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ANTITRUST TRADE AND PRACTICE

Increased Antitrust Scrutiny Is the Fashion Industry's Newest Trend

By Karen Hoffman Lent And Kenneth Schwartz

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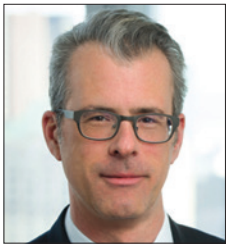

And **Kenneth Schwartz**

While fashion has always been about being on trend, there has been a notable trend of increased antitrust scrutiny of the fashion sector. Two recent antitrust lawsuits in the United States—one by the Federal Trade Commission (FTC) and one by private plaintiffs—both target alleged anti-competitive behavior in this industry.

In April, the FTC sued to block the merger of Tapestry Inc. (Tapestry) and Capri Holdings Limited (Capri), asserting the agency's now-familiar theories of threatened anticompetitive harm to an extremely narrow product market, negative effects to labor markets and serial acquisitions. *Federal Trade Commission v. Tapestry*, Case No. 1:24-cv-03109 (S.D.N.Y. complaint filed Apr. 23, 2024). The previous month, two consumers filed a class action against fashion designer Hermès, accusing the firm of unlawfully tying the purchase of its popular handbags to the purchase of other Hermès accessories. *Cavalleri v. Hermès International*, Case No. 3:24-cv-01707 (N.D. Cal. complaint filed Mar. 19, 2024).

Both cases boil down to defining the relevant handbag market, proving no industry is too niche to be subject to antitrust consideration.

Tapestry/Capri

On Aug. 10, 2023, Tapestry a house of brands including Coach, Kate Spade and Stuart Weitzman, announced its proposed acquisition of Capri, a fashion group consisting of Versace, Jimmy Choo and Michael Kors. In their press release, Tapestry and Capri explained that the $8.5 billion deal would unite six highly complementary brands and unlock "enhanced value" to "consumers, employees, communities and shareholders around the world." (Press Release, "Capri

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Holdings, Tapestry, Inc. Announces Definitive Agreement to Acquire Capri Holdings Limited, Establishing a Powerful Global House of Iconic Luxury and Fashion Brands" (Aug. 10, 2023)).

The FTC did not see the deal through that same lens and on April 22, 2024, moved to block the merger, diverging from its usual pattern of scrutinizing industries such as technology, healthcare and private equity, and venturing into the realm of handbags. The agency issued an administrative complaint and authorized a lawsuit in federal court to enjoin the transaction pending resolution of the administrative suit. According to the FTC, the proposed merger "threatens to deprive millions of American consumers of the benefits of Tapestry and Capri's head-to-head competition." (Press Release, Federal Trade Commission, "FTC Moves to Block Tapestry's Acquisition of Capri" (April 22, 2024)).

The FTC argues that the proposed deal would harm competition in a market for "accessible luxury" handbags, in which both Tapestry and Capri compete

'Accessible Luxury'

A crucial and contentious element of the matter will be defining the relevant product market. Market definition determines the universe in which anticompetitive conduct is measured.

The FTC argues that the proposed deal would harm competition in a market for "accessible luxury" handbags, in which both Tapestry and Capri compete. The agency claims that "despite its incorporation of the word 'luxury,' 'accessible luxury' is very distinct from what the parties and other industry players call 'luxury,' 'true luxury,' 'high-end luxury' or 'European luxury'…[which would attract] affluent, high-wealth consumers—in contrast to the millions of working- and middle-class clientele who comprise a large part of the customer base for Coach, Kate Spade and Michael Kors." (FTC Compl. at 4).

The FTC's hope to trim the market down to "accessibly luxury" aligns with the updated Merger Guidelines, which articulate a narrow approach to defining a market, including by allowing the agencies to ignore the impact of "significant substitutes" that may not fit within the precisely defined relevant market. U.S. Department of Justice and Federal Trade Commission, Merger Guidelines, Page 40 (Dec. 18. 2023).

On May 3, 2024, Tapestry and Capri asked U.S. District Judge Jennifer L. Rochon of the Southern District of New York to order the FTC to provide a "more definite statement" on what its proposed product market entails, contending that the FTC has "continuously refused" to elaborate on the accessible handbag market, or provide "any discernable bounds" to its definition, despite the agency's responsibility to do so. Motion for More Definite Statement, *Federal Trade Commission v. Tapestry et al.*, Case No. 1:24-cv-03109 (S.D.N.Y. May 3, 2024).

In its answer to the complaint, Tapestry emphasizes that while the FTC claims that the companies' brands constitute a "duopoly" in the market, a quick "online search…or stroll through a mall" shows that there are over 150 handbag brands competing at a consumer's disposal. Tapestry Answer at 5, *In the Matter of Tapestry, a corporation, and Capri Holdings*, Docket 9429 (May 6, 2024). As Capri put it, "[this suit] is nothing more than an improper attempt to expand antitrust law at the expense of a lawful transaction in an industry famous for dynamic

competition." Capri Answer at 5, *In the Matter of Tapestry, a corporation, and Capri Holdings*, Docket 9429 (May 6, 2024).

On May 13, 2024, Rochon denied the request by Tapestry and Capri for a more definite statement, explaining that "Defendants have sufficient notice of the allegations against them" and that the FTC had adequately "laid out numerous parameters of the alleged relevant market." *Federal Trade Commission v. Tapestry*, Case No. 1:24-cv-03109, Order (S.D.N.Y. May 13, 2024).

Although Rochon ultimately denied the motion, she herself even pressed the FTC lawyer for more details on what falls under the definition of "accessible luxury", including a query as to whether a men's duffle bag fit the gambit. She ultimately urged the companies and the FTC to discuss the market further in the hopes that they "have a more constructive dialogue" at a later date.

A tying arrangement is one in which a seller agrees to sell a product to a buyer only on the condition that the buyer purchases a different product from the seller.

While accessible luxury handbags may be a unique product market, the agencies are no strangers to pursuing theories of harm to niche luxury markets. Courts have gone both ways when evaluating these types of cases.

In 1993, the Department of Justice (DOJ) challenged the proposed acquisition by Gillette of Parker Pens, arguing that the acquisition would lessen competition of "premium fountain pens," which have established a "premium image among consumers for quality and prestige." (Press Release, U.S. Department of Justice, "Justice Department Challenges Proposed Acquisition By Gillette of Parker Pens" (March 19, 1993)).

The court in the matter ultimately denied the DOJ's injunction to stop the deal, finding that "[w]hile some users are devoted to fountain pens to such a degree…a broader market enjoys active competition among all modes of premium writing instruments." *United States v. Gillette*, 828 F. Supp. 78 (D.D.C. 1993).

While this case provides support for Tapestry, the court's ruling on the FTC's requested injunction of the *Whole Foods/Wild Oats* merger went the other way.

In 2008, the FTC sought to enjoin Whole Food's proposed merger of Wild Oats, claiming that the transaction would harm the "premium national and organic supermarket" (PNOS) market. The court agreed, granting the FTC's injunction, and finding that while "[o]f course customers cross-shop" between ordinary and premium supermarkets, the FTC sufficiently delineated a PNOS submarket, "catering to a core group of customers who have decided that natural and organic is important." *Federal Trade Commission v. Whole Foods Market*, 548 F.3d 1028, 1039 (D.C. Cir. 2008).

These cases demonstrate that the agencies' injunctions seeking to prevent transactions may hinge on proper market definition – whether its luxury pens, premium grocery stores or in this instance, accessible luxury handbags.

Labor Market Harms

In addition to alleging a narrow product market, the FTC also asserts that the proposed Tapestry-Capri deal would substantially harm competition in the labor market. In a now-familiar theme, the

FTC argues that the proposed acquisition would eliminate incentives for the two merging companies to compete for employees, thereby affecting employees' wages and workplace benefits.

The agency points to that shortly after Tapestry publicly committed to a $15/hour minimum wage for its hourly employees, Capri followed suit. (FTC Compl. at 2.) The agency's labor arguments align with its recent stance regarding labor market competition generally, not only in regards to the recent rule on noncompete agreements, but in the merger context as well, where the updated 2023 Merger Guidelines identify possible labor market effects as a basis to challenge a proposed transaction.

Consistent with these new guidelines, the FTC and DOJ have also proposed creating a new Labor Markets section in the updated premerger filings under the Hart-Scott-Rodino Act. The FTC has also brought similar labor theories of harm in other merger challenges such as in *Kroger/Albertson*.

Serial Acquisitions

Finally, the FTC also argues that the proposed acquisition is part of Tapestry's "decade-long M&A strategy through serial acquisitions to achieve its dream of becoming a major American fashion conglomerate." (Press Release, Federal Trade Commission, "FTC Moves to Block Tapestry's Acquisition of Capri" (Apr. 22, 2024)).

Over the last 10 years, Tapestry has acquired a number of fashion brands, including Coach, Kate Spade and Stuart Weitzman. With the proposed acquisition, the FTC argues, "Tapestry would be able to leverage its combined size for even more acquisitions of rivals in the 'accessible luxury' handbag market by which it could entrench its position and make it harder for smaller rivals and new entrants to compete." (FTC Compl. at 37.)

This FTC challenge is fully consistent with the agencies' recent crackdowns of serial acquisitions and roll-ups. The new Merger Guidelines encourage the agencies to "evaluate [a] series of acquisitions as part of an industry trend or evaluate the overall pattern or strategy of serial acquisitions by the acquiring firm collectively." U.S. Department of Justice and Federal Trade Commission, Merger Guidelines, Guideline 8 (Dec. 18. 2023). While the agencies have primarily focused their attention in this area on serial acquisitions and rollups by private equity firms in the health care industry, the fashion sector appears to have become the agencies' newest focus.

The case is currently scheduled for an evidentiary hearing on the FTC's motion for a preliminary injunction on Sept. 9, 2024. We will be sure to follow this case closely, as it demonstrates a new sector that may vulnerable to the agencies' current theories.

Hermès Class Action

Fashion companies are also not immune from antitrust litigation from consumers. On March 19, 2024, California residents and consumers Tina Cavalleri and Mark Glinoga filed a class action antitrust complaint against Hermès, alleging that the luxury fashion firm has engaged in unlawful tying by requiring customers to purchase ancillary Hermès products, such as belts, shoes, scarves and home goods, as a condition of purchasing a Birkin or Kelly handbag. (Class Compl. at 6.)

According to the complaint, Hermès sales associates do not earn commissions on handbag sales but are instructed to use the handbags "as a way to coerce consumers to purchase

ancillary products." Under the alleged scheme, only consumers "who have established sufficient 'purchase history' or 'purchase profile' with Hermès" may buy the coveted bag, according to the complaint. The complaint claims that the alleged scheme is effective because "the unique desirability, incredible demand, and low supply of Birkin handbags gives [Hermès] incredible market power."

A tying arrangement is one in which a seller agrees to sell a product to a buyer only on the condition that the buyer purchases a different product from the seller. Tying alone does not raise anticompetitive concerns, as courts have found them to be procompetitive in some instances. However, tying arrangements raise to a level of illegality when the seller has sufficient economic power with respect to the tying product to restrain free trade in the market for the tied product, substantially affecting commerce in the market for the tied product. Market power in the tying market is a key prerequisite in order to prevail on such a claim.

On May 9, 2024, Hermès moved to dismiss the case, arguing that the complaint does not define a viable tying market in which Hermès could exercise its alleged market power. In its motion, Hermès argued that "[a]s part of an effort to minimize the fierce competition across all segments of luxury goods, including handbags, plaintiffs allege the tying market is a market consisting of the Birkin and Kelly handbags—and absolutely nothing else. Courts commonly reject such claims of a so-called single-brand market, and this court should do so as well." (Mot. to Dismiss at 7.)

Hermès also argues that plaintiffs fail to adequately define a tied product market, ignoring the "clear competition Hermès faces from different sellers on the wide range of products it sells." While it may be a useful marketing tactic to promote an item as unique or one of a kind, the fact that luxury items are particularly desirable does not mean they are immune from competition. As Tapestry argued in its answer to the FTC's complaint, a stroll through the mall or scan on the internet would demonstrate otherwise.

Similar to the *Tapestry/Capri* litigation, this case will likely ultimately turn on proper relevant market definition. While neither lawsuit considers new antitrust principles, they raise an interesting question about the appropriate delineation of the relevant market when the alleged competition involves luxury—or apparently "accessible luxury"—goods.

Tapestry/Capri in particular demonstrates how narrow a runway the FTC may walk in its pursuit of preventing a transaction. Fashion has never been an industry to shy away from the spotlight, and these lawsuits, and the niche antitrust considerations embedded in these lawsuits, will keep all eyes watching.