

# How the first-mover dilemma in competition law can be tackled

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June 16, 2026



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In fast-moving markets, being first is often seen as a competitive advantage, although from a competition law perspective, the first mover may also become the first target for scrutiny. Early entrants often build scale, brand recognition, data pools, user networks and distribution depth before others enter. These features give them a first-mover advantage, even where the market is nascent, fluid and contestable. Over time, these advantages may begin to resemble entrenched market power, even when the market itself remains dynamic and far from settled.

Innovative businesses that create an entirely new market are often confronted with a difficult competition law question – if no other undertaking is offering a comparable product or service yet, does the first entrant become “dominant” merely by virtue of being first?

This question is significant, because competition law does not penalise success, scale or innovation, nor does it prohibit dominance. It penalises an entity for abusing its dominance. Once a firm is perceived to be dominant, its conduct becomes subject to materially greater scrutiny. The real issue, therefore, is not whether a business was first. It is whether the business’ early position gave rise to added responsibility and regulatory exposure, and whether that position could be used to foreclose rivals or distort competition.

Nowhere is this tension more apparent than in new-age markets that are being built in the realm of digital platforms, AI tools, and data-driven services. In their early stages, such businesses often have no competitors, no clear market

boundaries, and no reliable way to measure market power. At what point, then, does being first become a competition law risk, one that could attract regulatory scrutiny?

### **Regulatory restraint**

The case for regulatory restraint rests on the argument that if a market creator is treated as dominant merely because it is alone at inception, overregulation may stifle innovation. First movers often educate users, create supply, bear losses, test pricing and solve regulatory uncertainty. This could also entail aggressive pricing, bundling, or exclusive arrangements in early-stage markets, especially where they help create demand. However, the same conduct could raise concerns if it locks in users, denies access to critical inputs, or makes it difficult for equally efficient competitors to emerge. Therefore, while a balanced approach is essential, the real difficulty lies in timing intervention correctly.

The [Competition Commission of India's](#) (CCI) precedents reflect this caution. In *XYZ v. Ola Electric Ltd and Ors.*, the CCI noted in its order dated January 23, 2024, that the electric vehicle market was still relatively new and characterised by several players with no settled market positions. The CCI found that no player appeared able to exert market power or operate independently of market forces.

Similarly, in *Fast Track Call Cab Pvt. Ltd and Anr. v. ANI Technologies*, the CCI observed in an order dated July 19, 2017, that high market shares in the early years of a new technology may be “ephemeral”. Such markets often operate through network effects, and the early phase may simply be the stage at which networks are being created.

### **Regulatory intervention**

However, the case for intervention is equally compelling for digital markets, where network effects, data advantages, interoperability choices, exclusivity, can convert an innovation lead into a durable gatekeeping position. Once a market has tipped, rivals have exited or users/ partners have become dependent, at that stage, enforcement may come too late.

This concern also explains India's policy debate around ex-ante digital regulation, including the Ministry of Corporate Affairs' 2024 release of the [Committee on Digital Competition Law report](#) and the [draft Digital Competition Bill](#), which sought to create a framework for addressing conduct that could entrench the position of digital businesses before competitive harm becomes irreversible.

The CCI's digital enforcement too shows why the concern is practical. In "Re: Updated Terms of Service and Privacy Policy for WhatsApp Users", the CCI concluded in its order dated November 18, 2024, that WhatsApp's 2021 update was anti-competitive for mandating users to accept expanded data-sharing terms even before competitive harm is reflected in conventional price metrics.

Intervening too early risks chilling innovation and deterring firms from investing in uncertain markets. Intervening too late risks allowing first movers to entrench themselves beyond meaningful competitive challenge.

For the CCI, the balance may lie around contestability. A first mover should not be presumed dominant. Equally, it should not receive immunity merely because the market is new. Several questions could guide this assessment: Can customers and business users switch to other suppliers? Can competitors access the inputs needed to compete (data, users, suppliers, APIs access, distribution channels and other critical inputs)? Are network effects reversible, or do they make the leader stronger with every transaction?

For businesses involved in the creation of new markets, the practical implication is clear: build the category but remain vigilant not to foreclose it. Exclusivity arrangements may be commercially attractive in the early stages, but they should be used cautiously, especially where they prevent suppliers, customers or partners from dealing with potential rivals.

Access-related decisions should also be governed by clear and objective criteria. Onboarding, infrastructure access, suspension and termination should be documented and capable of being justified on legitimate business grounds. Pricing strategies should also be supported by pro-competitive justifications. Discounts, free trials, and launch incentives may be legitimate tools for building a new market, but businesses should be able to show that they are aimed at adoption, efficiency or consumer benefit, rather than excluding future competitors.

More importantly, businesses should continuously assess dependence. If customers, sellers, developers or partners cannot realistically reach the market without the first mover, the competition-law risk increases. At that stage, the business may no longer be seen merely as a market creator, but as a firm capable of controlling the conditions on which others participate in the market.

Ultimately, in new markets, the best competition law strategy is not to avoid success, but to build in a way that preserves choice, access and the possibility of future competition.

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