services, thereby abusing its dominant position. According to Section 4 of the Act, "dominant position" refers to a significant position held by an enterprise in the relevant market in India, enabling it to

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[46] Avinash B Amarnath, *The oligopoly problem: Structural and behavioural solutions under Indian competition law*, JOURNAL OF THE INDIAN LAW INSTITUTE 283-306 (2013).

[47] *Ibid.*

[48] Lakshmi Praharshitha Koduri, *The'Essential Facilities' Doctrine-A Study of Its Relevance and Applicability under the Indian Competition Law*, 2 PART 1 INDIAN J. INTEGRATED RSCH. 1 (2022); Vinod Dhall, *Competition Law in India,* 21 ANTITRUST 73 (2006).

[49] *Reliance Jio Infocomm Ltd*. v. *Bharti Airtel Ltd. & Ors*., Case No. 03 of 2017.

[50] *Ibid.*

[51] The Competition Act, 2002, Section 4 (Abuse of Dominance).

dominate the market.[52] The Competition Commission assesses various factors such as the size and resources of the enterprise, its economic power, the basis of its dominance, and customer dependence on the company, in addition to market share. Therefore, even if Jio has a large market share, it may not necessarily hold a dominant position when considering these other factors. The CCI ultimately dismissed Airtel's complaints, ruling that Jio's actions constituted a legitimate exercise of competitive pricing.

The CCI's investigation focused on whether the actions of the incumbent operators constituted an abuse of dominance and anti-competitive behaviour under the Competition Act, 2002. The CCI evaluated whether Airtel and other incumbents held a dominant position in the relevant market, which is the market for telecom services in India. The CCI examined whether the PoIs controlled by the incumbents could be considered essential facilities. Under this doctrine, owners of essential facilities are required to provide access to competitors on fair and reasonable terms. The CCI assessed the impact of the denial of PoIs on competition and consumer welfare. The disruption of Jio's services due to inadequate PoIs had the potential to harm consumer interests by limiting their choices and access to competitive telecom services.

The CCI found that the incumbent operators, including Airtel, had indeed engaged in anti-competitive practices by denying sufficient PoIs to Jio. This conduct was seen as an abuse of their dominant position in the market. The CCI directed the incumbent operators to cease their anti-competitive practices and ensure fair access to PoIs for Jio. The CCI's intervention, in this case, emphasizes its commitment to promoting competition and preventing the abuse of dominance in the telecommunications sector. By ensuring fair access to essential facilities like PoIs, the CCI aimed to strengthen a competitive environment that benefits consumers through improved services and increased choice. The decision also highlighted the application of the Essential Facilities Doctrine in the Indian context, emphasising the need for incumbent operators to provide access to critical infrastructure on fair terms to enable effective competition. The *Reliance Jio Infocomm Ltd.* v. *Bharti Airtel Ltd. & Ors*.[53] case illustrates the CCI's proactive role in addressing anti-competitive practices and ensuring that new entrants can compete effectively in the market. This intervention not only protected consumer interests but also reinforced the principles of fair competition and the importance of access to essential facilities in promoting a healthy and competitive telecom sector in India.

In another notable judgment, the *Builders' Association of India* v. *Cement Manufacturers' Association & Ors* case showcases how the CCI's actions are crucial

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[52] *Ibid.*

[53] *Reliance Jio Infocomm Ltd.* v. *Bharti Airtel Ltd. & Ors.*, Case No. 03 of 2017.

in maintaining market efficiency and promoting a competitive market environment.[54] In 2012, the Builders Association of India filed a complaint with the CCI, alleging that major cement manufacturers were involved in cartel-like behaviour, including price-fixing and limiting production to artificially inflate prices. This alleged collusion not only distorted market competition but also resulted in significant inefficiencies, such as higher prices and reduced output, which adversely affected consumers and the overall economy.

The CCI conducted a detailed investigation into the practices of the cement manufacturers. It scrutinised the evidence of regular meetings among the companies, where they allegedly discussed prices, production levels, and market allocation. The investigation revealed that the companies were indeed engaging in anti-competitive practices, which led to price parallelism and control over production, thereby manipulating the market to their advantage. The CCI's intervention was aimed at dismantling this cartel to restore market efficiency. By imposing significant fines on the involved companies and ordering them to cease their collusive activities, the CCI sought to disrupt the anti-competitive practices that were harming market efficiency. The fines were substantial, reflecting the severity of the violation and serving as a deterrent to future anti-competitive behaviour.

The CCI's actions had a direct impact on market efficiency. By breaking up the cartel, the CCI aimed to restore competitive pricing mechanisms, ensuring that prices were determined by genuine market forces of supply and demand rather than manipulative practices. This intervention helped to stabilise cement prices and improve availability, benefiting consumers and businesses reliant on cement for construction and infrastructure projects. Also, the case highlighted the importance of vigilance and enforcement in maintaining a healthy competitive environment. It demonstrated that regulatory oversight is essential in preventing firms from engaging in practices that undermine competition and market efficiency.

The Cement Cartel case exemplifies the CCI's critical role in enhancing market efficiency through the enforcement of competition law. By addressing anti-competitive practices, the CCI not only ensures fair competition but also promotes an efficient market environment where prices reflect true supply and demand dynamics. This intervention is crucial in protecting consumer interests, promoting a competitive business environment, and ensuring the efficient functioning of markets in India.

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[54] *Builders' Association of India* v. *Cement Manufacturers' Association & Ors*., Case No. 29 of 2010; 1 COMP.L.R. 1 (2012).

# IV

## Conclusion

The paper elaborately deals with the theoretical foundations of competition law in India and its practice, drawing comparisons with the well-established frameworks from the US and the UK. Competition law assumes a huge role related to market efficiency, consumer welfare, and fair business practice. Against the backdrop of classical and neoclassical theories of economics, the article contextualises the evolution and current status of competition law enforcement in India but places greater emphasis on how the regime is to adapt to the contemporary challenges of dominance through digital means and rising global competition. CCI's notable judgments bring into play some of the most important critical doctrines, like the Essential Facilities Doctrine and the Consumer Welfare Standard, showing the commitment of the CCI to ensuring access to users of essential services on fair terms and promoting a competitive market landscape.

This approach of behavioural economics getting integrated into the assessments of CCI is diverse in its understanding of market dynamics and consumer behaviour, amounting to a nuanced approach toward competition law enforcement. The work also recognises that the contribution of theoretical perspectives on competition from Ordoliberalism to the Chicago School has returned India to transnational thought in fashioning the country's competition policies. It is those very insights of those theories that added strength and dynamism to the legal framework for tackling issues thrown up by modern markets.

The regulatory framework needs further enrichment to deal with contemporary market realities concerning digital and technological market sectors to make enforcing competition law more effective in India. To do so, the CCI has to display deft approaches to data privacy problems, digital monopolies, and platform dominance. Cooperation with foreign authorities is very much required and has gained prominence in global markets. Tighter collaboration with foreign competition authorities will help in sharing information, best practices, and coordinated actions against anti-competitive practices that have cross-border implications. Sensitising the public and creating stakeholder engagement was also very important. By raising awareness about competition laws and their rights among consumers and businesses, they are better placed to identify and report anti-competitive practices that would promote a culture of compliance and demystify the role of the CCI.

Advanced technologies and data analytics can be deployed with much enthusiasm for detecting and analysing anti-competitive practices. This will bring much-needed

streamlining to the investigation process and give a proactive dimension to enforcement. A culture of compliance could be promoted within businesses, encouraging the establishment of compliance programs with ethical practices that would pre-empt anti-competitive behaviour. The CCI should, therefore, spell out guidelines and incentives for the infusion of competition law compliance within corporate governance frameworks. Legal provisions require periodic review and updating to remain relevant and current to prevalent challenges in the market. This means fine-tuning legal definitions, penalties, and mechanisms for enforcement to remain compliant with evolving market dynamics. Research and academic engagement could do much here; collaboration with academia brings new insights and innovative solutions from the current thinking within academic institutions to the CCI on newly emerging issues in competition law and economics.