NSR Tech Policy: Will Tech Market Losses Temper Techlash?

By Blair Levin | May 13, 2022

What's New: *A year ago, many believed that the stocks of Big Tech were on an upward trajectory for which the only material obstacle to continued growth was government intervention, through new regulation and/or antitrust actions. While that risk remains high, it turns out there were other risks to that growth, particularly inflation, a war, a return to pre-pandemic shopping and entertainment patterns, and competition.*

In light of the recent brutal sell-off of Big Tech stocks, it is worth considering whether these new negatives for Big Tech will slacken the US and other governments' efforts to constrain Big Tech. In other words, did Mr. Market do what Government wanted to do? The answer, we think, is mostly, but not entirely, no.

As we describe in more detail below, at a macro level, the sell-off is unlikely to affect current litigation or international legislation, like the EU's Digital Market Act and Digital Services Act. It may have a small effect on US federal antitrust and regulatory reform. At a micro level, however, we do think the sell-off may open the door to some deals that previously would have been DOA and may reduce political support for efforts that have some distance to go before crossing the finish line.

The Big Selloff

The last two weeks has been brutal for the market capitalizations of Tech. As CNBC noted at the beginning of the week, the Big Tech companies lost more than $1 trillion in market cap in the three trading days that ended the prior week. But that trend is not limited to the last couple of weeks. We will leave it to others to determine where we are on the roller coaster in terms of the direction of the stock price. We will focus on policy implications.

Macro-Policy: At first glance, no change: it's market share, not market cap; bad behavior, not big bulk

It is unlikely that we will see a shift in policy reflected in any public statements and policy initiatives for some time to come. The skepticism, and even hostility, toward Big Tech comes from its pervasive influence on society, politics, business, and what used to be known as private lives. Stock price declines have not reduced that influence at all. Indeed, the public concerns expressed by the leaders of the movement to constrain big tech arose when the target companies were much smaller in terms of market cap,[1] suggesting these concerns are deeply rooted in our culture.[2]. In addition, many of the alarms raised by policy makers, such as those surfaced in the hearing with the whistleblower Frances Haugen, are focused on specific behaviors. While the public impact of those behaviors may be amplified due to the broad reach of Meta's platform, the drop in Meta's stock price would be unlikely to assuage the lawmakers' concerns. As the hearings demonstrated, anxieties about Meta's impact on certain groups, such as children, are the underlying driver of reform, rather than concerns related to traditional antitrust analysis or company size.

When one looks at the specific initiatives, it is hard to imagine the key policy officials changing their positions. In litigation, the allegations in the complaints by federal and state authorities against Alphabet and Meta are not premised on market caps but rather on market dominance and behaviors that the authorities would argue created harms to competition. Size matters to the extent it correlates to market power.

The picture in Congress is less clear. When one looks at the legislative efforts currently underway – such as the antitrust reforms proposed by Representative Cicilline (D-RI) and Senator Amy Klobuchar (D-MN) -- it is hard to see how the sell-off would result in softening the arguments for advocates of stronger antitrust protections against self-preferencing or other alleged harms to competition.

Even so, the package of antitrust reforms proposed in the House and Senate apply only to "covered platforms," and the proposals use a market cap threshold of $550 billion as one component of determining which companies would fall within their scope.[3] As of this writing, Meta's market cap is below this threshold, though Apple, Alphabet, Amazon, and Microsoft remain safely above.

The definition is not based solely on market cap, and it gives regulators significant discretion to determine that a platform is "covered" even if its market cap falls below the threshold. But with Meta as one of the main targets of antitrust legislation and regulation, the company's stock performance in recent months has made the threshold appear more arbitrary to some, and has pushed the bill's advocates to defend its approach. Will that derail the effort? Probably not. Could it cause increase in the speed of the headwinds it already faced? Potentially, though other causes of those headwinds are more significant.

The market performance of Big Tech companies may also help bolster the national security arguments against reform, such as the claim that slowing the growth of Big Tech will help its Chinese competitors. Those arguments have carried some weight on the Hill, despite being criticized for being funded by tech companies. Some legislators may be more hesitant to dismiss those arguments out of hand at a time when US tech companies look weaker.[4]

Perhaps most sanguine from the Big Tech perspective is the inability of this Congress[5] to pay attention to a topic for long, and definitely for long enough to produce a bipartisan vote in the Senate. Ukraine, inflation, abortion, pandemic spending – all these have driven other topics off the front burner. The January 6 investigatory committee, the possibility the Chinese economy ceases to drive global growth, the denouement for reconciliation are only some of the predictably upcoming events that will overtake attention on Big Tech: the unknown unknowns are, of course, additive.

However, European regulation is always close to a constant regardless of other events. If one looks at the EU's Digital Markets Act (LINK) — the concerns reflect dominance and behavior, not market cap.[6] It is notable that the EU does have a market cap test: a platform may be covered by the legislation if it hits either a certain turnover threshold or if it exceeds a market cap of €75 billion. The US Big Tech firms easily exceed this market cap threshold, and the Digital Markets Act is moving rapidly toward implementation. Stock performance is extremely unlikely to affect the likelihood that it goes into effect.

Where it might matter---product market definition. There is a risk that our analysis of the macro implications is wrong. That risk lies in how courts will define the product market. The market selloff reflects many factors but one is evident that in 2022, likely for the first time since the internet began, in-person shopping in the U.S. regained market share relative to e-commerce. Another data point is an analysis by Mastercard indicating that U.S. online shopping purchases fell in March for the first time in nearly a decade while in-store purchases climbed. In particular, this could directly affect the definition for shopping, making certain antitrust claims against Amazon more difficult to sustain. It could also bleed over to Meta and Alphabet, where slowing online sales have also led to slowing on-line advertising. Whether courts adopt the view that online and off-line must be considered one market, the changes in behavior will also affect the public debate.

Micro-Policy: First glances aren't everything

But while we are skeptical of a change in legislative and litigation that are out of the barn, there are two areas where we do think the sell-off could affect policy outcomes.

Are some deals now doable that were not before? We think so. Given the radical selloff of some tech companies, antitrust authorities probably will be more reluctant to use political and administrative resources to challenge an acquisition that now may loom as the only viable path for the acquired firm. Consider, for example, Apple buying Peloton.[7] Apple has an operating system, broad product integration, and a vast user base, but no flagship fitness hardware product. Peloton offers a compelling fitness hardware product, but slowing user growth. As the Biden Administration took over, in January 2021, the fitness company peaked at a value of nearly $50B. It is now about $4.25B. In 2021, the combination of Apple's strength and Peloton's perceived potential would likely have justified a challenge. Now, a challenge is more questionable.

One could also make a similar argument about Roblox, a game company that last November was worth nearly $70B but now has a market cap of $14.35B. It has particularly valuable IP for metaverse related initiatives that might have interested a number of companies. Of course, we will have to see how the FTC addresses the Microsoft/Activision deal, but a few months ago we would have had a high level of conviction that no Big Tech company would have been allowed to buy Roblox. Now, we see it as a much closer call.

Peloton and Roblox's trajectory over the last year has also been the fate of many other former tech high-flyers, for whom, we think, the potential pool of buyers has increased.

But not all. As we wrote earlier (LINK), with Netflix stock down around 70%, some are wondering whether Apple, Alphabet, Amazon, or Meta would be logical buyers for Netflix, particularly if the stock continues a downward spiral. Whatever the validity of that market logic, we would expect that the current antitrust leadership would still challenge a deal from any of those entities. Whether the courts would uphold the complaint is another question but from a Netflix perspective, the prospect of a two-to-four-year battle with the outcome uncertain and management and key suppliers (content production companies) uncertain about who has authority to greenlight what, makes such deals problematic. That could change as the facts change, but we think Netflix must lose a lot more market share before it could be rescued by a Big Tech suitor.

Political Optics. As noted above, we don't think the sell-off will materially affect the legislative debate currently happening in Congress. We will have to reevaluate when we see where those efforts end up, and when we learn the results of the 2022 midterm elections. If, however, the selloff reflects a market view that we are likely to hit a recession, then we think the kind of political optics of challenging Big Tech power will have less currency, reducing the incentive for those on the Hill to push for various legislative remedies. We are not weighing in on the merits of such legislation, either now, or during a recession. We are simply noting that as a political matter, focusing on constraining Big Tech when the primary concerns of the electorate relate to the recession, tech regulation is likely to lose some of its appeal.[8]

Conclusion: Matt has provided quarterly reviews for analyzing the risks for the Tech sector and individual companies (LINK). We don't think the selloff materially changes that analysis. But the sell-off could make some deals more plausible and over time affect the political capital being put behind the effort to constrain the power of Big Tech.

[1] For example, in February 2017, when now FTC Chair Lina Khan published her law review article attacking how antitrust had allowed Amazon to grow too big, its market cap was about $400B. It is now about $1.1T. When White House competition adviser Tim Wu published his book "The Curse of Bigness" in late 2018, two targets, Apple and Alphabet stood at about $750B and $725B, respectively. They are now at about $2.25T and $1.45T respectively.

[2] Yes, this is a not so thinly veiled reference to the leaked draft of Alito's opinion in Dobbs. Whether the reference is meant to honor or to mock the draft, well, we'll let you decide.

[3] According to the legislation, "The term 'covered platform' means an online platform that...[has] during any 180-day period during the 2-year period, an average market capitalization greater than $550,000,000,000,

adjusted for inflation on the basis of the Consumer Price Index…” https://www.congress.gov/bill/117th-congress/senate-bill/2992/text.

[4] Of course, the Chinese tech companies, in terms of market cap, are also a lot weaker. But the DC debate rarely goes to that point.

[5] Or now that we think of it, any Congress in this century.

[6] The DSA is less relevant here as it’s not about market power with many of its provisions applying to any platform. While some DSA obligations apply only to large platforms, again, as with the point up front about the Congressional hearings involving the whistle blower and Meta, the DSA is not about market power as much as the impact large platforms have on certain kinds of speech and populations.

[7] While not required by any SEC rule to reveal our conflicts here, in the interests of full transparency, we have an iPhone and a Peloton and we do think their integration could be awesome.

[8] Further, reasonable minds can differ on the political implications. We read an analysis that says that if the recession hits, the political incentives are to “punch up” by attacking big companies and no one (other than Saudi Oil) is bigger than Big Tech. While we understand the argument, we think blaming Big Tech for a recession or arguing that regulation would cure the recession’s ills will not make sense to most people on either the right or left.

Full 12-month historical recommendation changes are available on request

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