

TekSavvy's release of competition complaint 'unusual'—lawyers

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- Tactic likely designed to influence Competition Bureau
- Customer complaints in Canada 'quite significant' – lawyer

Canadian internet service provider TekSavvy's decision to publicly release its antitrust complaint against two of its rivals is an "unusual" tactic, lawyers said.

"In publicizing this, TekSavvy has done something that is not that common," said Subrata Bhattacharjee, a competition lawyer at Borden Ladner Gervais. "In my experience, most companies who choose to do that" are using the Competition Bureau's (CB) complaint process as "one part of an overall tactical offensive," he added.

Complaints to the CB from a competitor can have "quite significant" effects and many of them "turn into something material," he noted.

"It's unusual that TekSavvy has made it public," agreed Michael Binetti, a competition lawyer at Affleck Greene McMurtry. "This is a way to nudge the enforcement arm into action."

TekSavvy's **complaint** alleges that two of its larger competitors, **Bell** [TSE: BCE] and **Rogers** [TSE: RCI], abused their dominant positions as wholesalers which sell to and compete with smaller firms such as TekSavvy.

The alleged abuse consists of margin squeezing, with Bell and Rogers accused of increasing their wholesale prices to TekSavvy by 595% and 338% respectively, breaching pricing rules set by the Canadian Radio-television and Telecommunications Commission. TekSavvy also claims that Bell-owned Virgin and Rogers'-owned Fido are "fighting brands" that sell below cost.

TekSavvy is asking the CB to fine Bell and Rogers \$10 million CDN each and order them to stop the alleged anticompetitive conduct.

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Internet service pricing is a "very important issue for many Canadians," Bhattacharjee said, adding that publication of the complaint is intended to win public support so citizens put pressure on the CB to act.

However, he also noted that the CB is "not run by political fiat" and there have been "a lot of cases" where the Bureau has withstood significant public pressure for the sake of rational enforcement that is consistent with the law, "not just consistent with people whining." He gave the example of the CCB's refusal to investigate allegations of retail gas price-fixing as a situation where the regulator resisted significant public pressure.

Although the 57-page complaint is "very detailed and sets out a very good story ... that in itself doesn't mean that it's a clean fit under the provisions of the [Competition] Act, Bhattacharjee said. "It's always difficult to determine the strength of a Section 79 case based on what one party says." Section 79 of the Competition Act prohibits the abuse of dominance.

The CB will not rely on a complaint to develop its own theory of a case, he added. Rather, the complaint should trigger information gathering by which the agency will determine whether or not this is something that they should further investigate.

What TekSavvy has done is to "really lay down the gauntlet," Binetti said, adding that the company has positioned the matter as "low-hanging fruit" for the CB. The complaint argument that the price for wireline internet services is "up for everybody because of this conduct ... would pique the bureau's interest," Binetti said.

He also noted that the CB's strategic plan calls for a focus on the digital economy. TekSavvy's complaint, he argued, deals with "a pipeline or access to the digital economy." For that reason, he can see the bureau being interested.

If pursuing the complaint will lead to a "pro-consumer effect ... this may spark the bureau to action," Binetti said." However, if the ultimate beneficiary of an investigation is likely to be "just TekSavvy, the Bureau may be less inclined." The CB is less likely to use its limited resources to "help otherwise well-funded litigants hash out their business dispute" than to pursue cases where "the ultimate beneficiary is Joe and Jane Consumer."

Binetti and Bhattacharjee disagreed about the likely response by Bell and Rogers to the public release of the complaint.

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"I think [TekSavvy is] banking on the fact that Bell and Rogers will not respond in kind in the public domain," Binetti said.

However, Bhattacharjee noted that press coverage of allegations about anticompetitive conduct will sometimes cause respondents to react publicly.

Ultimately, Bhattacharjee argued, what will influence the CCB most is the substantive strength of the case, "which is measured to some degree by the complaint but more importantly by the evidence that the Bureau is able to get."

Bell and Rogers did not respond to a request for comment.

TekSavvy declined to comment.

by Mark Coakley in Toronto

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