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Change of Tone Could Help Google in European Antitrust Case

By [JAMES KANTER](#)

BRUSSELS — For the past two years, [Google](#) has worked hard to avoid facing formal antitrust charges in Europe that could mean years of expensive litigation and encourage the authorities in other parts of the world to take comparable action.

Time is running out. The [European Commission](#) could bring charges against the U.S. company for abusing its dominance in the search and advertising market in the next few weeks.

But there remains hope for a deal that would spare Google the arduous court orders and huge fines once imposed on [Microsoft](#), another U.S. technology titan that ran afoul of European competition laws more than a decade ago.

That hope is the result, at least in part, of a changed environment in Brussels. The bitter fight with Microsoft taught regulators that long-running cases, even if won, may not result in effective remedies in the fast-moving technology sector.

Perhaps more important has been the role played by Joaquín Almunia, a Spanish politician who took over as the European Union's competition commissioner just as the investigation into Google was getting under way.

Mr. Almunia has been a low-key figure compared with his predecessor, Neelie Kroes, who earned the nickname "Steely Neelie" for the apparent relish with which she wielded her considerable power in antitrust cases. Mr. Almunia has gained a reputation for attempting to reach settlements, where possible, rather than trying to win scalps.

Mr. Almunia, who took office in 2010, has said that the challenge in antitrust cases "is to intervene in a timely fashion, before it's too late."

"One trend that is emerging from a growing number of antitrust cases is our search for effective — and sometimes structural — commitments when they would more efficiently prevent competition concerns in the longer term," he said at a conference in St. Gallen, Switzerland, last year.

In his brief tenure, Mr. Almunia has successfully concluded cases with International Business

Machines, Standard & Poor's and Apple. The cases lasted no more than two years or so. Of those three cases, only the S.&P. case was not settled before formal charges were filed. By comparison, the cases against Microsoft lasted more than a decade and spanned the tenure of two of Mr. Almunia's predecessors.

But far from weakening enforcement of antitrust regulations, settlements show the formidable power that European investigators have over companies. Unlike their counterparts in the United States, antitrust regulators in Europe can impose penalties without first winning a court order. A company can appeal to a court but usually must comply in the interim.

Trevor Soames, a partner at the Brussels office of Shearman & Sterling, a law firm, said judges were perceived as giving "unjustified deference" to decisions by the European Commission, and so many companies avoid fighting cases. The result is that companies "enter into settlements that they shouldn't, as the case against them is weak," said Mr. Soames, who has represented Microsoft and Qualcomm in antitrust cases.

Without a settlement, Google would leave itself open to being fined as much as 10 percent of its annual worldwide revenue, which reached nearly \$38 billion last year, and conform to any E.U. law it was found to violate before being allowed to appeal to the General Court of the European Union.

Google and Mr. Almunia have repeatedly left the door open for negotiations.

More than a year ago, at the annual World Economic Forum in Davos, Switzerland, Mr. Almunia assured Eric E. Schmidt, then Google's chief executive, that he would give the company a chance to offer a solution without incurring a penalty.

This year, again in Davos, Mr. Almunia met with David C. Drummond, the chief legal officer of Google. At that meeting, Mr. Drummond suggested that the Google case provided an opportunity to change the model of European antitrust inquiries to resolve cases more rapidly, according to people with knowledge of the discussion who spoke on condition of anonymity because it had been private.

The two men also discussed the desirability of addressing any concerns about Google's business practices without going through all of the steps in previous cases, these people said.

"Our size and success rightly generate scrutiny, which is why we've worked hard to explain how our business works, cooperating with the European Commission since this investigation began," said Al Verney, a Google spokesman. "Because there's always room for improvement, we're happy to discuss any concerns the commission might have."

During its battles in Europe, Microsoft was able to continue consolidating its command over

some aspects of desktop and server software before it finally consented to change some of its business practices. Microsoft also eventually paid fines totaling €1.7 billion, or more than \$2 billion at the time, but those sums went to the Union's budget rather than to competitors or to consumers that might have been harmed by its practices.

In another lengthy case against a U.S. technology giant, Intel was fined €1.1 billion, the largest single fine levied by the European antitrust authorities, by Ms. Kroes in 2009 for abusing its dominance in the computer chip market.

Intel has appealed that ruling, saying the commission did not follow procedure. A four-day hearing is scheduled for July, and a judgment could come late this year. Any finding against the commission could limit its scope for extracting settlements in the future.

In the case of Google, Mr. Almunia suggested last year that his approach would be “a good example that timely intervention is crucial in fast-moving technology markets, which often feature network and lock-in effects.”

Last month he said he would review the findings by his case team some time after Easter, which was April 8. But there are factors that may delay any presentation of charges, known as a statement of objections.

One is the complexity of the case. With at least 14 complaints from sectors including publishing, advertising, mapping and search under consideration, the “Google case is already bloated compared to cases like Microsoft and Intel,” said Nicolas Petit, a law professor at the University of Liège in Belgium. “If Mr. Almunia sends formal charges anytime soon,” he said, “I believe he will be seeking to channel the investigation toward a narrower set of allegations and will be hoping to quiet down the clamoring for action by all of the complainants.”

In an important respect, Google's strength is a more sensitive issue in Europe than in the United States, where its share of online searches is about 67 percent, according to comScore, a research company.

In Germany, France, Italy, Spain and Britain, Google's share of online searches rose to 94.3 percent in February from 92.1 percent when Mr. Almunia started his investigation, comScore said. The next closest competitor is Microsoft's Bing, with a share of about 2 percent.

Mr. Almunia also may be seeking to align the European investigation with an inquiry by the U.S. Federal Trade Commission that began a few months later.

Last month, speaking in Washington, Mr. Almunia called the relationship between Europe and the United States “the bedrock on which global competition enforcement will be based.”

That relationship is especially important in the case of Google, experts said.

“The Google case is hugely important to the technology industry, and the danger is that if more mature agencies in the West fail to sing from the same hymn sheet, then there’s a risk that the younger agencies will feel entitled to regulate in conflicting ways,” said William E. Kovacic, a former F.T.C. commissioner and a law professor at George Washington University in Washington.

“I’d expect the Europeans and Americans to be talking about Google as much as they can, perhaps even on the timing of any decisions they take,” he said.

Google also has strongly hinted that Microsoft, which is an official complainant in the case, would be one of the main beneficiaries of any legal action that bogged it down in Europe.

That may be yet another reason for caution for Mr. Almunia, whose department has long been accused of relying too much in its investigations on outside complaints from companies, rather than gathering evidence of actual harm to consumers.