

June 29, 2017

The Honorable Tom Marino
Chairman
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Judiciary Committee
U.S. House of Representatives
Washington, District of Columbia 20515

The Honorable David Cicilline
Ranking Member
Subcommittee on Regulatory Reform,
Commercial and Antitrust Law
Judiciary Committee
U.S. House of Representatives
Washington, District of Columbia 20515

Dear Chairman Marino and Ranking Member Cicilline,

ACT | The App Association supports the Subcommittee on Regulatory Reform, Commercial and Antitrust Law's goal of ensuring that foreign countries develop and enforce antitrust laws that promote competition and maximize consumer welfare. We believe the Subcommittee is right to examine the practices of foreign antitrust authorities because a strong global economy depends on the even-handed protection of competitive forces.

The App Association represents more than 5,000 small and medium-sized app developers and connected devices companies across the mobile economy who leverage the connectivity of smart devices to create innovative solutions that make our lives better. Operating both domestically and internationally, our members are interested in the fair and appropriate application of antitrust laws to protect consumers. Although smaller companies may not draw the same attention as larger companies, they stand to suffer greatly if foreign governments arbitrarily apply their laws to favor domestic competitors. Therefore, it is critically important that antitrust authorities around the globe recognize the contributions of U.S. businesses and refrain from using antitrust laws for protectionist ends against them.

Many of us have objections—articulated in the Report and Recommendations of the U.S. Chamber's International Competition Policy Expert Group (Report and Recommendations)—concerning a lack of due process protections, transparency, and impartiality in some foreign governments' application of competition laws. We urge the Subcommittee to consider these concerns, which exist across the app developer community, and to do so without prejudging the merits of good faith cases brought by international antitrust authorities.

The concerns outlined in the Report and Recommendations do not absolve companies of their responsibility to adhere to competition laws in the countries in which they operate. We are concerned that some companies that have been the target of enforcement actions might point to a pattern of alleged malfeasance by antitrust authorities overseas to shift the focus from their own anticompetitive behavior. The Subcommittee should therefore be careful not to condemn the good faith actions by foreign antitrust authorities—actions that rightly enjoin market activity that harms competition and consumers, particularly when those actions are aligned with the U.S. government's enforcement activities.

Often, the activity foreign antitrust authorities scrutinize involves intellectual property, technical standards, and licensing behavior. When a company has its patent included in a technical standard, that patent becomes a “standard essential patent” (SEP). An SEP owner voluntarily commits to license its patent on fair, reasonable, and non-discriminatory (FRAND) terms to any willing licensee, including competitors. We appreciate actions by antitrust authorities around the world to address SEP owners who have used abusive tactics with reasonable and willing licensees, violating their voluntary FRAND commitments on which innovators rely.

Due to their voluntary nature, FRAND commitments do not depreciate the value of the SEP holder’s property rights or investments in research and development. This is because the SEP holder can decide to make its patent reasonably available to any willing licensee—per the voluntary FRAND commitment—in exchange for the ability to access a greater number of licensees (i.e., implementers of the technical standard to which the SEP is essential). Antitrust authorities around the world have found departures from FRAND commitments to violate competition laws in certain circumstances. These enforcement bodies’ actions are not *per se* protectionist measures to prevent a company from obtaining the market value of their patent. Moreover, across administrations, the U.S. government has issued guidance and enforcement actions to ensure SEP owners do not leverage their position to abuse willing licensees who rely on FRAND promises. These actions help to protect competition as well as American consumers.

Numerous antitrust authorities (including in the United States) have long recognized the importance of FRAND commitments—especially to small businesses like our members—and have stopped SEP holders from renegeing on them. The future of 5G connectivity, the internet of things, and the trillions of dollars they represent are at stake in this debate. American competitiveness is dependent upon a vibrant ecosystem supported by strong standards. We jeopardize the opportunities and success of our businesses when SEP holders are permitted to engage in anticompetitive conduct, wherever that conduct may occur.

We urge the Subcommittee to seriously consider these crucial issues as it examines foreign antitrust activities. We hope the Subcommittee refrains from dismissing the worthy applications of foreign antitrust law, despite extant flaws in foreign antitrust laws or their enforcement.

Sincerely,



Morgan Reed
President
ACT | The App Association