

# Antitrust In Retail: The Meaning Of 'Accessible Luxury'

By **David Kully** (July 1, 2024)

*This article is part of a quarterly column that explores recent antitrust developments in the retail industry and their potential impacts on competition. In this installment, we discuss the Federal Trade Commission's recent action aimed at the market for accessible luxury handbags.*



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On April 22, the Federal Trade Commission sued to block the proposed acquisition by Tapestry Inc. of Capri Holdings Ltd., a transaction that according to the FTC "would combine six iconic brands, including three — Tapestry's Coach and Kate Spade and Capri's Michael Kors — that are close competitors."<sup>[1]</sup>

The FTC's case was met immediately with an unusual degree of public skepticism, and not just from the merging parties.<sup>[2]</sup> The target of much of the skepticism was the Goldilocks nature of the market in which the FTC alleges Tapestry and Capri compete and in which consumers would be harmed by the merger.

According to Tapestry, there are hundreds of companies producing handbags and other products also made by Tapestry and Capri.<sup>[3]</sup>

But the FTC's complaint excludes from its relevant market true luxury products priced above the prices of most Coach, Kate Spade and Michael Kors products, and everyday mass-market products generally sold at lower prices — arriving at what the FTC refers to as an accessible luxury market segment at the just-right price range between the high end and low end.

Despite the skepticism — and some mockery — directed at the FTC's approach to its challenge to the transaction, there is nothing inherently flawed about the FTC's alleged market.

The FTC might ultimately fail in proving that such a distinct market segment exists, but not because defining retail markets around specific product segments or price ranges is incoherent or unintelligible.<sup>[4]</sup>

Antitrust plaintiffs have pursued and, in some cases, proven similar markets in past cases, over objections of improper gerrymandering like those directed at the FTC in this case.

As in most cases, this one will likely turn on the facts that the FTC introduces to satisfy its burden of proving its accessible luxury market, in this case by showing that purchasers of those products do not substitute readily between accessible luxury products and true luxury or mass-market products.

## **The Accessible Luxury Market**

The FTC alleges in its complaint that Tapestry and Capri today "compete on everything from clothing to eyewear to shoes" — but compete "most fiercely [and] boast eye-popping market shares" in accessible luxury handbags.<sup>[5]</sup>

The FTC redacted references in its complaint to the eye-popping share figures — which the FTC also says would "create a colossus,"[6] but the Wall Street Journal reported that Coach and Michael Kors together control 53% of the accessible or affordable luxury handbag market.[7]

According to the FTC, it did not invent the term "accessible luxury," and instead points to Coach as the originator, alleging that Coach coined the term 20 years ago to describe the market segment in which it operated.[8]

The FTC claims that the term is ubiquitous in Tapestry's and Capri's documents, including their filings with the U.S. Securities and Exchange Commission.

It says "the parties, press and analysts, and other industry participants" have since adopted the term to refer to handbags "that can boast leather and craftsmanship," unlike mass-market handbags, and that consumers can purchase "at an affordable price," unlike true luxury handbags.[9]

The FTC also alleges that accessible luxury products are:

- Purchased by distinct customers, "middle and lower-income consumers who seek out high-quality items at affordable prices";
- Frequently promoted with discounting; and
- Made in unique production facilities featuring high-quality craftsmanship and, unlike mass-market products, not made in bulk in China.[10]

The FTC posits that these practical indicia support the existence of their accessible luxury handbag market under the U.S. Supreme Court's 1962 *Brown Shoe v. U.S.* decision.[11]

The FTC also asserts that if a hypothetical monopolist of accessible luxury handbags imposed a price increase then, "consumers would not switch to mass-market or to true luxury handbags in sufficient volumes to render the price increase unprofitable," thus satisfying the antitrust agencies' hypothetical monopolist test for the existence of an antitrust product market.[12]

The merging parties unsurprisingly take issue with the FTC's analysis and support for the existence of a market for accessible luxury handbags.

In a May 3 motion in the U.S. District Court for the Southern District of New York, they claimed that the FTC didn't provide clarity as to what products fall within its alleged markets.

They moved to require the FTC to provide a more definite statement to put them on notice "as to who is in and out of the market for purposes of defending against the FTC's claims." [13]

After the court denied the motion on May 13,[14] the parties filed answers to the FTC's complaint attacking the FTC's decision to define a market around so-called descriptive verbiage without pointing to characteristics that actually distinguish accessible luxury handbags from true luxury and mass-market products.[15]

As a result, the merging parties believe the FTC fails "at the gating element of its claim — defining the relevant product market." [16]

### **Can the FTC Sustain its Accessible Luxury Market?**

The FTC will ultimately need to supply the clarity sought by Tapestry and Capri as to the boundaries of its alleged accessible luxury handbag market, identify which producers' products fall within that market, and defend its delineation of the boundaries of its market with evidence.

And it might well fail. But the FTC has received unwarranted criticism for arguing that there might be a distinct market for consumer products with particular prices or characteristics.

If the facts ultimately support the distinctions the FTC alleges — a big if — it can prevail in the case, despite the seeming unconventionality of its approach or apparent arbitrariness of the ways in which it has described its just-right, Goldilocks-style market.

In *Brown Shoe* itself, a foundational case for the analysis of the boundaries of antitrust product markets, the Supreme Court observed that price differences and peculiar characteristics between products can be the bases for identifying "competing products of each of the merging companies." [17]

The court rejected strict price-based market divisions, finding it would be "unrealistic [that] men's shoes selling below \$8.99 are in a different product market from those selling above \$9.00," [18] but identified practical indicia such as "distinct prices [and a] product's peculiar characteristics and uses" as relevant factors for courts to consider. [19]

The antitrust agencies have in the past pursued other cases based on similar retail product distinctions. In 2003, the FTC challenged the merger of Nestlé S.A. and Dreyer's Grand Ice Cream Inc. based on alleged harm to competition in a market for "superpremium ice cream" — and resolved its concerns with agreed divestitures. [20]

The FTC also sued in 2018 to block the merger of owners of Crisco and Wesson cooking oil, alleging a market for branded cooking oil that excluded functionally indistinguishable and less-expensive store brands. [21] The parties abandoned the proposed merger following the FTC's challenge. [22]

In an earlier challenge, the FTC successfully persuaded a court in 1983 that premium fountain pens were a market distinct from other fountain pens, but the U.S. District Court for the District of Columbia ultimately rejected the FTC's challenge to a merger of premium fountain pen manufacturers — in the 1993 *U.S. v. Gillette* decision — because it found that other premium writing instruments were reasonable substitutes for premium fountain pens and belonged in the same product market. [23]

In a related context, with the D.C. District Court's 2022 decision in *U.S. v. Bertelsmann SE*, the U.S. Department of Justice prevailed in its challenge to Penguin Random House's acquisition of Simon & Schuster based on a market for "anticipated top-selling books" in which authors would earn advances of greater than \$250,000. [24]

In private litigation, efforts to define consumer product markets around specific price or perceived quality distinctions have succeeded in some instances [25] and failed in others. [26]

This shows there is nothing wrong with the approach, but does reflect the challenge to plaintiffs in proving a market consisting of only a subset of seemingly substitutable consumer products.

The FTC will face just this challenge as it attempts to convince the judge that its accessible luxury market is just right.

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[1] Complaint, In the Matter of Tapestry, Inc. & Capri Holdings Limited, FTC Docket No. 9429 (April 22, 2024), ¶ 1. The FTC also filed a substantially identical complaint in federal court, and moved for a preliminary injunction to block the merging parties from proceeding with the consummation of their merger while the FTC's case is pending in its administrative court. See Compl. for a Temporary Restraining Order & Prelim. Inj. Pursuant to § 13(b) of the FTC Act, FTC v. Tapestry, Inc. v. Capri Holdings Limited, No. 1:24-cv-3109 (S.D.N.Y. Apr. 23, 2024) (ECF No. 1). On May 1, the court entered a case management and scheduling order calling for an evidentiary hearing on the FTC's motion for a preliminary injunction to commence in September 2024. ECF No. 71.

[2] See Jenna Greene, In Michael Kors, Coach merger challenge, FTC's case is not in the bag, Reuters (Apr. 25 2024) ("[I]s this somewhat subjective [accessible luxury] category – sandwiched between the vast universe of cheaper, mass-market bags and the rarified stratosphere of high fashion offerings – a viable market definition for the FTC to prove that the \$8.5 billion merger is anti-competitive? After speaking with antitrust lawyers and fashion experts . . . , I'm skeptical"), <https://www.reuters.com/legal/government/column-michael-kors-coach-merger-challenge-ftcs-case-is-not-bag-2024-04-25/>; Pamela N. Danziger, 'Accessible Luxury' On Trial As FTC Moves to Block Tapestry from Acquiring Capri, Forbes (May 8, 2024) ("As a market researcher focused on the luxury market for more than twenty years, I have a hard enough time defining luxury, let alone 'accessible luxury.'"), <https://www.forbes.com/sites/pamdanziger/2024/05/08/accessible-luxury-on-trial-as-ftc-moves-to-block-tapestry-from-acquiring-capri/>; George F. Will, The FTC's trustbusting is getting ridiculous. Luxury handbags? Please., Washington Post (May 29, 2024).

[3] Def. Tapestry, Inc.'s Answer & Defenses ("Tapestry Answer"), FTC v. Tapestry, Inc. v. Capri Holdings Limited, No. 1:24-cv-3109 (S.D.N.Y. Apr. 23, 2024) (ECF No. 91), at 1 (referring to "hundreds of bags available at every price points in competition with Tapestry and Capri").

[4] Tapestry Answer at 3 ("The FTC's unintelligible market definition and theory of consumer harm make no sense in this industry").

[5] FTC Administrative Compl. ¶ 2.

[6] Id.

[7] Suzanne Kapner, *FTC Blocks \$85 Billion Deal Uniting Coach, Michael Kors*, Wall Street Journal (Apr. 22, 2024).

[8] FTC Administrative Compl. ¶ 3.

[9] *Id.* ¶¶ 22, 23, 25.

[10] *Id.* ¶¶ 30, 34, 36.

[11] 370 U.S. 294, 325 (1962).

[12] FTC Administrative Compl. ¶¶ 38, 39.

[13] See Mem. of Law in Supp. of Mot. for More Definite Statement, *FTC v. Tapestry Inc. & Capri Holdings Limited*, No. 1:24-cv-3109 (S.D.N.Y. May 3, 2024) (ECF No. 74).

[14] ECF No. 88.

[15] See *Tapestry Answer* (ECF No. 91) at 5-7.

[16] *Id.* at 5.

[17] 370 U.S. at 326.

[18] *Id.*

[19] *Id.* at 325.

[20] Press Release, *Nestlé-Dreyer's Settle FTC Charges; Dreamery, Godiva, Whole Fruit Brands and Nestlé Distribution Assets Will be Divested to CoolBrands* (June 25, 2003). In a private antitrust case, a court had previously rejected the existence of a market for "super premium ice cream" and granted summary judgment to the defendants.

[21] Press Release, *FTC Challenges Proposed Acquisition of Conagra's Wesson Cooking Oil Brand by Crisco owner, J.M. Smucker Co.; Merger of Crisco and Wesson would give Smucker power to raise prices of leading canola and vegetable cooking oil brands sold to U.S. retailers, complaint alleges* (March 5, 2018).

[22] See Maria Armental, *Smucker, Conagra Call Off Wesson Oil Deal After FTC Challenge; Federal Trade Commission had sued on antitrust grounds; Smucker already owns Crisco*, Wall Street Journal (March 6, 2018).

[23] See *United States v. Gillette Co.*, 828 F. Supp. 78, 83-84 (D.D.C. 1993) ("Although plaintiff is correct in segregating out a 'premium' sub-market from the larger fountain pen market, it has failed to demonstrate that premium fountain pens are not in competition with other premium writing instruments.").

[24] *United States v. Bertelsmann SE & Co. KGaA*, 646 F. Supp. 3d 1, 25-29 (D.D.C. 2022).

[25] See, e.g., *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1129-30 (C.D. Cal. 2009) (finding plaintiffs plausibly alleged a market for "high-end competitive swimwear" distinct from other swimware).

[26] See, e.g. *In re Super Premium Ice Cream Distribution Antitrust Litig.*, 691. F. Supp. 1262, 1268 (N.D. Cal. 1988) (finding that "all grades of ice creams compete with one another for customer preference and for space in the retailers' freezers").