Tech firms could see fallout from antitrust shift

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(AP) -- If the Obama administration is serious about more aggressively responding to antitrust complaints, some of technology's biggest companies could have to rethink their business strategies or expansion plans.

The administration said Monday it has abandoned Bush-era policies that it criticized as too friendly to companies that dominate their markets. The Justice Department didn't call out any companies by name, and its shift in approach will affect all industries. But it raises the stakes for tech heavyweights whose practices have been questioned elsewhere more than in the United States.

For instance, Intel Corp. could face a steep fine in Europe this week over its behavior in the microprocessor industry. An IBM Corp. competitor is accusing the company in Europe of manipulating the market for mainframe computers. Microsoft Corp. - a marquee antitrust defendant during the Clinton administration - has been battling other charges in Europe in this decade as well.

Tougher antitrust enforcement could also focus on Google Inc., whose leading market shares in online search and advertising markets were already drawing scrutiny in the waning days of the Bush administration.

It remains to be seen whether the Justice Department's different approach will lead to more court cases or more challenges to proposed business deals. But antitrust lawyers say a more aggressive antitrust philosophy likely would make the Obama administration resemble the Clinton years far more than the Bush years.

"This is back to the future," said Stephen Bomse, partner in the antitrust group of the Orrick, Herrington & Sutcliffe law firm.

Under Clinton, the Justice Department brought 12 anti-monopoly cases that didn't involve mergers or acquisitions. That included the long-running case against Microsoft in which a judge at one point ordered Microsoft split into two. (The case eventually was settled with the Bush administration, though it lives on: The Justice Department recently extended its oversight of Microsoft's compliance with the settlement for another 18 months, into 2011).

Under Bush, the department brought three anti-monopoly cases, but none outside of mergers and acquisitions. The targets in those cases were Chicago-based industrial component supplier Amsted Industries Inc., newspaper publishers Daily Gazette Co. and MediaNews Group Inc., and chip maker Microsemi Corp.

Robert Pitofsky, chairman of the Federal Trade Commission from 1995 until 2001 and now an attorney with the Arnold & Porter law firm, said he doesn't think the U.S. will entirely match Europe's zeal for antitrust cases.

One reason is that the U.S. is still more likely to have a free-market bent than Europe, he said. And it can be tricky to regulate technology from an antitrust perspective. Technological innovations can create monopolists very quickly by cornering or creating specific parts of a market. If regulators are too aggressive, they run the risk of stifling innovation.

"The vast majority of activity in Silicon Valley is innovation, trying to make a better product - that was not viewed as anticompetitive under

Bush or Clinton," said Jonathan Jacobson, a partner in the antitrust practice at the Wilson Sonsini Goodrich & Rosati law firm. "Technological innovation is supposed to keep you out of trouble."

But the standard that tech companies are judged by - whether they are engaging in "exclusionary" or "predatory" conduct against competitors - is the same as everyone else. Viewed through that lens, tech companies can be at a disadvantage because they grow so fast and can get on regulators' radars much more quickly.

Already fears of a tougher antitrust regime under Obama might have played out in Silicon Valley. When IBM was discussing a proposed $7 billion takeover of rival Sun Microsystems Inc. this spring, Sun sought detailed assurances that IBM would see the deal through an antitrust review. When the talks collapsed, Sun ended up agreeing to be acquired by Oracle Corp., a company with less overlap with Sun, meaning the deal is perceived as less likely to generate antitrust questions.

Intel's antitrust challenges arose from complaints by smaller rival Advanced Micro Devices Inc. According to AMD, Intel boxed AMD out of certain accounts by paying computer makers and retailers to avoid AMD's products. AMD claims that Intel would drop this hammer when AMD's market share would get too big.

Intel, which owns about 80 percent of the worldwide PC microprocessor market, argues that the rebates it offered were legal, and are a common way to reward buying in very high volumes.

European regulators don't buy Intel's argument. They have charged Intel with engaging in a coordinated strategy to limit AMD's reach, including by selling server chips below the cost of making them. The European Commission is expected to formally fine Intel this week. The fines can be up to 10 percent of a company's annual revenue, and in 2008, Intel had $37.6 billion in worldwide sales.

The U.S. initially stayed on the sidelines while Intel and AMD began duking it out overseas in 2003. Last year U.S. regulators stepped up their inquiries, with the Federal Trade Commission opening a formal probe into Intel's sales tactics. The FTC's two-year investigation had been considered "informal" until that point. So far, the U.S. Justice Department has not taken action.