# IS DEALMAKING GOING OUT OF FASHION? THE IMPACT OF THE FTC-TAPESTRY, INC. LITIGATION ON M&A ACTIVITY IN THE FASHION INDUSTRY

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## INTRODUCTION

> *"This . . . 'stuff'? Oh, okay. I see, you think this has nothing to do with you.*
>
> *You go to your closet, and you select, I don't know, that lumpy blue sweater, for instance, because you're trying to tell the world that you take yourself too seriously to care about what you put on your back . . .*
>
> *However, that blue represents millions of dollars and countless jobs.*
>
> *And it's sort of comical how you think that you've made a choice that exempts you from the fashion industry when, in fact, you're wearing a sweater that was selected for you by the people in this room."*[1]

Anyone who has watched The Devil Wears Prada remembers the iconic scene where Miranda Priestly, the editor-in-chief of a fashion magazine, disparages Andy, her assistant who doesn't care about fashion, by pointing out the origin of Andy's cerulean sweater, and why everyone should care about fashion.[2] Miranda boldly proclaims that no one is exempt from the fashion industry and that the sweater represents "millions of dollars and countless jobs."[3] Iconic movies aside, fashion is everywhere. We are all consumers of shoes, clothing, and accessories. From the young professional woman contemplating her first designer bag purchase, to the Midwestern dad buying a three-pack of the same t-shirt—everyone is making choices about fashion consumption constantly.

It should come as no surprise that, given the pervasiveness of fashion in our everyday life, the Federal Trade Commission (FTC) is concerned with the impact of consolidation in the fashion industry. In August 2023, Tapestry, Inc. (Tapestry) tried to acquire Capri Holdings Limited (Capri) in a deal that would unite prominent American fashion brands Coach, Kate Spade, Michael Kors, Stuart Weitzman, Versace, and Jimmy Choo under the same roof.[4] After an investigation into the planned acquisition, the FTC sued

1. THE DEVIL WEARS PRADA (Fox 2000 Pictures 2006).
2. *Id.*
3. *Id.*
4. Shemona Safaya, *Tapesty to Acquire Rival Luxury Group Capri Holdings in $8.5bn Deal*, JUSTSTYLE (Aug. 10, 2023), https://www.just-style.com/news/tapestry-to-acquire-rival-luxury-group-capri-holdings-in-8-5bn-deal/ [https://perma.cc/4VMP-7Q57].

to block Tapestry's acquisition of Capri.[5] In October 2024, the U.S. District Court for the Southern District of New York granted the FTC's motion for a preliminary injunction to block the deal.[6] The parties subsequently abandoned the planned acquisition.

Observers familiar with the fashion industry might find this decision surprising given that mergers and acquisitions (M&A) activity in the global fashion industry is not uncommon.[7] The iconic global luxury conglomerate Louis Vuitton Möet Hennessy (LVMH) owns seventy-five luxury brands selling clothing, cosmetics, bags, watches, wines and spirits, and perfumes.[8] In the opening price point market, Chinese e-commerce retailer Shein recently acquired a one-third share in Sparc Group, whose holdings include American fast fashion brand Forever 21,[9] and acquired the intellectual property and trademarks of UK fast fashion retailer Missguided.[10] However, as the FTC and the U.S. District Court for the Southern District of New York explained, the acquisition of Capri by Tapestry would have consolidated a very specific submarket in the U.S. fashion industry which could have been harmful to consumers.[11]

This Note will lay out the fundamental U.S. antitrust laws that govern such M&A transactions and discuss the rationale behind the court's decision in *Tapestry*. While the court's decision might appear to preclude mergers in the fashion industry, this Note will discuss why the affordable luxury market the court has identified is particularly vulnerable to harms from consolidation. This Note will then suggest that while the affordable luxury space may not be ripe for M&A activity, dealmaking in the opening price point and true luxury fashion markets is still very possible due to the market structure in those segments. Finally, the Note will also suggest that for future

5. Press Release, Fed. Trade Comm'n, FTC Moves to Block Tapestry's Acquisition of Capri (Apr. 22, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-moves-block-tapestrys-acquisition-capri [https://perma.cc/LNG7-WUYA].

6. FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 498 (S.D.N.Y. 2024).

7. *A Running Timeline of Fashion, Retail Funding and M&A*, FASHION L. (Nov. 12, 2025), https://www.thefashionlaw.com/a-running-timeline-of-fashion-and-luxury-mergers-acquisitions/ [https://perma.cc/AEJ3-YT9H]; Don-Alvin Adegeest, *A Timeline of Fashion's Mergers, Acquisitions and Luxury Financing in 2023*, FASHION UNITED (Dec. 27, 2023), https://fashionunited.uk/news/business/a-timeline-of-fashion-s-mergers-acquisitions-and-luxury-financing-in-2023/2023122773297 [https://perma.cc/YXQ7-XJUP].

8. *Our 75 Maisons*, LVMH, https://www.lvmh.com/en/our-maisons [https://perma.cc/RW3L-BAEU].

9. Jordyn Holman, *Shein and Forever 21 Team Up in Fast-Fashion Deal*, N.Y. TIMES (Aug. 24, 2023), https://www.nytimes.com/2023/08/24/business/shein-forever-21.html [https://perma.cc/DQ4A-W5JU].

10. Mark Faithfull, *Shein Buys Missguided and Launches Apparel Range with Forever 21*, FORBES (Nov. 1, 2023), https://www.forbes.com/sites/markfaithfull/2023/11/01/shein-buys-missguided-and-launches--forever-21-x-shein-apparel-line/ [https://perma.cc/ZXR7-HSAA].

11. *Tapestry, Inc.*, 755 F. Supp. 3d at 456, 481.

merger litigation in the fashion industry, courts might accept an efficiencies defense if parties are able to argue novel, merger-specific, and verifiable efficiencies. Dealmaking doesn't need to go out of fashion.

## I. BACKGROUND

### *A. Tapestry, Inc.'s Acquisition of Capri Holdings Ltd.*

#### *1. The Deal and Background on the Entities*

Regulators such as the FTC and Department of Justice (DOJ) are often concerned with M&A activity involving large corporations that could lead to monopolization in a particular market. One such large corporation in the U.S. fashion market is Tapestry. Tapestry describes itself as a "global house of iconic brands."[12] The company was founded in 1941 under the name Coach, Inc. (Coach).[13] Since its founding, Coach has grown into an extremely profitable, global company, going on to acquire many other brands. In 2015, Coach acquired Stuart Weitzman Holdings LLC, a footwear and fashion accessories company.[14] Three years later in 2018, the company acquired Kate Spade & Company, an accessories and ready-to-wear company. After this acquisition, the company changed its name to Tapestry, Inc.[15] This spree of M&A activity by Tapestry in the U.S. fashion industry has mimicked the consolidation of European luxury fashion brands under the LVMH conglomerate.[16]

Another prominent player in the U.S. luxury fashion market is Capri—a "global fashion luxury group."[17] The group consists of "iconic brands," Versace, Jimmy Choo, and Michael Kors.[18] The group started out under the name Michael Kors. In 2017, Capri acquired Jimmy Choo for $1.2 billion, and in 2018, it acquired Versace for $2.1 billion.[19]

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12. *Investor Relations - Tapestry, Inc. Is a Global House of Iconic Brands*, TAPESTRY, https://www.tapestry.com/investors/ [https://perma.cc/3AHH-VMRK].
13. TAPESTRY, INC., ANNUAL REPORT (FORM 10-K), at 2 (2023).
14. *Id.*
15. *Id.*; *Investor Relations - Tapestry, Inc. Is a Global House of Iconic Brands*, *supra* note 12.
16. *See LVMH: A Timeline Behind the Building of the World's Most Valuable Luxury Goods Group*, FASHION L. (Dec. 12, 2024), https://www.thefashionlaw.com/lvmh-a-timeline-behind-the-building-of-a-conglomerate/ [https://perma.cc/23EY-58H8].
17. *Iconic Brands, Glamorous Style*, CAPRI HOLDINGS LTD., https://www.capriholdings.com/corporate-overview/default.aspx [https://perma.cc/H73E-6REF].
18. *Id.*
19. Vikram Alexei Kansara, *Tapestry Is Acquiring Michael Kors, Versace and Jimmy Choo in $8.5 Billion Deal*, BUS. FASHION (Aug. 10, 2023), https://www.businessoffashion.com/articles/luxury/tapestry-buys-capri-holdings-acquisition-michael-kors-versace/ [https://perma.cc/G578-X2CX].

In August 2023, Tapestry tried to acquire Capri for $8.5 billion.[20] If the acquisition had been successful, Tapestry would have united Coach, Kate Spade, Michael Kors, Stuart Weitzman, Versace, and Jimmy Choo under the same roof—about $12 billion in combined revenue.[21] This acquisition, valued at $8.5 billion, along with previous acquisitions of American luxury brands, such as Stuart Weitzman, Kate Spade, Jimmy Choo, Coach, and Michael Kors, would have turned Tapestry into an almost $15 billion luxury conglomerate.[22] While the acquisition was likely to have several benefits for the transacting parties,[23] the FTC was concerned about the impact of consolidation in the U.S. luxury fashion industry on consumers.

### *2. Federal Trade Commission Litigation*

On April 23, 2024, the FTC took its concerns to court and sued to block Tapestry's acquisition of Capri.[24] The FTC's theory of harm was that the merger would eliminate "head-to-head competition" on several key factors such as price, discounts and promotions, and innovation.[25] The FTC also argued that the merger could lead to detrimental effects for employees due to job losses or reduced wages and benefits.[26] In October 2024, the U.S. District Court for the Southern District of New York granted the FTC's motion for preliminary injunction to block Tapestry's acquisition of Capri.[27]

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20. Safaya, *supra* note 4.

21. Pamela N. Danziger, *Tapestry's Success in $8.5 Billion Capri Acquisition Hinges on Management and Relationships*, FORBES (Aug. 23, 2023), https://www.forbes.com/sites/pamdanziger/2023/08/23/tapestrys-success-in-85-billion-capri-acquisition-hinges-on-management-and-relationships/ [https://perma.cc/7RTN-WJHQ].

22. Press Release, Capri Holdings Ltd., Tapestry, Inc. Announces Definitive Agreement to Acquire Capri Holdings Limited, Establishing a Powerful Global House of Iconic Luxury and Fashion Brands (Aug. 10, 2023), https://www.capriholdings.com/news-releases/news-releases-details/2023/Tapestry-Inc.-Announces-Definitive-Agreement-to-Acquire-Capri-Holdings-Limited-Establishing-a-Powerful-Global-House-of-Iconic-Luxury-and-Fashion-Brands/default.aspx [https://perma.cc/3XS7-V3TU]; CNBC, *Why Jimmy Choo, Michael Kors, Versace, Kate Spade Are Suddenly One Company*, YOUTUBE (Nov. 2, 2023), https://www.youtube.com/watch?v=yEv_E5WYfmE (last visited Nov. 30, 2025); Precious Oluwatobi Emmanuel, *Recent Luxury Mergers & Acquisitions in the Fashion World*, FASHION & L.J. (Sept. 6, 2021), https://fashionlawjournal.com/recent-luxury-mergers-acquisitions-in-the-fashion-world/ [https://perma.cc/T5YK-K77M].

23. *See* Danziger, *supra* note 21.

24. FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 406 (S.D.N.Y. 2024).

25. Press Release, Fed. Trade Comm'n, *supra* note 5.

26. *Id.*

27. *Tapestry, Inc.*, 755 F. Supp. 3d at 498; Siddharth Cavale, *US Court Blocks Tapestry's $8.5 Billion Acquisition of Rival Capri*, REUTERS (Oct. 25, 2024), https://www.reuters.com/legal/government/us-court-blocks-tapestrys-85-billion-acquisition-rival-capri-2024-10-24/ [https://perma.cc/Q63L-4T2M].

Tapestry has since abandoned the proposed acquisition of Capri.[28] This comes amidst additional scrutiny of fashion deals and heavy fines for luxury brands' unfair pricing strategies by European Union antitrust regulators.[29] The trend toward mega-mergers in the fashion industry and the pushback from antitrust regulators globally demands a consideration of the regulators' rationale regarding why such M&A deals could have detrimental effects on consumers and workers in the fashion industry.

### *B. Antitrust Laws in the United States*

#### *1. The Sherman Act, Clayton Antitrust Act & FTC Act*

The Sherman and Clayton Acts are the bedrock of antitrust law in the United States.[30] The Sherman Antitrust Act of 1890 outlaws any "contract, combination in the form of trust or otherwise, or conspiracy" that restrains interstate commerce or international trade.[31] The Sherman Act also forbids monopolization or attempts at monopolization of commerce.[32] In 1914, the Sherman Act was supplemented by the Clayton Act and the FTC Act to further bolster antitrust enforcement.

The FTC Act created the FTC with the mission to "protect consumers and promote competition."[33] The Act prohibits "unfair methods of competition" and "unfair or deceptive acts or practices."[34] The Supreme Court has held that all violations of the Sherman Act also violate the FTC Act.[35] Therefore, while the FTC does not technically enforce the Sherman Act, it can bring cases under the FTC Act against conduct that violates the Sherman Act. The FTC Act also prohibits a more expansive set of practices

28. Deirdre Hipwell & Julia Fanzeres, *Capri, Tapestry Scrap Merger After FTC Blocked Deal (2)*, BLOOMBERG L. (Nov. 14, 2024), https://news.bloomberglaw.com/antitrust/capri-and-tapestry-end-merger-plan-after-ftc-wins-blocking-order [https://perma.cc/HE6B-CKE9].

29. Foo Yun Chee, *LVMH to Win EU Antitrust Approval for Tiffany Deal – Sources*, REUTERS (Oct. 14, 2020), https://www.reuters.com/article/business/lvmh-to-win-eu-antitrust-approval-for-tiffany-deal-sources-idUSKBN26Z1YL/ [https://perma.cc/53DT-V9AL]; Edith Hancock, *EU Antitrust Enforcer Fines Gucci, Chloe, Loewe More Than $180 Million After Pricing Probe*, WALL ST. J. (Oct. 14, 2025), https://www.wsj.com/business/retail/eu-antitrust-enforcer-fines-gucci-chloe-loewe-more-than-180-million-after-pricing-probe-2ea87769 [https://perma.cc/M2MD-NTRK].

30. *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/BK6X-XLTJ].

31. 15 U.S.C. § 1.

32. 15 U.S.C. § 2.

33. *Our History*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/history [https://perma.cc/4V9G-5KS8].

34. 15 U.S.C. §§ 41–58.

35. *The Antitrust Laws*, *supra* note 30.

that harm competition but do not fit neatly into categories of conduct prohibited by the Sherman Act.[36] According to the Supreme Court,

> [t]he standard of 'unfairness' under the FTC Act is, by necessity, an elusive one, encompassing not only practices that violate the Sherman Act and the other antitrust laws, but also practices that the Commission determines are against public policy for other reasons.[37]

Only the FTC can bring cases under the FTC Act.[38]

The Clayton Act outlaws (1) "price discrimination against competing companies[,]" (2) "conditioning sales on exclusive dealing[,]" (3) "[M&A deals] when they may substantially reduce competition[,]" and (4) "serving on the board of directors for two competing companies."[39] These prohibitions are "designed to prevent [anticompetitive] conduct, particularly by companies attempting to purchase their competition."[40] The primary legislation governing the legality of M&A activity, such as the Tapestry-Capri deal, is Section 7 of the Clayton Act, which bars a transaction when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."[41] In most cases, courts apply the statute prior to the acquisition's consummation, which requires the court to make predictions about the likely effects of the merger or acquisition at some point in the future.

The federal courts have had substantial leeway in applying the Clayton Act's "may substantially lessen competition" standard to create a common law of mergers.[42] Until 1974, every Supreme Court decision applying Section 7 to review a proposed merger found the proposed merger to be unlawful.[43] The mergers invalidated by the Supreme Court in the 1960s and

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36. For a more detailed discussion of the FTC Act, see Herbert Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 1871 (2010); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 233–34, 251, 271 (1980).

37. FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 454 (1986) (cleaned up).

38. 15 U.S.C. §§ 41–58.

39. *Clayton Antitrust Act*, LEGAL INFO. INST. (July 2020), https://www.law.cornell.edu/wex/clayton_antitrust_act [https://perma.cc/97F8-EU6R].

40. *Id.*

41. 15 U.S.C. § 18.

42. Wilkie Farr & Gallagher LLP, *Cases and Precedents: United States*, GLOB. COMPETITION REV., https://globalcompetitionreview.com/tools/cases-and-precedents/mergers/jurisdiction/1 [https://perma.cc/ KD6D-43UG] (select "Overview" dropdown).

43. *Id.*

the early 1970s included a vertical merger[44] between a shoe retailer and supplier,[45] and a horizontal merger[46] between two local grocery stores.[47]

This approach changed in the mid-1970s when lawyers and economists, primarily academics affiliated with the University of Chicago, now referred to as the "Chicago School," argued that "[e]conomic efficiency should be the exclusive goal of the antitrust law."[48] Their approach involved reducing the focus on concentration being inherently harmful and instead focusing on consumer welfare, as measured in economic terms by prices and output.[49] Congress also passed the Hart-Scott-Rodino (HSR) Act in 1976, which required merging entities to submit a pre-merger filing to the FTC and the DOJ detailing the terms and other key information of the proposed transaction.[50] The Chicago School and the HSR Act led to a significant change in U.S. merger law. In litigation related to mergers, the courts focused on whether "the merged entity could profitably exercise monopoly power; the merger would increase barriers to entry; and the combination achieves verifiable, merger-specific efficiencies that will pass through to customers."[51]

### *2. The 2023 Merger Guidelines*

Today, the DOJ and the FTC play a particularly important role in U.S. merger law by reviewing HSR filings, negotiating with merging parties, and bringing suits to enforce the Clayton Act. Since 1968, the DOJ and the FTC have issued merger guidelines, which lay out the framework for reviewing proposed transactions. While these guidelines are not binding and cannot in themselves prevent a transaction, parties tend to consider the contents of the merger guidelines closely.

Most recently, the 2023 Guidelines were organized around thematic areas of concern, including consolidation in highly concentrated markets, acquisitions that would eliminate potential entrants, and transactions

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44. "A vertical merger is one between two firms with potential or actual buyer-seller relationships. An example is the acquisition of Detroit Steel Corporation by Cleveland-Cliffs Iron (a supplier of iron ore)." W. KIP VISCUSI, JOSEPH E. HARRINGTON, JR. & JOHN M. VERNON, ECONOMICS OF REGULATION AND ANTITRUST 203 (4th ed. 2005).

45. Brown Shoe Co., Inc. v. United States, 370 U.S. 294 (1962).

46. "A horizontal merger is defined as one in which rivals in the same market form one company. An example is the merger of two aircraft manufacturers, Boeing and McDonnell-Douglas." *Id.*

47. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

48. HERBERT HOVENKAMP, PRINCIPLES OF ANTITRUST 49 (3rd ed. 2025).

49. *Id.* at 49–51.

50. 15 U.S.C. § 18a.

51. Wilkie Farr & Gallagher LLP, *supra* note 42. For specific examples of merger-specific efficiencies, see also *infra* note 116.

involving multi-sided platforms.[52] Prior iterations of the merger guidelines adopted a Chicago School approach centered around consumer welfare.[53] Critics of this consumer welfare approach—sometimes referred to as the "Competitive Process School"—argued that by centering consumer welfare, the DOJ, the FTC, and the courts could be disregarding longer-term benefits, such as increased efficiency or innovation.[54] The Competitive Process School suggested that the agencies and the courts should consider the impact of a transaction on not just consumers, but also competitors and workers as part of their competitive analysis.[55] The 2023 Guidelines reflect the influence of the Competitive Process School and "extensively cite the 1960s and early 1970s Supreme Court case law that predates the Chicago School and the turn towards consumer welfare."[56]

### *3. The Antitrust Concerns with Horizontal Mergers*

Antitrust lawyers and economists are often most concerned with horizontal mergers like the one between Tapestry and Capri. As mentioned earlier, a horizontal merger is a merger between direct competitors operating in the same market.[57] These types of transactions are of particular concern for several reasons.[58] First, the new entity can exercise their market power to profitably increase prices, restrict output, or reduce quality. Second, the increased market power may also reduce firms' incentives to innovate to stay competitive. Third, the increased market share would allow firms to exercise monopsony power[59] in input markets, including the labor market. Fourth, the concentration may increase the likelihood of oligopoly behavior where multiple firms implicitly or explicitly collude to parallel price, rather than fully competing.[60]

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52. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, MERGER GUIDELINES (2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf [https://perma.cc/C7YJ-9R9V] [hereinafter 2023 GUIDELINES].

53. Wilkie Farr & Gallagher LLP, *supra* note 42.

54. *E.g.*, Gregory J. Werden, *The Competitive Process Standard*, 86 ANTITRUST L.J. 579 *passim* (2024).

55. *See id.* at 637–38.

56. Wilkie Farr & Gallagher LLP, *supra* note 42; 2023 GUIDELINES, *supra* note 52.

57. VISCUSI ET AL., *supra* note 44.

58. For a fuller discussion of the economic theory related to harms and benefits of horizontal mergers, beyond the scope of this Note, see *id.* at 210–19.

59. Monopsony power exists on the buying side of the market. The theory of monopsony envisions a market with only one buyer that uses its power to reduce the quantity purchased thereby reducing the price the monopsonist has to pay. GEORGE J. STIGLER, THE THEORY OF PRICE 216–18 (4th ed. 1987).

60. For a fuller discussion of this phenomenon, beyond the scope of this Note, see Martin K. Perry & Robert H. Porter, *Oligopoly and the Incentive for Horizontal Merger*, 75 AM. ECON. REV. 219 (1985).

The 2023 Guidelines state that the FTC and the DOJ view any horizontal merger that (1) increases the market Herfindahl-Hirschman Index (HHI) by 100 points and (2) (a) results in an HHI of either 1,800 or (2) (b) the merged firm possessing a market share of greater than 30% to be presumptively illegal.[61] Clearly, the 2023 Guidelines' approach of determining the unlawfulness of a merger based on market concentration thresholds requires the agencies to define a relevant market.

## II. THE RATIONALE FOR BLOCKING THE TAPESTRY-CAPRI MERGER

In the Tapestry-Capri case, as in many M&A activity-related antitrust inquiries, defining the relevant market was the key to determining whether the transaction between Tapestry and Capri was likely to have anti-competitive effects. To establish a *prima facie* case under Section 7, the FTC needed to "(1) define a relevant market, and (2) show that the effect of the merger in that market is likely to be anticompetitive."[62]

### *A. Defining the U.S. "Affordable" Luxury Market*

A "relevant product market" is a term of art in antitrust analysis.[63] It "consists of products that have reasonable interchangeability for the purposes for which they are produced—price, use, and qualities considered."[64] Reasonable interchangeability is often analyzed using the cross-elasticity of demand, which "refers to the change in the demand by consumers for one product as a result of a change in the price of another product."[65] Products are reasonably interchangeable where "consumers

61. 2023 GUIDELINES, *supra* note 52, at 5–6. HHI is a common economic measurement used in competition and antitrust law:

> HHI is a rough metric that the Agencies use to gauge concentration within a market. It is calculated by summing the squares of the market share of each firm within a given market. For example, if there are six firms in a certain market, and each possess an equal market share (16.67%), the HHI for that market would be 1667. If two of these firms were to merge, the HHI would rise to 2223. Under the approach put forth by the 2023 Guidelines, that merger would be presumptively unlawful.

Wilkie Farr & Gallagher LLP, *supra* note 42.

62. FTC v. IQVIA Holdings Inc., 710 F. Supp. 3d 329, 352 (S.D.N.Y. 2024).

63. United States v. H & R Block, Inc., 833 F. Supp. 2d 36, 50 (D.D.C. 2011).

64. Concord Assocs. v. Ent. Props. Tr., 817 F.3d 46, 52 (2d Cir. 2016) (quoting PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002) (per curiam)) (quotation marks omitted); *accord* United States v. Visa U.S.A., Inc., 163 F. Supp. 2d 322, 335 (S.D.N.Y. 2001) ("A relevant product market is composed of products that have reasonable interchangeability, in the eyes of consumers, with what the defendant sells." (quoting United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 404 (1956) (quotation marks omitted)), *aff'd*, 344 F.3d 229 (2d Cir. 2003).

65. Hayden Publ'g Co. v. Cox Broad. Corp., 730 F.2d 64, 70 n.9 (2d Cir. 1984); *see also* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

would respond to a slight increase in the price of one product by switching to another product."[66] Therefore, in determining whether products are part of the same product market, courts ask this key question: "[W]hether particular products are sufficiently close substitutes such that substitution to one could constrain any anticompetitive pricing in the other."[67]

In answering this question, courts use a combination of empirical and qualitative inquiries. The empirical approach commonly uses the hypothetical-monopolist test (HMT) as a method of evaluating a proposed market.[68] The HMT tests "whether a hypothetical monopolist acting within the proposed market would be substantially constrained from increasing prices by the ability of customers to switch to other producers."[69] Beyond the empirical test, courts "often look to 'practical indicia' of market boundaries to identify whether two products are economic substitutes and compete within the same antitrust market."[70] These indicia, known as the *Brown Shoe* factors, include "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors."[71] While both approaches have been used by courts, "there is no requirement to use any specific methodology in defining the relevant market" and "courts have determined relevant antitrust markets using, for example, only the *Brown Shoe* factors, or a combination of the *Brown Shoe* factors and the HMT."[72]

In *Tapestry*, the FTC argued that the relevant market should be defined as the "accessible luxury handbag" market.[73] According to the FTC, there are three distinct submarkets within the broader market of handbags: "mass market" (also identified using terms such as "fast fashion" or "opening price point"),[74] "accessible luxury" (also identified using terms such as

66. Regeneron Pharms., Inc. v. Novartis Pharma AG, 96 F.4th 327, 339 (2d Cir. 2024) (quoting Todd v. Exxon Corp., 275 F.3d 191, 201–02 (2d Cir. 2001)).

67. United States v. Aetna Inc., 240 F. Supp. 3d 1, 20 (D.D.C. 2017) (cleaned up) (quoting *H & R Block, Inc.*, 833 F. Supp. 2d at 54).

68. *See, e.g.*, *Regeneron*, 96 F.4th at 339; FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 167 (3d Cir. 2022); FTC v. Sanford Health, 926 F.3d 959, 963 (8th Cir. 2019).

69. United States v. Am. Express Co., 838 F.3d 179, 198 (2d Cir. 2016) (quotation marks and citations omitted), *aff'd sub nom.* Ohio v. Am. Express Co., 585 U.S. 529 (2018).

70. *Regeneron*, 96 F.4th at 339 (quoting *Brown Shoe*, 370 U.S. at 325); *accord* FTC v. Meta Platforms Inc., 654 F. Supp. 3d 892, 912 (N.D. Cal. 2023).

71. *Brown Shoe*, 370 U.S. at 325.

72. *Meta Platforms Inc.*, 654 F. Supp. at 912.

73. Plaintiff Federal Trade Commission's Post-Hearing Proposed Findings of Fact and Conclusions of Law at ¶ 41, at 82, FTC v. Tapestry, Inc., 755 F. Supp. 3d 386 (S.D.N.Y. 2024) (No. 24-cv-03109).

74. *Id.* at ¶¶ 132–134, at 36.

"affordable luxury"),[75] and "true luxury" (also identified using terms such as "luxury," "pure luxury," "pinnacle luxury," "traditional luxury," "European luxury," and "traditional European luxury").[76] The FTC argued that mass-market handbags and true-luxury handbags are not interchangeable with accessible-luxury handbags and therefore are not part of the relevant product market.[77] If the FTC's market definition were to be accepted, then Tapestry and Capri were really the only major players in this affordable luxury handbag market.

In the defendants' view, the FTC's theory of the case was "completely divorced from the marketplace realities."[78] The defendants argued that "accessible luxury is a generalized concept rather than a separate relevant market" and that the FTC's market definition is no more than "a very artificially curated selection of handbag brands" and "an exercise in gerrymandering."[79] Tapestry instead argued that all handbags should be considered together as part of a single, undifferentiated market.[80]

If the FTC's market definition is to be accepted, then Coach, Michael Kors, and Kate Spade dominate the "affordable luxury market" in the United States. However, if its definition is too narrow, then the luxury market in the United States is closer to the market illustrated in Figure 1 with a much larger number of players.[81]

75. *Id.* at ¶ 47, at 12–13.

76. *Id.* at ¶ 61, at 18, ¶ 116, at 30–31.

77. *Id.* at ¶¶ 52–55, at 85–86.

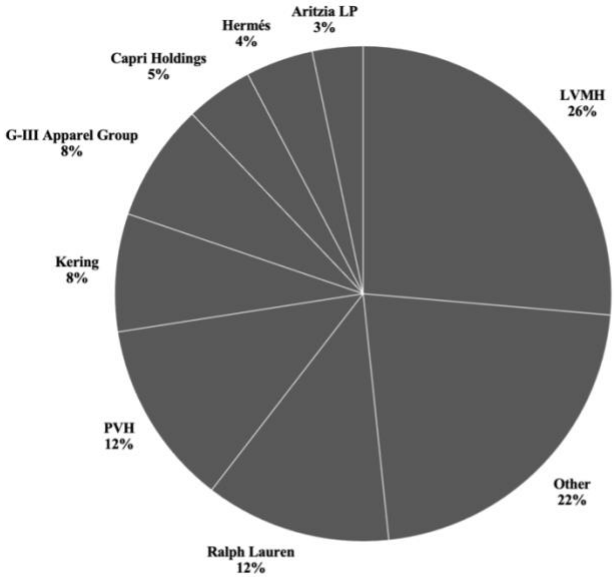
78. Defendant Tapestry, Inc. & Capri Holdings Ltd.'s Opposition to the Federal Trade Commission's Motion for Preliminary Injunction at 8, FTC v. Tapestry, Inc., 755 F. Supp. 3d 386 (S.D.N.Y. 2024) (No. 24-cv-03109) [hereinafter Tapestry, Inc. Opposition].

79. Defendant Tapestry, Inc. & Capri Holdings Ltd.'s Proposed Findings of Fact & Conclusions of Law ¶ 91 at 31–32, FTC v. Tapestry, Inc., 755 F. Supp. 3d 386 (S.D.N.Y. 2024) (No. 24-cv-03109); *Tapestry, Inc.*, 755 F. Supp. 3d at 416 (quoting Tapestry, Inc. at the motion hearing).

80. Tapestry, Inc. Opposition, *supra* note 78, at 21–26.

81. *Luxury Fashion - United States*, STATISTA (Jun. 2025), https://www.statista.com/outlook/emo/luxury-goods/luxury-fashion/united-states [https://perma.cc/8QZ6-P8JP].

FIGURE 1. LUXURY FASHION MARKET (UNITED STATES 2025)




The District Court ultimately decided that the FTC's market definition was more appropriate based on both the HMT and the *Brown Shoe* factors and decided to grant the FTC's request for a preliminary injunction on the FTC-Capri merger.[82]

### *B. Potential Harm to Consumers in the Affordable Luxury Market*

In concluding its decision to grant the preliminary injunction, the court discussed potential harm to consumers. As outlined in Section I.B.3, enforcement agencies are concerned with the anticompetitive harm from monopoly or oligopoly markets. The consolidation of a market into a monopoly or oligopoly could harm consumers in a myriad of ways,

82. Using both tests, the court determined that the proposed "affordable luxury" handbag market was the right definition. *Tapestry, Inc.*, 755 F. Supp. 3d at 439. The court then found that within the affordable luxury handbag market, the high market shares and concentration levels established a strong *prima facie* case against the defendants. *Id.* at 456. The court also found substantial qualitative evidence that the merging parties were particularly close competitors and there would be significant unilateral price effects from eliminating the head-to-head competition. *Id.* at 487. Defendants failed to rebut the *prima facie* case with evidence on entry, autonomy, or efficiencies and therefore the court granted the FTC's request for preliminary injunction. *Id.* at 485–86.

including higher costs, reduced quality, and decreased choice for consumers.[83]

While the theory of harm associated with horizontal mergers is well understood, the application to the fashion industry is a recent development. Many might not consider consumers of fashion as the deserving recipients of the FTC and DOJ's antitrust enforcement protection. Fashion is often considered a frivolity. [84] But, as the court in *Tapestry* reiterates, "Section 7 has no hierarchy of products: it applies to '*any* line of commerce.'"[85] The court suggests that downplaying the importance of handbags ignores the importance that handbags have to consumers:

> Downplaying the importance of handbags as nonessential discretionary items that consumers can simply choose not to buy if the price is too high ignores that handbags are important to many women, not only to express themselves through fashion but to aid in their daily lives - from supporting their career aspirations by transporting their work materials home or inspiring confidence in professional settings, to holding important personal items such as medications or personal hygiene products, to carrying a young child's snacks or toys. Plaintiffs often prevail in Section 7 cases involving consumer goods that are arguably less essential.[86]

If allowed to go forward, the Tapestry-Capri merger would have led to a situation where a single firm had monopoly power due to their market share in the affordable luxury handbag market. This firm, i.e., Tapestry, could have used their market power to increase prices of affordable luxury handbags that are important for women in their daily lives. Uniting all brands under the same firm might have also led to a decrease in quality-based competition between the different brands. This could have led to a reduction in handbag leather quality, craftsmanship, and even design innovation. More insidiously, Tapestry could have depreciated the quality

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83. *See supra* Section I.B.3.

84. Kate Fletcher, *Fashion Is Seen as Frivolous but It's at the Heart of Contemporary Culture*, THE GUARDIAN (Apr. 4, 2014), https://www.theguardian.com/sustainable-business/sustainable-fashion-blog/fashion-frivolous-contemporary-culture-ownership-usership [https://perma.cc/3PCD-EYWM].

85. *Tapestry*, 755 F. Supp. 3d at 496.

86. *Id.* (first citing United States v. Pabst Brewing Co., 384 U.S. 546, 552–53 (1966) (beer); then citing FTC v. Warner Commc'ns, Inc., 742 F.2d 1156, 1159 (9th Cir. 1984) (prerecorded music); then citing F. & M. Schaefer Corp. v. C. Schmidt & Sons, 597 F.2d 814, 815–16 (2d Cir. 1979) (regional beer); then citing A.G. Spalding & Bros. v. FTC, 301 F.2d 585, 628–29 (3d Cir. 1962) (sporting goods); then citing United States v. Bertelsmann SE & Co., 646 F. Supp. 3d 1, 12 (D.D.C. 2022) (anticipated top-selling books); then citing United States v. United Tote, Inc., 768 F. Supp. 1064, 1065, 1087 (D. Del. 1991) (racetrack-gambling technology); and then citing Hamilton Watch Co. v. Benrus Watch Co., 114 F. Supp. 307, 315 (D. Conn.) (jeweled watches), *aff'd*, 206 F.2d 738 (2d Cir. 1953)).

of certain brands under their control to divert sales to the other brands. Thus, the court's decision and reasoning in *Tapestry* indicated a clear desire to protect consumers from these harms in the affordable luxury handbag market with very few competitors.

## III. CAN THE LVMH DREAM STILL BE A REALITY IN THE U.S. FASHION INDUSTRY?

Clearly, U.S. courts are likely to continue scrutinizing antitrust activity in the handbag and broader fashion industry given the fact that they have identified the importance of such goods to consumers.[87] The FTC's market definition, and the *Tapestry* court's agreement with that market definition, suggests that M&A activity in the affordable luxury industry is unlikely to receive antitrust approval from regulators barring a drastic change in the market structure. Does this mean that U.S. fashion conglomerates, like Tapestry, cannot hope to re-create the success of LVMH and Inditex group in Europe? Not necessarily. First, while the court has granted the preliminary injunction in the affordable luxury market, the differentiation of markets as (1) true luxury, (2) affordable luxury, and (3) opening price point, implies an opportunity for M&A activity in the true luxury and opening price point segments. These markets are not defined by the same problematic characteristics that could lead to lessened competition in the affordable luxury market. Second, unlike Tapestry and Capri, other merging parties might have a stronger "efficiencies defense." A different set of parties might be able to justify their deal by providing unique merger specific and verifiable efficiencies that a court may accept.

### *A. Possibilities in the Opening Price Point and True Luxury Markets*

In *Tapestry*, the court accepted the FTC's argument that "within this broader market of handbags are three distinct submarkets"—opening price point, affordable luxury, and true luxury.[88] The court's acceptance of submarkets within the broader fashion market raises the question of whether there might be an opportunity for M&A activity in other segments of the fashion market. The court's decision in *Tapestry* means that M&A deals in the affordable luxury market are unlikely (unless the market and competitors change dramatically), but the decision might also mean that M&A deals in other parts of the fashion market are not precluded. In scrutinizing future M&A activity in segments of the luxury market, the FTC

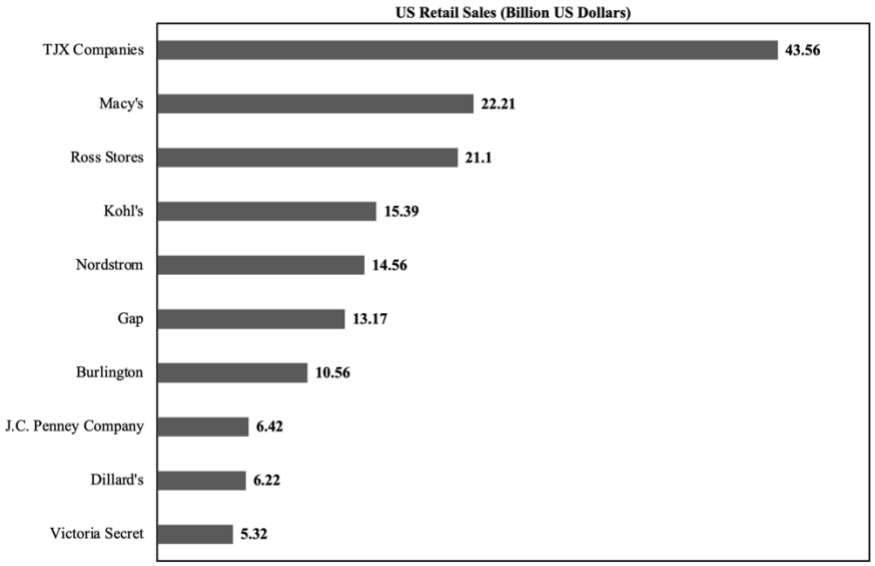
87. *See supra* Section II.B.
88. *Tapestry*, 755 F. Supp. 3d at 415.

and courts are likely to consider the market power of transacting parties and impact on consumers as they did in *Tapestry*. In this exercise, courts are likely to find that market power and consumer welfare are not at risk in the opening price point and true luxury segments of the handbag market.

*1. Opportunities for M&A Activity in the Opening Price Point Market*

The opening price point market is differentiable from the affordable luxury market because of the sheer number of competitors in the market, the low barriers to entry for new entrants, and the freedom for consumers to switch between brands. Figure 2 demonstrates the retail sales for the top ten opening price point apparel retailers in the United States.[89]

FIGURE 2: LEADING APPAREL RETAILERS BY RETAIL SALES (UNITED STATES 2024)

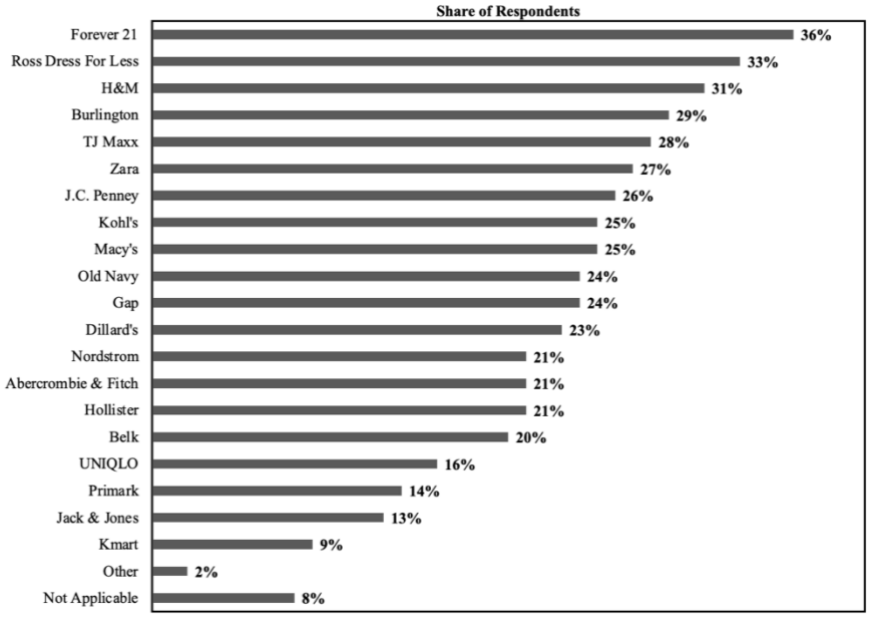



In contrast to the affordable luxury market, the opening price point segment of the fashion market has far more competitors. American mall brands, like Gap, Old Navy, Express, Urban Outfitters, and several others, compete with European opening price point brands, like H&M group, Zara,

89. *Sales of Selected Apparel Retailers in the United States in 2024*, STATISTA (July 14, 2025), https://www.statista.com/statistics/197833/2010-sales-of-apparel-retailers-in-the-us/ [https://perma.cc/QDM2-WQFE].

and Primark. A survey of Generation Z, in Figure 3, demonstrates just how stiff competition for consumers is in the opening price point market.[90]

FIGURE 3: LEADING FASHION STORES AMONG GENERATION Z BY USAGE (UNITED STATES 2024)




The opening price point fashion market is close to what economists would describe as perfectly competitive. Products in this market have a high cross price elasticity, meaning that a small change in price would cause consumers to switch from one product to a substitute product. Thus, if an opening price point fashion company raised its prices significantly, consumers would switch to another, cheaper alternative. Consumers of opening price point fashion tend not to have loyalty to brands and make their purchasing choices based on price, quality, and variety. Even mass-market giants, like H&M and Nike, reported lowered earnings "thanks to increased competition from newer upstarts."[91] In this context, a merger

90. *Leading Fashion Stores Among Generation Z Ranked by Brand Usage in the United States in 2024*, STATISTA, (Oct. 9, 2024), https://www.statista.com/forecasts/1465695/most-used-fashion-stores-among-gen-z-in-the-united-states [https://perma.cc/2ELA-8K5S].

91. Danny Parisi, *Weekend Briefing: Mass Fashion Stalwarts like Nike and H&M Face Stiff Competition*, GLOSSY (June 30, 2024), https://www.glossy.co/fashion/weekend-briefing-mass-fashion-stalwarts-like-nike-and-hm-face-stiff-competition/ [https://perma.cc/H76U-UKQH].

between two brands is unlikely to significantly increase their market power in a way that would allow the merging parties to manipulate market price. Consumers, therefore, are unlikely to suffer the harm of higher prices if two brands in the opening price point market merge. This should mean that M&A activity within this market is likely to receive approval from the FTC and DOJ.

*2. Opportunities for M&A Activity in the True Luxury Market*

The true luxury market is differentiable from the affordable luxury market because consumers in the true luxury market are unlikely to be price sensitive in the same way as consumers in the affordable luxury market. Luxury goods "represent an exception in the price-demand relationship."[92] "More precisely, luxury demand is expected to remain unchanged or rise with higher prices, and vice versa."[93] The "[e]xisting literature on the pricing of luxury goods particularly emphasizes four concepts: 1) the Veblen effect, 2) the snob effect, 3) the bandwagon effect, and 4) price signaling theory."[94]

First, the Veblen effect theory posits that for certain "Veblen" goods, price and quantity do not share the inverse relationship that they do for ordinary goods.[95] According to the theory, individuals engage in consumption of conspicuous goods and services in order to signal their wealth to peers and earn greater social status.[96] In the consumption of such goods, price can actually be a signal of prestige to peers, so consumers might be willing to pay exorbitantly higher prices for a functionally equivalent product.[97] According to this theory, a man may choose to purchase a tie from Gucci for a price ten times higher than the price of a mall brand tie, even though they are functionally the same product, simply for the prestige signal it sends to his peers. The higher the price, the greater the prestige signal. Therefore, as the price of a Veblen good increases, the quantity demanded

92. Vanessa Theiss & Laura Noll, *The Effect of Price Changes in Luxury Goods*, 39 MKTG. REV. ST. GALLEN 24, 25 (2022), https://www.econstor.eu/bitstream/10419/276173/1/MRSG_2022_1_24-31.pdf [https://perma.cc/M2VB-XUNC].

93. *Id.*

94. *Id.*

95. THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS 68–101 (Martha Banta ed., Oxford Univ. Press 2007) (1899).

96. *Id.* at 74.

97. *Id.* at 70, 96.

may increase.[98] This theory has been widely reaffirmed and even documented by economists.[99]

Second, the snob effect describes the social need for uniqueness and exclusiveness as a prevailing purchasing motive in luxury.[100] The more consumers buying a product, the less attractive that product becomes to the snob.[101] The demand among snobs increases with higher prices, as price sensitive customers are priced out, because the snob's demand for a good is inverse to the markets demand for that good.[102] Since the pandemic, European luxury brands like Chanel have sharply increased their prices, partly as an attempt to signal their exclusivity. These price hikes exclude aspirational customers while signaling to the ultra-wealthy that their brand is only attainable for an exclusive few.[103]

Third, unlike snobs, conformists purchase products to conform with others, leading to the bandwagon effect.[104] A "conformist" demands more of a product merely because others consume more of it. While the demand among "conformists" increases with accessible prices, their demand is not exclusively dependent on price but instead on market demand for a product.[105] Today, in large part due to social media, the bandwagon effect is more alive than ever. The trendiest bags and shoes are frequently viral on TikTok and Instagram, signaling to buyers what market demand for a product is and encouraging conformists to buy these luxury products despite price.[106]

Lastly, price signaling theory suggests that consumers assume a positive correlation between price and quality.[107] Studies show that consumers use

98. *Id*. at 68–101.

99. *See* Laurie Simon Bagwell and B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 AM. ECON. REV. 349 (1996) (for a deeper discussion of conspicuous consumption); John Creedy & D.J. Slottje, *Conspicuous Consumption in Australia* (Univ. of Melbourne Dep't of Econ., Research Paper No. 307, 1991) (for econometric evidence of the Veblen effect).

100. H. Leibenstein, *Bandwagon, Snob, and Veblen Effects in the Theory of Consumers' Demand*, 64 Q.J. ECON. 183, 199–202 (1950).

101. *Id.* at 199.

102. *Id.* at 200–01.

103. Mimosa Spencer, *Luxury Prices in New Spotlight as Chanel Enters New Chapter*, REUTERS (June 9, 2024), https://www.reuters.com/business/retail-consumer/luxury-prices-spotlight-chanel-enters-new-chapter-2024-06-07/ [https://perma.cc/3N29-QGWM].

104. Leibenstein, *supra* note 100, at 190–98.

105. *Id.*

106. *See, e.g.*, Jocelyn Silver, *Tiny Jacquemus Bag Memes Have Been Reborn*, W MAG. (May 28, 2019), https://www.wmagazine.com/story/jacquemus-tiny-bag-memes [https://perma.cc/CV8R-QZW9] ; @lolasaratoga, TIKTOK (Aug. 19, 2025), https://www.tiktok.com/@lolasaratoga/video/7540274369696664845 (last visited Nov. 30, 2025).

107. Devon DelVecchio & Sanjay Puligadda, *The Effects of Lower Prices on Perceptions of Brand Quality: A Choice Task Perspective*, 21 J. PROD. & BRAND MGMT. 465, 465 (2012).

price as a heuristic to evaluate quality.[108] Higher prices trigger higher quality perceptions while lower prices trigger lower quality perceptions. [109] In the luxury fashion market consumers are driven, in part, by the pursuit of high-quality materials and workmanship. Higher prices might signal higher quality to these consumers and cause an increase rather than decrease in demand.

While these are theoretical models, the theory and evidence suggest that luxury goods may not be subject to the traditional price-demand relationship of regular goods. In this context, a court might find that consolidation in the true luxury market is unlikely to harm consumers. Since consumers are not price sensitive and, in some cases, increase their demand as prices rise, the *Tapestry* theories on consumer harm do not apply.

Some commentators on the subject may go as far as to argue that protecting rich consumers is not the purpose of the antitrust laws. Consumers of luxury fashion can easily purchase non-luxury fashion to fulfill their basic needs. Their choice to subject themselves to higher-priced luxury products should arguably exclude them from the protection of antitrust regulators. However, this is not sufficient grounds to preclude wariness of consolidation in the luxury fashion industry. The antitrust laws do not discriminate between which consumers are worthy or unworthy of protection.[110] If luxury fashion consumers were harmed by consolidation in the luxury fashion industry, an injunction against the merging parties would be warranted. However, as explained in this Section, traditional theories of harm related to the price-demand relationship do not apply to luxury fashion consumers. To prove antitrust harm in this market, regulators should need to indicate other harms to consumers and competition, beyond simply higher prices.[111]

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108. *See, e.g.*, Tibor Scitovszky, *Some Consequences of the Habit of Judging Quality by Price*, 12 REV. ECON. STUD. 100 (1945); Benson P. Shapiro, *Price Reliance: Existence and Sources*, 10 J. MKTG. RSCH. 286 (1973); D.S. Tull, R.A. Boring & M.H. Gonsior, *A Note on the Relationship of Price and Imputed Quality*, 37 J. BUS. 186 (1964); Namin Kim, Moonkyu Lee & Hae Ryong Kim, *The Effect of Service Coupons on the Consumer Trade-Offs Between Price and Perceived Quality*, 14 J. PROMOTION MGMT. 59 (2008); Moonkyu Lee & Yung-Chien Lou, *Consumer Reliance on Intrinsic and Extrinsic Cues in Product Evaluations: A Conjoint Approach*, 12 J. APPLIED BUS. RSCH. 21 (1996).

109. *See supra* note 108; *see also* Kyle Bagwell & Michael H. Riordan, *High and Declining Prices Signal Product Quality*, 81 AM. ECON. REV. 224 (1991).

110. *See supra* Section II.B.

111. *See supra* Section I.B.3 & Part II.

### *B. Merger Specific and Verifiable Efficiencies*

Apart from looking to the opening price point and true luxury markets, fashion conglomerates hoping to continue dealmaking may be able to effectively use an efficiencies defense during merger litigation. Although the Supreme Court has never expressly endorsed using an efficiencies defense to a Section 7 claim,[112] "[t]he trend among lower courts [is] . . . to recognize or at least assume that evidence of efficiencies may rebut the presumption that a merger's effects will be anticompetitive . . . ."[113] Additionally, the DOJ and FTC have accepted that "merger-generated efficiencies may enhance competition by permitting two ineffective competitors to form a more effective competitor, e.g., by combining complementary assets."[114] In order to make an effective efficiencies defense, "the efficiencies must: (1) offset the anticompetitive concerns in highly concentrated markets; (2) be merger-specific (i.e., the efficiencies cannot be achieved by either party alone); (3) be verifiable, not speculative; and (4) not arise from anticompetitive reductions in output or service."[115] In *Deutsche Telekom* the court accepted an efficiencies defense, after a *prima facie* showing by the FTC that the merger was anticompetitive, because of a "variety of efficiencies that would be passed on to the consumer . . . ."[116]

In *Tapestry*, the court rejected the merging parties' cursory claims of cost savings as a potential efficiencies defense.[117] Therefore, future fashion brands hoping to merge likely need to show significant verifiable efficiencies, beyond cost savings, that could only be achieved by the two firms becoming one. While this kind of defense may seem challenging, there are several areas in which fashion brands can create efficiencies through M&A activity: improved quality, increased sustainability, and benefits to workers.

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112. FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327, 347 (3d Cir. 2016).

113. New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 207 (S.D.N.Y. 2020); *see also* 2023 GUIDELINES, *supra* note 52, at § 3.3.

114. U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 29 (2010), https://www.ftc.gov/system/files/documents/public_statements/804291/100819hmg.pdf [https://perma.cc/G9AN-D2FA].

115. FTC v. Hackensack Meridian Health, Inc., 30 F.4th 160, 176 (3d Cir. 2022) (cleaned up).

116. The court accepted the defendants' claimed efficiencies, including:

> (1) more than doubling the standalone firms' network capacity, which is projected to result in 15 times the speeds now offered by the four major MNOs to consumers; (2) saving $26 billion in network costs and another $17 billion in other operating costs; (3) increasing network coverage to strengthen competition in underserved markets; and (4) accelerating the provision of 5G service.

*Deutsche Telekom*, 439 F. Supp. 3d at 208.

117. FTC v. Tapestry, Inc., 755 F. Supp. 3d 386, 481 (S.D.N.Y. 2024).

### *1. Improved Quality*

The efficiencies accepted as a viable defense in *Deutsche Telekom* included claims that the merger would improve the quality of service for customers.[118] This should lead us to conclude that quality improvements in fashion might be an efficiencies defense for future proposed mergers. Consolidation in the fashion industry could improve the quality of products if fashion brands under a conglomerate are able to learn from each other and produce higher quality products for the same price. Higher quality might include better materials or craftsmanship for fashion items. It might also include better brick-and-mortar store networks to reach more consumers or enhanced e-commerce capabilities to increase consumer convenience. These are all quality improvements in line with those accepted as a viable defense in *Deutsche Telekom*. One could plausibly envision that a future fashion industry merger might be able to enhance product and service quality in a manner that would be merger-specific and unachievable by each fashion company alone.

An increase in quality might be an especially effective defense given concerns with generally declining quality in the fashion industry.[119] Even the fates of fashion brands in Europe, post-acquisition by LVMH, indicate declining quality that harms consumers. Reductions in quality have become a common complaint according to consumers of European luxury fashion.[120] If American brands hoping to get regulatory approval for their deal can demonstrate that the quality of their brands would in fact improve post-deal, rather than decline, this might encourage regulators and courts to accept an efficiencies defense.

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118. *See supra* note 116 and accompanying text. Quality improvements including higher speeds, network coverage, and accelerated provision of 5G service were accepted as an efficiencies defense. *Deutsche Telekom*, 439 F. Supp. at 208.

119. *See, e.g.*, Jing Feng, *New Clothes Feel Cheap? They Really Don't Make Them Like They Used To*, NBC NEWS (Feb. 2, 2025), https://www.nbcnews.com/business/consumer/major-clothing-brands-cut-corners-quality-limit-price-hikes-rcna190850 [https://perma.cc/8XGX-KN93]; Maliha Shoaib, *'Luxury No Longer Means Quality': Consumers Weigh in on the Slowdown*, VOGUE BUS. (Jan. 13, 2025), https://www.voguebusiness.com/story/companies/luxury-no-longer-means-quality-consumers-weigh-in-on-the-slowdown-survey [https://perma.cc/632B-XVC7].

120. *See* Paul Dutz, *LVMH: High-Quality Compounding Surpasses Poor Sentiment*, SEEKING ALPHA (Jan. 29, 2024), https://seekingalpha.com/article/4665802-lvmh-high-quality-compounding-surpasses-poor-sentiment [https://perma.cc/ZPJ2-4ZFH]; u/eventualguide0, *LVMH Bought a Majority Share in Polène*, REDDIT: R/HANDBAGS (Aug. 30, 2024), https://www.reddit.com/r/handbags/comments/1f4u7cc/lvmh_bought_a_majority _share_in_pol%C3%A8ne/ [https://perma.cc/6ME7-6BMT].

*2. Increased Sustainability*

Beyond a standard quality improvement efficiencies defense, increased sustainability may be an effective efficiencies defense. Consolidation in the fashion industry could potentially create the synergies and economies of scale necessary to increase sustainability.[121] On the demand side, there has been an increase in customers wanting to align their fashion purchases with the sustainability goals. This has fueled the popularity of brands like Patagonia, Pangaia, Allbirds, Veja, Lush, and Pela that were built "based on environmental activism, fair trade practices, and the use of recycled and organic materials in their products."[122] On the supply side, there is a strong business rationale for increasing sustainability: One study indicates that "sustainability factors in Mergers and Acquisitions are significantly correlated with long-term performance" with "evident improvements of financial ratios in the long run."[123] Furthermore, "after the completion of Mergers and Acquisitions deals, [there was an] improvement in terms of Environmental, Social and Governance scores for companies involved in the deal."[124]

Parties to an M&A deal can increase sustainability by learning from each other's sustainability practices, capitalizing on sustainability in their supply chains, and achieving the economies of scale necessary to practice sustainability to a much greater extent. According to an industry analyst, "introducing sustainable and responsible practices to the environment and society costs money and effort. Hence, larger scale and higher efficiency from M&A activity such as Tapestry's acquisition of Capri provides a useful platform to up the ante on ESG."[125]

The challenge with this defense, however, is that antitrust law currently does not prioritize sustainability considerations. Instead, collaboration around sustainability goals can often be considered a violation of antitrust

121. Rachel Cernansky, *Can a Fashion Mega-Merger Drive Progress on Sustainability?*, VOGUE BUS. (Aug. 17, 2023), https://www.voguebusiness.com/sustainability/can-a-fashion-mega-merger-drive-progress-on-sustainability [https://perma.cc/562S-77AK].

122. Isabel Neiva, Javier Carinena, Konstantin Lyakhov, Sebastiao Fernandes, & Hamza Saad, *Introduction to Green M&A: Pioneering Sustainability in Business Strategy*, KEARNEY (Sept. 27, 2024), https://www.middle-east.kearney.com/service/mergers-acquisitions/article/introduction-to-green-m-a-pioneering-sustainability-in-business-strategy [https://perma.cc/38FU-3ABD].

123. Stefano Caiazza, Giuseppe Galloppo & Viktoriia Paimanova, *The Role of Sustainability Performance After Merger and Acquisition Deals in Short and Long-Term*, 314 J. CLEANER PROD., Sept. 2021, art. no. 127982, at 1.

124. *Id.*

125. Cernansky, *supra* note 121.

law.[126] A survey suggests "that some 60% of businesses had shied away from cooperation with competitors for fear of competition law."[127] In May 2022, the European Commission, the European Union's antitrust authority, even raided fashion houses who were believed to have been collaborating on sustainability progress under the suspicion that there might have been collusion with respect to prices.[128] While this may seem to preclude a sustainability-related efficiencies defense, the key would be to demonstrate efficiencies that could increase the sustainability of the post-merger entity without increasing prices for consumers.

Beyond this, the attitude toward sustainability concerns is shifting. In a survey, 65% of consumers "said they want to buy purpose-driven brands that advocate sustainability" (but only about 26% of consumers actually purchased such brands).[129] For many consumers, the barrier between preferences and purchases is affordability. This is where the efficiencies of a merger may allow fashion companies to increase sustainability through economies of scale rather than price increases. If parties can point to how sustainability practices could be effectively increased or strengthened and cannot be done so in the absence of the merger, an efficiencies defense is likely to be successful.

*3. Benefits to Workers*

An unconventional, but still potentially acceptable, efficiencies defense might come in the form of efficiency gains that benefit workers in the merging companies. This might be a timely defense, given that President Biden's FTC and DOJ had become increasingly interested in how the enforcement of antitrust law can be used to protect the rights of workers.[130] Additionally, emerging scholarship is urging enforcers to re-examine employer power in labor markets when determining anticompetitive

126. Matteo Gasparini, Knut Haanaes & Peter Tufano, *When Climate Collaboration Is Treated as an Antitrust Violation*, HARV. BUS. REV. (Oct. 17, 2022), https://hbr.org/2022/10/when-climate-collaboration-is-treated-as-an-antitrust-violation [https://perma.cc/ML4Z-JDM3].

127. Simon Holmes, *Climate Change and Competition Law*, OECD (Dec. 1, 2020), https://one.oecd.org/document/DAF/COMP/WD(2020)94/en/pdf [https://perma.cc/8SEE-RZYJ].

128. Elizabeth Paton, Ephrat Livni & Jenny Gross, *When Does Collaboration Become Collusion?*, N.Y. TIMES (Nov. 13, 2022), https://www.nytimes.com/2022/11/07/fashion/fashion-industry-antitrust-sustainability.html [https://perma.cc/5GUN-98QZ].

129. Katherine White, David J. Hardisty & Rishad Habib, *The Elusive Green Consumer*, HARV. BUS. REV., July–Aug. 2019, https://hbr.org/2019/07/the-elusive-green-consumer [https://perma.cc/C2VV-RJ2Y].

130. *See, e.g.*, Press Release, U.S. Dep't of Just., Departments of Justice and Labor Strengthen Partnership to Protect Workers (Mar. 10, 2022), https://www.justice.gov/archives/opa/pr/departments-justice-and-labor-strengthen-partnership-protect-workers [https://perma.cc/2LKL-UE9G].

effects.[131] This includes doing away with traditional assumptions about how markets function and taking a multi-disciplinary, social sciences approach to understanding antitrust impacts on labor.[132] Given the growing concern for labor in the antitrust equation, an efficiencies defense citing improvements for workers might be appealing to a court.

The challenge with an efficiencies defense involving benefits to workers is that it flies in the face of normally expected outcomes when firms merge to increase efficiency. "Efficiency often comes from the consolidation of the operations of two companies that merged. Two accounting departments become one; two production lines become one. . . . [T]hey lay off thousands of workers."[133] Estimates suggest that "at least 100,000 workers lost their jobs this century as a result of mergers."[134] These job losses are driven by the consolidation of non-revenue generating roles (Human Resources, Information Technology, Marketing, etc.), optimization of production processes, and offshoring and outsourcing.[135]

Given this data, it's hard to imagine how a merger in the fashion industry might benefit workers. However, benefits to workers have been used as a procompetitive justification for joint ventures before. In 1983, General Motors (GM), the leading American automobile manufacturer with a 44% market share (based on one of the FTC's market share calculations), entered into a joint venture with Toyota, Japan's top automaker and the second-largest seller of subcompacts in North America.[136] Car assembly would take place at a former GM plant in Fremont, California, managed by Japanese executives appointed by Toyota, and operated primarily by American workers.[137] GM justified the partnership by emphasizing its need to learn Toyota's highly efficient manufacturing and management techniques, considering Toyota the most valuable source for this expertise.[138] At the time the Fremont manufacturing plant was considered "one of, if not the worst-run plants in the country."[139] Infamous incidents about workers "drinking, doing drugs, gambling, and even having sex while on the job" were widely

131. *See, e.g.*, Hiba Hafiz, *Towards a Progressive Labor Antitrust*, 125 COLUM. L. REV. 319 (2025).

132. *Id.* at 319–20.

133. JOHN N. DROBAK, RETHINKING MARKET REGULATION: HELPING LABOR BY OVERCOMING ECONOMIC MYTHS 46 (2021).

134. *Id.* at 48. For a detailed discussion of job loss in the United States caused by mergers, see *id.* at 46–48.

135. *Id.*

136. *In re* General Motors Corp., 103 F.T.C. 374, 375 (1984).

137. *Id.* at 376–77.

138. *Id.* at 388.

139. Anthony Capretto, *The Rise and Fall of the Toyota and General Motors Joint-Venture*, CAR BUZZ (Oct. 28, 2024), https://carbuzz.com/rise-and-fall-toyota-general-motors-joint-venture/ [https://perma.cc/JB42-GVQW].

known and "[w]orkers would routinely not show up for their shifts, leading to entire lines being idle, and allegedly forcing managers to have to travel to local bars in hopes of finding workers."[140] The FTC thought that this venture would "increase the efficiency of General Motors, which efficiency, the Commission thought, would be passed on to the rest of the U.S. industry and make the U.S. industry more competitive"[141] and allowed the parties to proceed.[142] Over the course of the partnership, "hundreds of workers were sent overseas to Japan to learn the production techniques first-hand" and these procompetitive benefits were realized to a large extent.[143]

If merging parties can show that their consolidation could lead to such merger-specific benefits for workers, then perhaps the FTC and DOJ would be willing to allow these M&A deals to go forward. In the opening price point segment of the fashion industry, parties that could show their merger would prevent the outsourcing and offshoring of U.S. fashion manufacturing might be able to use such a defense. They could argue that, by merging, workers might be able to learn efficient production processes that would keep costs low and prevent the loss of jobs to low-cost manufacturers overseas—a massive concern in the mass-market U.S. fashion industry.[144] In the affordable luxury and true luxury market, merging parties might be able to show that their consolidation would lead to skill improvements for workers and artisans who often fully or partially handcraft the products. This would, arguably, help American luxury fashion workers stay competitive with European luxury fashion workers.[145] If efficiencies that benefit workers are acceptable as a procompetitive justification for joint ventures, courts could be persuaded to also accept them as an efficiencies defense for mergers in concentrated markets, as long as they are merger-specific, verifiable, and do not arise from anticompetitive reductions in output or service.

140. *Id.*

141. 2 CORP. ACQUISITIONS & MERGERS § 21.11 (2022).

142. *See In re* General Motors Corp., 103 F.T.C. 374 (1984).

143. Capretto, *supra* note 139.

144. Jordan Weissmann, *Fashionomics: How America Shed Her Clothes (Factories)*, THE ATLANTIC (June 22, 2012), https://www.theatlantic.com/business/archive/2012/06/fashionomics-how-america-shed-her-clothes-factories/258876/ [https://perma.cc/3X4W-8FHR] (demonstrating the magnitude of job loss in the U.S. clothing manufacturing industry that parties could attempt to solve for through a merger).

145. *See Fashion and High-End Industries in the EU*, EUR. COMM'N, https://single-market-economy.ec.europa.eu/sectors/textiles-ecosystem/fashion-and-high-end-industries/fashion-and-high-end-industries-eu_en [https://perma.cc/LEE4-Q7VJ].

## CONCLUSION

The FTC's challenge to Tapestry's acquisition of Capri marks a significant moment in antitrust enforcement within the fashion industry. By defining a distinct "affordable luxury" market and recognizing the potential consumer harm from consolidation, the court's decision signals heightened scrutiny for future M&A activity in this sector. However, this does not mean that dealmaking is entirely out of fashion. The court's recognition of separate markets—opening price point, affordable luxury, and true luxury—creates opportunities for consolidation in segments where competition is more robust, and consumer harm is less likely.

Furthermore, the rejection of Tapestry's efficiencies defense underscores the importance of proving verifiable, merger-specific benefits. Future M&A activity in the fashion industry may succeed if parties can demonstrate genuine efficiencies, such as improved quality, increased sustainability, or benefits to workers, that cannot be achieved without the merger.

Ultimately, while the dream of building an American LVMH-style fashion conglomerate may face regulatory roadblocks in the affordable luxury space, opportunities for strategic acquisitions remain. The evolution of U.S. antitrust enforcement in fashion will continue to shape the industry, requiring dealmakers to be more innovative, strategic, and prepared in justifying the benefits of their transactions.

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