

## CARTELIZATION IN THE OTT SECTOR IN INDIA: A LEGAL PANORAMA

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### Abstract

*In this new arena of online content, Netflix Inc. and Amazon Prime Video are playing a pivotal role in getting substantial rights of major big production banners, for instance, Netflix Inc. managed to get the entire streaming rights of the banner, Red Chillies Entertainment owned by Shahrukh Khan whereas Amazon Prime Video acquired, all the exclusive streaming rights worldwide<sup>1</sup> of Salman Khan Films production. In both these cases, we can see a vertical agreement under section 3(4) of the Competition Act, 2002. Vertical agreements are not per se anti-competitive or void, only when they put a restraint on competition, they are considered void. In the present scenario, there is collusion between production houses and streaming platforms, and there is hardly any room left for other emerging OTT service providers to grow in the market.*

**Keywords:** Relevant Market, Dominant Position, Collusion, Vertical Agreements, Cartel, Over-the-Top (OTT).

### Introduction

*“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, The Wealth of Nations. (1776)*

Cartels have existed ever since humans commenced trading. With the advent of civilization in the world, trade started to develop. Markets began to take shape and cultures spread across the globe began exchanging commodities via land and sea routes. This sowed the seeds for the growth of various traders and merchants. Eventually as the market and customer base began, traders started engaging in collusive habits to control the market and cartels started coming into shape.

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<sup>1</sup>Amazon Prime Video versus Netflix: A tale of two competitive streaming services in India (Sep. 14, 2021, 02:37 AM) <https://www.firstpost.com/entertainment/amazon-prime-video-versus-netflix-a-tale-of-two-competitive-streaming-services-in-india-3936543.html>.

Be it the Pharaoh-backed drug market of Ancient Egyptian culture<sup>2</sup> or the salt syndicates of France and Naples in the 13<sup>th</sup> century, there have been numerous instances of cartelization throughout the ancient world. Cartelization is the antithesis of competition. Through competition, the State thrives to promote innovation, new ventures, development, etc. which are beneficial for the people currently involved in trade and the new players entering the market. Cartels engage in price control, limit production or trade in goods and restrict the entry of new players in the market. The factual interpretation of cartels is based on the cartel theory having its origin in America. It was introduced in 1883 by the Australian economist Friedrich Kleinwachter.

The word Cartel has been derived from the Italian word *cartello* which means “leaf of paper” or “placard”. Lorenz Von Stein was the first person to use the word Cartel to define curtailment of competition.

In India, instances of Cartelization have been observed since ancient times. During the Colonial times, the East India Company had established a monopoly in Bengal province for Opium production. The great Indian strategist *Chanakya* in his book *Arthashastra* had penalized anti-competitive behavior and cartel formation.

Section 2(c) of the Competition Act, 2002 defines Cartel as - “cartel” as an association of producers, sellers, distributors, traders, or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services”.

So, there are three essential elements of Cartels –

1. Existence of an arrangement or understanding between the competitors.
2. Parties engaged in similar trades.
3. The agreement aimed to limit, control or attempt to control production.

The article discusses how cartel-like behavior has started shaping up in the new age of streaming service platforms and has adversely affected the free market dynamics. In this article,

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<sup>2</sup>Cocaine Mummies & the search for narcotics in historic collections (Sep. 14, 2021, 17:23 PM) <https://blogs.ucl.ac.uk/researchers-in-museums/2019/04/20/cocaine-mummies-the-search-for-narcotics-in-historic-collections/>.

we will first discuss how the rise of streaming services took place and the factors behind their growth. Post that, we will discuss how the enterprises, that have got huge financial resources started abusing their position and exhibiting Cartel comportment. In the last two points, we will discuss, what legal recourses we have in India to put an end to such malpractices initially by the use of the Competition Act, 2002, and then by going through our pristine Constitution.

### **Rise of the OTT platforms**

There was a time when people would wait for months and years for their favorite actor's movies in India since cinema back then was a star-driven business. Chronologically, the attracting factor for people towards theatre was the star, the songs, and the story coming in the end. Then the 90s and early 2000 saw the rise of private television channels in India<sup>3</sup>, which became an alternate source of entertainment for the Indian audience. Both television and theatres ran in symbiosis in providing entertainment until the data prices dropped drastically in India in the year 2016<sup>4</sup> giving way to the evolution of streaming platforms.

With the advent of the Smartphone revolution followed by the internet boom, smaller content creators who were struggling to find a space for themselves amongst the bigger producers got an opportunity to showcase their talent via streaming mediums<sup>5</sup>. No longer is the industry a star-run business, where people would watch the movie for their favorite stars. Story/Content is running the business now; movies with not-so-popular actors and banner names but with amazing storylines are reaching the audience.

With the internet boom, YouTube was the first platform to get the audience's attention given its free streaming features<sup>6</sup>, then native streaming platforms such as TVF and MX player started coming in; showcasing various domestically made web series. The Indian audience also started getting more interested in the concept of web series given they had the opportunity to choose what they wanted to watch and not depend on the mercy of television channels. Collectively,

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<sup>3</sup>Television in India (Sep. 14, 2021, 01:50 AM) <https://www.flexiprep.com/NIOS-Notes/Senior-Secondary/Mass-Communication/NIOS-Class-12-Mass-Communication-Ch-13-Television-in-India.html>.

<sup>4</sup> Mobile data price down 95%, revenue up 2.5 times in 5 years: Trai (Sep. 14, 2021, 01:54 AM) [https://www.business-standard.com/article/pti-stories/mobile-data-price-down-by-95-but-revenue-up-2-5-times-in-5-yrs-tra-119082101291\\_1.html](https://www.business-standard.com/article/pti-stories/mobile-data-price-down-by-95-but-revenue-up-2-5-times-in-5-yrs-tra-119082101291_1.html).

<sup>5</sup> How Online Platforms are Providing Opportunities to Artists (Sep. 14, 2021, 01:59 AM) <https://www.matchmytalent.com/blog/how-online-platforms-are-providing-opportunities-to-artists/>.

<sup>6</sup> How India conquered YouTube (Sep. 14, 2021, 02:01 AM) <https://www.ft.com/content/c0b08a8e-4527-11e9-b168-96a37d002cd3>.

these services started to be called OTT or Over-the-Top platforms all over the world, given they were providing streaming services to their users over the internet<sup>7</sup>

Seeing the boom in the online content industry, bigger streaming giants such as Amazon and Netflix entered the Indian market and started collaborating with Indian producers and directors to produce content domestically<sup>8</sup>. Now, the Indian audience has the opportunity to watch homegrown online content plus content from all around the world.

Earlier, OTT services were considered a smaller threat to the Indian Cinema theatres, but the Corona Lockdown of March 2020, has changed the industry drastically. With theatres remaining closed for more than a year and a half, the online content industry took a huge leap and grew by metes and bounds, and today is set to continue the expansion<sup>9</sup>.

The industry is now looked upon as an alternative to cinema theatres and is also giving tough competition to the cable television industry<sup>10</sup>. People have the opportunity to watch the best movies on their phones or television sets; stars who had a huge box office reputation are also willing to come to the OTT platforms.

### **Collusive practices by Dominant Enterprises**

The rise of big corporate entities in the market has brought with it preeminence along with competitiveness. In the wake of the Covid-19 Pandemic, sudden advances were seen in the Media and Entertainment Industry. The immediate upshift of the film industry from cinema theaters to OTT (Over-the-Top) platforms has massively affected the market in general and cinema theaters in specific. As the shift is fairly visible from the bygone theater releases to the new age of internet streaming services, the audience prefers the latter one it is more flexible for the individuals. With the rise of the new age of OTT platforms, various production companies have come up in the market providing streaming services. Today, India enjoys more than 40 OTT platforms providing online streaming services including international and

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<sup>7</sup>What is the definition of OTT (Sep. 17, 2021, 17:14 PM) <https://www.adjust.com/glossary/ott-over-the-top?>

<sup>8</sup> Netflix to Invest \$400M in Indian Content Over Two Years, CEO Reed Hastings Says (Sep. 14, 2021, 02:08 AM) <https://www.hollywoodreporter.com/tv/tv-news/netflix-invest-400m-indian-content-says-ceo-reed-hastings-1260159>.

<sup>9</sup> OTT to the top: For OTT platforms, 2020 was a time for serious growth (Sep. 14, 2021, 02:10 AM) <https://www.thehindu.com/society/ott-to-the-top-for-ott-platforms-2020-was-a-time-for-serious-growth/article33411204.ece>.

<sup>10</sup> 55% of Indians prefer OTT platforms vs 41% that still prefer DTH: MoMAGICsurvey (Sep. 14, 2021, 02:31 AM) <https://brandequity.economictimes.indiatimes.com/news/media/55-of-indians-prefer-ott-platforms-vs-41-that-still-prefer-dth-momagic-survey/70858815>.

domestic players like Amazon Prime Video, Netflix Inc., Disney Hotstar, Zee5, etc. According to a credible research firm – Price Waterhouse Coopers Global Entertainment and Media Outlook 2019-23<sup>11</sup> the OTT market is expected to grow at the rate of 21.8% CAGR, from Rs. 4,464 Cr. in 2018 to Rs. 11,976 Cr. in 2023. Simultaneously, the FICCI EY report of 2019 suggests a market growth of 24 billion by 2021. In this new arena of online content, Netflix Inc. and Amazon Prime Video are playing a pivotal role in getting substantial rights of major big production banners, for instance, Netflix Inc. managed to get the entire streaming rights of the banner, Red Chillies Entertainment owned by Shahrukh Khan whereas Amazon Prime Video acquired, all the exclusive streaming rights worldwide<sup>12</sup> of Salman Khan Films production. In both these cases, we can see a vertical agreement under section 3(4) of the Competition Act, 2002. Vertical agreements are not per se anti-competitive or void, only when they put a restraint on competition, they are considered void. In the present scenario, there is collusion between production houses and streaming platforms, and there is hardly any room left for other emerging OTT service providers to grow in the market. In the famous U.S. case of **the United States v. Paramount Pictures, Inc.**<sup>13</sup>; collusive vertical integration was observed by major film studios. The theater chains would show only those movies produced by the studios owning them, creating a de facto oligopoly in the market. A sevenfold test including clearance agreements, pooling agreements, block bookings, and joint ownership was propounded by J. William O. Douglas where clearance agreements and block bookings were seen as restrained in trade practices while pooling agreements and joint ownership were considered bona fide practices in the trade. After this case, more independent producers producing the films were seen in the market free from the interference of the majority of studios dominating them.

The advent of the enormous market players had raised the issue of cartel creation in the Indian market. Many competitive players have come forward in recent times and faced the misuse of the dominant position. With problems come solutions, so in India, the first-ever Competition statute came into force, the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969. With new advancements in the market, the archaic MRTP Act was replaced with the new

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<sup>11</sup>Global Entertainment & Media Outlook: 2019-2023 (Sep. 14, 2021, 02:34 AM) [https://bestmediainfo.in/mailler/nl/nl/2019\\_Global\\_E\\_M\\_Outlook.pdf](https://bestmediainfo.in/mailler/nl/nl/2019_Global_E_M_Outlook.pdf).

<sup>12</sup>Amazon Prime Video versus Netflix: A tale of two competitive streaming services in India (Sep. 14, 2021, 02:37 AM) <https://www.firstpost.com/entertainment/amazon-prime-video-versus-netflix-a-tale-of-two-competitive-streaming-services-in-india-3936543.html>.

<sup>13</sup> William O. Douglas, *United States v. Paramount Pictures Inc.*, 334 U.S. 141, 167.

Competition Act of 2002<sup>14</sup>making some amendments to the Act through a constitutional mandate by the recommendations of the **Raghavan Committee**. The competition statute aims to prohibit all anti-competitive agreements at the vertical and horizontal level that restrict competition and are detrimental to the consumer's rights and to regulate the abusive behavior of dominant firms setting unfair and discriminatory conditions upon the consumers. In **CCI v. Coordination Committee of Artist and Technicians of W.B. Film and Television and Ors.**<sup>15</sup>, the Supreme Court while upholding the order of CCI held that the action of associations working at a horizontal level attracted the element of "Anti-Competitive Agreement" given under section 3(3) of the Competition Act, 2002 as the association caused restriction on the telecast of dubbed serial, causing an appreciable adverse effect on competition of the relevant business enterprises in the market.

In its Contemporary; U.S.A's landmark law the Sherman Antitrust Act<sup>16</sup>was passed way back in 1890 by Senator John Sherman. To strengthen the Sherman Act another anti-trust law was enacted in 1914, the Clayton Antitrust Act by the United States Congress. The aim of this Antitrust statute is, to encourage economic competitiveness and fairness amongst the market players. In the famous case of **AT&T**<sup>17</sup>(American Telephone & Telegraph Company), a highly profitable firm had gained a monopoly in the telecom sector, restricting any new player to emerge in the market, eventually, numerous charges were laid against it under the Sherman Antitrust Act and it was agreed between the U.S. Government and the firm to break the parent company into seven baby bells, to limit the bundling ability of the company spreading monopoly in the market resulting into the emergence of numerous baby bells. Similarly, the Indian streaming sector needs to be constantly in check to see whether any single entity doesn't monopolize the market.

In another case<sup>18</sup>of the United States v. Columbia Pictures, several film studios colluded together to develop a paid cable network called "Premiere", to compete with HBO. The studios decided to license films to this new platform for a nine-month exclusive window to increase

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<sup>14</sup>[https://www.cci.gov.in/sites/default/files/advocacy\\_booklet\\_document/CCI%20Basic%20Introduction\\_0.pdf](https://www.cci.gov.in/sites/default/files/advocacy_booklet_document/CCI%20Basic%20Introduction_0.pdf).

<sup>15</sup>CCI v. Coordination Committee of Artist and Technicians of W.B. Film and Television and Ors, A.I.R. 2017 S.C. 1449 (India).

<sup>16</sup>Sherman Antitrust Act (Sep. 14, 2021, 02:53 AM) <https://www.investopedia.com/terms/s/sherman-antitrust-act.asp>.

<sup>17</sup>AT&T's Successful Spinoffs (Sep. 14, 2021, 02:53 AM) <https://www.investopedia.com/ask/answers/09/att-breakup-spinoff.asp>.

<sup>18</sup>The United States v. Columbia Pictures Indus., 507 F. Supp. 412, 419 (S.D.N.Y. 1980). The four studios involved in the venture were Columbia, Universal, Paramount, and Fox.

profits, the Court found that the exclusive nine-month window was a per se embargo on HBO and the agreement was found to be anti-competitive.

From the above-quoted examples, we can perceive similar collusive practices in the Indian streaming Industry<sup>19</sup>. After colluding with big production banners, premium streaming service providers like Netflix and Amazon Prime Video are free to set their prices regardless of the competition, while the independent and smaller players are helpless to put down their prices to survive in the OTT market. The setting of artificially high prices by the dominant venture participants is a sign of a cartel<sup>20</sup>.

Therefore, this sector requires government intervention in its nascent stage so that the players with bigger financial muscles do not defy the natural laws of fair competition, and the true values of fair competition remain intact.

### **The Legal Remedy Available**

*Laws are like cobwebs, which may catch small flies, but let wasps and hornets break through.*

- **Jonathan Swift**

This quote very precisely summarizes the condition of the OTT platforms. They have become like wasps and hornets who are trying to break through the cobwebs of law. Since content streaming over the internet is a relatively new phenomenon in India, there were very few laws that regulated it. Whereas, the other two giants of the entertainment industry, Television and Films have their respective governing bodies. Television is regulated by the Telecom regulatory authority of India<sup>21</sup> Films being regulated by the Central Board of Film Certification<sup>22</sup> and any kind of anti-competitive behavior was monitored by the Competition Commission of India.

The OTT sector being completely a breakthrough in technology was completely unfettered from any kind of regulating body<sup>23</sup>. Thus, initially, the players enjoyed unfettered powerplay and scored as many runs as possible by showing unregulated and uncensored content. Post the

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<sup>19</sup>Supra Note 2 and 3.

<sup>20</sup> Bd. of Regents of Univ. of Okla. v. Nat'l Collegiate Athletic Ass'n, 546 F. Supp. **1276, 1301** (W.D. Okla. **1982**).

<sup>21</sup> Telecom regulatory authority of India (Sep. 14, 2021, 02:58 AM) <https://www.trai.gov.in/about-us/history>.

<sup>22</sup>About Us (Sep. 14, 2021, 2:49 AM) <https://www.cbfcindia.gov.in/main/about-us.html>.

<sup>23</sup> OTT platforms like Zee5, Netflix in talks with the Indian government for self-regulation (Sep. 14, 2021, 03:05 AM) <https://www.wionews.com/entertainment/ott-platforms-like-zee5-netflix-in-talks-with-indian-government-for-self-regulation-264724>.

pandemic; after the exponential spur of the OTT sector the Indian government became serious regarding certification in the OTT sector and released the Intermediary Guidelines and Digital Media Ethics Code Rules 2021<sup>24</sup>, regulating the content streamed online.

The fact which is being overlooked by the Government and other regulating bodies is the cartel behavior that has started to develop in the streaming industry<sup>25</sup>, by the online streaming giants. But if we look closely, the Competition Act is comprehensive enough to deal with the collusive behavior shown by the OTT cartels.

Section 3 of the Competition Act, defines Anti-competitive agreements<sup>26</sup>. The agreements referred to under (a) to (d) of Section 3(3) of the Act may pilot to a Cartel.

Sub-section (3) of Section 3 of the Competition Act<sup>27</sup> provides that the commission may investigate any alleged contravention of the act. If there is a prima facie case, the director general may order an investigation.

- **Powers of the Commission**

After the inquiry, the Commission has the authority to pass any or all of the following directions/orders-

1. Direct the enterprise concerned to modify such agreements.
2. Direct the parties to cease and not to re-enter such agreements.
3. Direct the enterprises involved to comply with such other orders as the commission may pass and adhere to the directions, including payment of a fine if any;
4. Pass any other order it deems fit.

The Competition Commission previously also dealt with cartel behavior in the Entertainment Industry. In the case of **FICCI v. United Producers & Ors**<sup>28</sup> in which the members of United Producers and Distributors Forum (UPDF) colluded not to release Hindi Films to multiplexes

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<sup>24</sup> Press Release <https://pib.gov.in/PressReleaseDetailm.aspx?PRID=1700749>.

<sup>25</sup> Cartelisation in the OTT space is dangerous: Siddharth Anand Kumar (Sep. 14, 2021, 03:09 AM) <https://www.exchange4media.com/digital-news/if-i-made-a-film-there-are-only-a-few-places-where-i-can-go-to-sell-a-film-112892.html>.

<sup>26</sup> The Competition Act, 2002, No (12 of 2003), §3 (India).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ficci - Multiplex Association Of . vs. United Producers/ Distributors*, Case No. 01 OF 2009 (India).



to pressurize them into accepting new terms and revenue sharing ratio. The report of the Director-General, in this case, found that UDPF controlled nearly all the shares in the market of the production and distribution of Hindi motion pictures that were exhibited in Multiplexes within India. This was an agreement to fix sale prices by fixing the revenue share ratio which violated Section 3(3)(a) of the Act.

With the speed with which the streaming platforms like Netflix and Amazon are increasing their market share, there may come a time in the future when these two would be the only dominant entities, and filmmakers and producers would be forced to adhere to all or any of the conditions imposed by them for licensing of movies or shows.

In another case of 2013<sup>29</sup>, Raaj Kamal Film International was a firm that had produced a film called '*Vishwaroopam*' and had planned to release the films not only in theatres but also through DTH, but Tamil Nadu Theatre Owners Association passed a resolution denying their co-operation for screening of any film. The commission in this case decided that the object of Competition law is to promote competition and consumer welfare. Technological innovation or utilization of existing technology in a more novel manner is the right of every entrepreneur. The decision of theatre owners not to exhibit this movie or any other technology, prima facie limits the market of exhibiting films for the welfare of the viewers and is anti-competitive as it limits the producer to provide the experience of a movie in the comforts of his home.

From the above-quoted examples, we can conclude that every streaming platform should have an equal opportunity in this new world of digital content, so the true values of fair competition are preserved and viewers are not deprived of their opportunity to choose from different choices available online.

- **Regulation of Abuse of Dominant Position by OTT Platforms**

Competition law per se doesn't define dominance as bad but it is the abuse of the competition which is bad. Abuse of Dominant position occurs when a group or an enterprise uses its dominant position in the marketplace to exclude or exploit others.

Abuse includes –

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<sup>29</sup>Raaj Kamal Film International v. M/S Tamil Nadu Theatre Owners, Case No. 01 of 2013 Jan. 16, 2013 (India).

- Imposing unjust conditions or price
- Exploitative Pricing
- Circumscribing production/market
- Creating hurdles to entry and applying dissimilar conditions to similar transactions.
- Using its dominant position from one relevant market to enter into, or protect other relevant markets.

If any OTT platform is found indulged in any of these scenarios, it would be abusing its dominance in the market

Section 4(1) of the Competition Act, 2002 states, that there should be no abuse of dominant position by an enterprise. Thus, what needs to be proved is the abuse of the enterprise in the relevant market. There are three stages in determining the abuse; determination of the relevant market, determination of 'dominance', and the determination of 'abuse' of that dominant position.

For our purposes, the relevant market is the Film and Television Industry of India. This market has drastically changed post the Corona lockdown, because of the closed theatres. The bigger international streaming platforms with their financial muscles have been attracting the movies of the major production houses and therefore are getting better viewership and subscription base<sup>30</sup>. Therefore, it can be concluded that international streaming platforms have become dominant in the Indian market and there always is a need to check on them to detect abuse of dominance.

There are two major methods of determining abuse of dominance

1. The ability of an enterprise to function independently of competitive forces in the relevant market. One has to check the ability to work independently of the market forces and check whether it has the power to drive the existing competitors out of the market and impose restrictions and obligations on the captive consumer<sup>31</sup>. International platforms like Netflix

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<sup>30</sup>International Brands Rise to the Top of Indian Streaming Market (Sep 14, 2021, 03:21 AM) <https://www.statista.com/chart/23009/market-share-streaming--ott--platforms-in-India/>.

<sup>31</sup>M/S. Dlf Limited v. Competition Commission of India, May 19, 2014 (India).

and Amazon are on their way to achieving this level of power in the market, given their increasing market share in the Indian streaming industry.

2. The ability of an enterprise to control its consumers or competitors or the relevant market in its support. Such a position may level up the enterprise's power where it may freely adopt any strategy suited to increase profits over the competing forces or captures consumers in such a way that discourages new competition both in terms of competing firms and products. In a famous case<sup>32</sup>, the commission has said that when a specific player in the relevant market possesses a clear comparative advantage for performance in the form of financial resources, technical capabilities, brand, goodwill, etc. it would make it difficult for the competitors to sustain their business in the market, the enterprise would be in a position to create such a state of affairs which is beneficial to itself but would be deleterious to the competitors.

Since few of the streaming platforms have gained enough financial resources and licensing deals with the leading stars, production companies, directors, writers, etc. It would not be incorrect to say that they can alter the market conditions according to their suited needs.

- **Inquiry into Abuse of Dominant Position**

The Commission has the power to enquire into the Abuse of dominance by an OTT platform. Under Section 19 of the Act, the commission may inquire into an alleged contravention of section 4(1) of the Act that lays down abuse of dominance. Some factors which the Commission would need to keep in mind while dealing with the abuse of dominance are resources, the dependence of the consumers, size, entry barriers social obligations, and cost in the relevant geographic and product market according to Section (4).

After the inquiry, the Commission has the authority to order the to discontinue and not to enter into any such abusive agreement, modification of the agreement, pass any such orders or issue such directions, etc<sup>33</sup>

- **Penal Provisions**

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<sup>32</sup>Mcx Stock Exchange Ltd. &Ors v. National Stock Exchange of India, CASE NO. 13/2009 (India).

<sup>33</sup>The Competition Act, 2002, No (12 of 2003), Acts of Parliament, 2002, §27 (India).

Section 27(b) provides for the penalty which will be imposed on the enterprises engaged in abuse of dominant position. The proviso to this section provides for the breach of section 3 or 4 by a cartel or the abuse of a dominant position. It provides that when an agreement under Section 3<sup>34</sup> or 4 has been entered into by a cartel, the Commission may impose upon such producer, seller, distributor, trader, or service provider included in that cartel, a penalty of about thrice its profit for each year of the prolongation of such agreements or 10% of the total turnover for every year for the prolongation of such agreement, whichever is higher.

### **Constitutional outlook**

Our founding forefathers envisioned a country having ample opportunities for its people. The dream was to have a free market without having any room for a monopoly. In this era of global competition, every individual has a right to carry on any business, occupation, or profession that deems fit in the public realm. Today for an individual to make ends meet has to engage in different kinds of business activities or professions to attain prestige and dignity in the eyes of society. In this regards the Constitution of India has enshrined in Part III, Article 19(1)(g) that protect and allow Indian citizen “to practice any profession or to carry on any occupation, trade or business.” Though it is a fundamental right it is not an absolute one and is subject to certain reasonable restrictions for the interest of the general public. Thus, in the exercise of the right under Article 19(1)(g) reasonable restrictions can be imposed under Article 19(6). In **P.P Enterprises and ors v. Union of India**<sup>35</sup>, it was discussed that under Article 19(1)(g) of the Indian Constitution, every citizen has a right to practice any profession or carry on any business, occupation, or trade. However, the legislature has the authority to put reasonable restrictions on the aforesaid unfettered right by making a law imposing reasonable restrictions under clause (6) of Article 19. It was held that the Court in each case has to strike a proper balance between freedom guaranteed by Article 19(1)(g) and its restrictions given in clause (6) of Article 19. Article 301 of the Indian Constitution, read along with Article 302 and 304(b), empower the Parliament to enact suitable laws to reasonably restrict freedom of trade throughout the territory of India.

In **Harnam Singh v. R.T.A Calcutta Region**<sup>36</sup>, The Supreme Court held that under the Constitution's Article 19(1)(g)<sup>37</sup> no monopoly can be guaranteed based on an individual or

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<sup>34</sup>*Ibid.*

<sup>35</sup>P.P Enterprises and ors v. Union of India, (1982) 2 S.C.C. 33 (India).

<sup>36</sup>Harnam Singh v. R.T.A Calcutta Region, A.I.R. 1954 S.C. 190 (India).

<sup>37</sup>INDIA CONST. art. 19.

association wanting to carry on an occupation. This means that if competition is allowed in the business, then the authorities should not hesitate to impose a ban on it if a monopoly is found. Article 19(1)(g) does not guarantee a monopoly to individuals to carry on any occupation but works for the betterment and welfare of its citizens practicing trade and profession. Not getting an equal opportunity to trade in the OTT sector, is a clog on the rights of the trade, commerce, and intercourse of the rights of the small-scale streaming services as provided in Article 301 of the Indian Constitution.

A.V Dicey in his concept of Rule of Law has clearly stated that the only supreme force a country can have is the Law of the land, it excludes any form of arbitrariness in the governance of the country; this principle has been enshrined in Article 14 of the Indian Constitution wherein it is stated that there would be no denial of equality before the law or equal protection of the law. If the small-scale players in the market are not protected by the antitrust authorities it would be violative of Article 14<sup>38</sup> of the Indian Constitution. Given this, the State must strive to maintain equality in every sector of governance, be it the market, public places, religious institutions, etc. Therefore, the Indian Government and the antitrust authorities must look into the matter of inequalities that are spreading in the Indian OTT market.

The directive principles of State policy serve as an inspiration to the Competition Act, specifically Articles 38<sup>39</sup> and 39<sup>40</sup> of the Indian Constitution which aims at securing a just and social market economy<sup>41</sup> for the welfare of the people. There is a requirement for more government intervention and prudence, to constantly keep the free market economies of the Entertainment Industry under surveillance so that the dominating market players hesitate before involving in any collusive agreements.

## **Conclusion**

It is not said that there is not enough legislation to deal with the cartel behavior but the lack of vigilance on the part of the competent authorities is causing the growth spur of the OTT Cartels. This new sector is still immensely untouched by the clutches of the antitrust authorities, which

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<sup>38</sup>INDIA CONST. art 14.

<sup>39</sup>INDIA CONST. art 38.

<sup>40</sup>INDIA CONST. art 39.

<sup>41</sup>COMMUNICATION FROM INDIA (Nov. 19, 1981, 08:52 AM), <https://commerce.gov.in/international-trade/india-and-world-trade-organization-wto/indian-submissions-in-wto/competition-policy/communication-from-india-3/>.

has given the people with the resources in the industry, the illusion that they can go on making huge profits by indulging in anti-competitive agreements.

The government has to devise a mechanism to constantly keep a check on the licensing of movies and shows by the production houses and as has been evident from the case of Columbia Pictures that if the dominant players in the market start exercising their influence to alter the market conditions in their favor, it is the market, the government, and the customer who are at loss.

Cartel agreements by the more powerful streaming platforms are also against our Constitutional provision of the State striving to minimize income inequalities and to secure a welfare model in which justice, social, economic, and political shall inform all the institutions of the national life<sup>42</sup>. The economy would also be adversely affected because of this cartel behavior, given the level of employment would drastically be affected if the number of players in the market is reduced to three or four, enabling the concentration of wealth in the hands of fewer enterprises. Also, a lot of artistic talent in the country needs a platform to showcase their abilities; a reduction in the number of competitive streaming platforms would deprive them of their chance or opportunity to do so. With big entities controlling the market, it is easy to fix prices causing predatory pricing in the market sphere, clearly eliminating the entry of new and smaller players to bring to light Artistic talent.

Taking advantage of their stronghold in the market, the dominating platforms also happen to defy the labor laws; engaging artists by signing unilateral contracts suited to their needs. Associations working for the actors and artists in India like CINTAA<sup>43</sup> need to be made aware of these collusive agreements so that the artists are not exploited. The producers and filmmakers also need to be warned of indulging in any such agreement which is against the free-market policies.

So, it is high time the collusion and cartelization in the OTT sector are checked and regulated. The antitrust authorities should consider the seriousness of the issue and how if not timely resolved, would lead to complete anarchy in the streaming sector.

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<sup>42</sup>INDIA CONST. art 39.

<sup>43</sup> CINTAA, <https://www.cintaa.net/>.