



EUROPEAN COMMISSION
DG Competition

Case M.10564 – APOLLO / MISSGUIDED

Only the English text is available and authentic.

**REGULATION (EC) No 139/2004
MERGER PROCEDURE**

Article 7(3)
Date: 17/12/2021



EUROPEAN COMMISSION

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PUBLIC VERSION

In the published version of this decision, some information has been omitted pursuant to Article 17(2) of Council Regulation (EC) No 139/2004 concerning non-disclosure of business secrets and other confidential information. The omissions are shown thus [...]. Where possible the information omitted has been replaced by ranges of figures or a general description.

Apollo Management, L.P.
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Rajib (Danny) Passi
[...]

Subject : **Case M.10564 – APOLLO / MISSGUIDED**
Commission decision pursuant to Article 7(3) of Council Regulation
N° 139/2004¹ and Article 57 of the Agreement on the European Economic
Area²
Request for derogation

Dear Sir or Madam,

- (1) We refer to your application submitted on 16 December 2021 pursuant to Article 7(3) of Council Regulation (EC) No 139/2004 (the ‘Merger Regulation’) for a derogation from the suspension obligation provided for in Article 7(1) of the Merger Regulation with regard to a concentration, which would result from a proposed transaction by which Alteri Investments II SC (‘Alteri’, Luxembourg), an affiliate of Apollo Management, L.P. (Apollo Management, L.P., its affiliates, and

¹ OJ L 24, 29.1.2004, p. 1 (the ‘Merger Regulation’). With effect from 1 December 2009, the Treaty on the Functioning of the European Union (‘TFEU’) has introduced certain changes, such as the replacement of ‘Community’ by ‘Union’ and ‘common market’ by ‘internal market’. The terminology of the TFEU will be used throughout this decision.

² OJ L 1, 3.1.1994, p.3 (the ‘EEA Agreement’).

funds managed by its affiliates are referred to together hereinafter as ‘Apollo’) and Mr. Rajib Passi (‘Mr. Passi’) intend to acquire joint control over Missguided Limited (‘Missguided’, United Kingdom) by way of purchase of shares within the meaning of Article 3(1)(b) and Article 3(4) of the Merger Regulation (‘the Transaction’). In this Decision, Apollo, Mr. Passi, and Missguided are referred together as ‘the Parties’. Missguided is also referred to as ‘the Target’.

1. THE PARTIES AND THE TRANSACTION

- (2) Missguided is a UK-based online retailer (e-commerce) active worldwide. It is active in both the retail and wholesale supply of clothing, apparel, footwear, and ‘health and beauty’ products. Missguided is currently solely controlled by Mr. Passi, who owns 100% of Missguided through R Holding Company Limited (‘R Holding’, British Virgin Islands) and Nakai Investments Ltd.
- (3) Alteri is a subsidiary of Apollo. Apollo manages investments in companies worldwide that are active in a variety of sectors, including oil and gas, retail, and information technology. It also controls Walz Group and CBR Group, which are inter alia active in the design, wholesale and retail of women’s apparel.
- (4) Mr. Passi also controls By Design LLC, which is a purely US wholesale clothing fashion group with no sales in the EEA. Mr. Passi therefore already controls at least one other undertaking within the meaning of Art. 3(1)(b).
- (5) Under a term sheet entered into between Alteri and Missguided on 30 October 2021, and as amended on 30 November 2021, Alteri [Details of the transaction] in exchange of an equity participation of 50% in a vehicle entity (‘Topco’, Luxembourg) which will hold all the shares of Missguided. Mr. Passi will have an indirect shareholding of 50% in Topco and co-controlling rights over strategic decisions of Missguided. Moreover, the Parties explain that pursuant to a shareholder agreement that is to be negotiated, Alteri will have a casting vote on all matters of Topco, and thus ultimately of Missguided, except for the approval of certain strategic matters that will require joint approval by Alteri and Mr. Passi. Such strategic matters include, most importantly, the approval of budget and business plan and annual capital expenditures of more than £[...], as already set out in the Term Sheet. The Parties confirm that there is no agreed dispute mechanism in place and expect to resolve any issues via negotiation between them. As a result of the Transaction, Missguided’s structure of control will change from a situation of sole control exercised by Mr. Passi to a situation of joint control exercised indirectly by Apollo and Mr. Passi.
- (6) Missguided will continue to perform on a lasting basis all the functions of an autonomous economic entity pursuant to Art. 3(4) of the Merger Regulation. The Transaction would provide it with sufficient resources to continue to operate independently on the market. Furthermore, it would continue to exercise its economic activities beyond one specific function for its parents. In addition, Missguided’s parents do not have a strong presence in any upstream or downstream markets and Missguided would not rely to a significant extent on sales to or purchases from its parents. The Parties emphasize in this regard that the Transaction

would not create any incentive to foster supplier/customer relationships between the companies as they have different customer bases and different business models.³

- (7) In light of the above, the Transaction would result in a concentration within the meaning of Article 3(1)(b) and Article 3(4) of the Merger Regulation.

2. UNION DIMENSION

- (8) The concentration does not have a Union dimension within the meaning of Article 1(2) of the Merger Regulation because the Target's EU-wide turnover is below EUR 250 million. Moreover, the concentration also does not have a Union dimension within the meaning of Article 1(3) of the Merger Regulation because the Target does not achieve more than EUR 25 million turnover in at least three Member States.
- (9) On 24 November 2021, by way of a reasoned submission under Article 4(5) of the Merger Regulation, the Parties requested that the Commission examine the Transaction on the ground that it was capable of being reviewed under the national competition laws of at least three Member States, specifically Cyprus, Germany, Ireland, and Poland. The Commission transmitted the submission to all Member States on the same date. None of the Member States competent to examine the concentration expressed their disagreement to the request for referral within 15 working days.
- (10) As a result, the concentration has been referred to the Commission pursuant to Article 4(5) of the Merger Regulation and is deemed to have a Union dimension.

3. THE APPLICATION FOR DEROGATION

- (11) The Parties submit that Missguided is in serious financial distress, with critical operational difficulties and the risk of resulting insolvency ensuing for the following reasons.
- (12) First, according to the Parties, Missguided's serious financial distress is reflected in a significant recent funding shortfall. Notably, Missguided is currently funded through a GBP [...] overdraft facility provided by a commercial bank and by delaying supplier payments. Overdue supplier payments stand at approximately GBP [...]. Overall, Missguided achieved a negative EBITDA of [...] % in financial year 2020/2021 and expects a negative EBITDA of [...] % in 2021/2022. The Parties also submit that Missguided recently initiated talks with crisis experts [Details about financial situation]. In particular, Missguided was seeking GBP [...] in emergency funding from outside investors.
- (13) Second, the indirect impacts of the COVID-19 pandemic on Missguided have, on balance, been unfavorable to Missguided's financial situation. On the one hand, the e-commerce retail sector maintained growth rates in line with or slightly above pre-pandemic period levels. However, Missguided underperformed the market, particularly due to its reliance on so-called 'going out' or 'vacation' fashion items,

³ Application pursuant to Article 7(3) of the Merger Regulation, paragraph 51.

i.e., fashion items commonly used in party and nightlife settings which were restricted or closed entirely amid restrictions related to the COVID-19 pandemic. On the other hand, Missguided's activities as a wholesaler were negatively impacted by supply chain delays, higher air and sea freight costs and new customs clearance requirements and delays related to the UK's exit from the EU and its ongoing consequences.

- (14) Against this background, the Parties submit that Missguided is currently facing difficulties to update its stockholding due to the refusal of suppliers to provide stock pending the repayment of debt due. Missguided estimates that [...]% of its suppliers, covering [...]% of its stock buy, are currently on hold and refusing to provide goods pending repayment of debt due. The Parties submit that without the means to address outstanding overdue creditor positions, the business will likely struggle to secure stock deliveries, which in turn is likely to lead to an insolvency.
- (15) The Parties submit that, absent the Transaction, Missguided would not have sufficient funds to repay current bank facilities. They argue that the transfer of funds as a result of the Transaction already in December 2021 is critical to ensure the continued flow of stock to Missguided (especially in view of the end-of-year season) and to prevent the withdrawal of bank facilities. Notably, [Details about financial situation]. The Parties submit that if the Transaction could be implemented in December 2021, Missguided would be able to avoid a formal insolvency process because of a positive cash flow balance.

4. THE CONDITIONS FOR DEROGATION PURSUANT TO ARTICLE 7(3) OF THE MERGER REGULATION

- (16) Pursuant to Article 7(1) of the Merger Regulation, a concentration falling under that Regulation shall not be implemented either before its notification or until it has been declared compatible with the common market. Pursuant to Article 7(3) of the Merger Regulation, the Commission may, on the basis of a reasoned request, grant a derogation from the obligation imposed by Article 7(1).
- (17) Derogation from the obligation to suspend concentrations is granted only exceptionally, normally in circumstances where the suspension required under the Merger Regulation would cause serious damage to the undertakings concerned by a concentration, or to a third party.
- (18) Article 7(3) of the Merger Regulation provides that in deciding upon the request, the Commission must take into account, inter alia, the effects of the suspension on one or more undertakings concerned by the concentration or on a third party and the threat to competition posed by the concentration.

4.1. The Transaction falls under the suspension obligation pursuant to Article 7(1) of the Merger Regulation

- (19) Given that the Transaction is to be examined by the Commission pursuant to Article 4(5) of the Merger Regulation, it falls under the suspension obligation laid down in Article 7(1) of the Merger Regulation.

4.2. The effects of the suspension on the undertakings concerned and third parties

- (20) According to the information provided by the Parties, which appears a priori plausible, the derogation is required to avoid significant negative financial effects to Missguided and to third parties.
- (21) As an initial matter, as noted, the background to Missguided's financial distress includes the distinctive indirect impact of the COVID-19 pandemic on Missguided, the company's persistent financial difficulties over the last several years, and the failure of Missguided to find alternative sources of funding to avert a possible near-term insolvency. As to the effect of the suspension on Missguided, the Parties' submissions make a credible case that any delay in Missguided's access to Apollo's proposed rescue financing would lead the company to face significant difficulties in maintaining supplies through the winter season due to the refusal of certain suppliers to provide goods pending the repayment of debt due. This eventuality would likely result in lower sales, compounding the existing operational difficulties and therefore the overall financial distress faced by Missguided. Indeed, on balance, it appears that any delay in securing Apollo's rescue financing could cause significant negative financial effects on Missguided and its ability to continue as a going concern.
- (22) As to the effect of the suspension on third parties, the Parties submissions indicate that it would likely affect suppliers, creditors, workers, and customers. As a suspension would prevent Missguided from rapidly resuming supply, the impact of falling revenues and cash flow would negatively affect suppliers of goods and of marketing, fulfilment and distribution services. A possible insolvency would further risk losses among creditors, including but not limited to suppliers in respect of any debt due. Should Missguided cease operations or become insolvent, 400 members of its head office staff would be at risk of losing their jobs. Moreover, this scenario would also negatively affect the ca. 1000 employees of the third party fulfilment centre used by the business. Finally, losses to customers could arise in this worst-case situation, in particular through the cancellation of refunds.
- (23) Moreover, it appears that a derogation from the suspension obligation would also not have adverse effects on any third party, according to the information submitted by the Parties. In this regard, the Parties have provided information about the process undertaken to identify a potential purchaser for the businesses of Missguided in the past, which failed.⁴ Therefore, granting the derogation to the Parties would not give rise to concerns involving the interests of third parties.
- (24) In light of the above, the Commission considers that the circumstances invoked in support of a derogation from the suspension obligation are exceptional in this case. Missguided appears to be in serious financial distress. If Missguided were to fail to obtain rescue financing from Apollo this year, the company may be unable to replenish its stock and operate in the relevant retail or wholesale markets. This could further endanger the financial viability of the business and potentially harm third parties, such as workers, creditors, suppliers, and customers. The delay in the implementation of the Transaction due to the standstill obligation imposed by the Merger Regulation may cause these disruptions to materialize.

⁴ Application pursuant to Article 7(3) of the Merger Regulation, paragraphs 18 and 21.

- (25) Against this background, it is possible to conclude that the suspension obligation imposed by Article 7(1) of the Merger Regulation could lead to serious harm to Missguided and potentially also to the company's workers, creditors, suppliers, and customers. Furthermore, on the basis of the information submitted by the Parties, a derogation from the standstill obligation would likely also not have adverse effects on any third party.

4.3. The threat to competition posed by the concentration

- (26) The Parties to the Transaction are active in the wholesale and retail of non-food products, in particular in (i) clothing and footwear, (ii) beauty products, and (iii) health products.
- (27) Missguided is a UK-based online retailer (e-commerce) targeting mainly young female customers. Missguided is active through Missguided's own brand, collaboration with other brands and the recently launched menswear brand e-commerce called Mennace.
- (28) Apollo controls two companies whose activities give rise to horizontal overlaps and potential vertical relationships with those of Missguided.
- (a) Walz Group is active in the market of mail order, internet and brick-and-mortar retail for baby care products, games and toys and other consumer goods. It also sells a limited selection of women's apparel through its businesses Die Moderne Hausfrau, Walz Vital and Baby Walz (the latter only relates to maternity clothing). In addition, Walz Group is also active in the wholesale market of the same products.
- (b) CBR Group is active in the design, wholesale and retail of women's apparel. CBR Group is active through the brands Street One and CECIL. CBR is active in distance selling and brick-and-mortar (to a limited extent). The range of products that CBR offers through its brick-and-mortar shops is not broader than the one available through CBR's distance selling channel.
- (29) For the reasons set out below and on the basis of the information submitted by the Parties, neither the very limited horizontal overlaps, nor any potential vertical relationships seem to raise, *prima facie*, any competition concern.

4.3.1. Horizontal overlaps

- (30) The horizontal overlaps arising from the Transaction are the following:
- (a) Non-food retail of clothing and footwear products for distance selling in Austria, Belgium, France, Germany and the Netherlands. The Parties' activities overlap in the following potential sub-segments:
- Women's apparel in Austria, Belgium, France, Germany and the Netherlands;
 - Children's apparel in Austria and Germany;
 - Underwear/intimate apparel in Austria and Germany;
- (b) Non-food retail of clothing and footwear products for beauty and health products for distance selling in Austria, Belgium, France, Germany and the

Netherlands. The Parties' activities overlap in the following potential sub-segments:

- Mass lip products in Belgium, France, Germany and the Netherlands,
 - Mass face products in Austria, Belgium, France, Germany and the Netherlands; and
 - Mass eye products in France, Germany and the Netherlands.
- (c) Non-food wholesale of clothing and footwear products in Austria, Germany, Italy and Sweden. The Parties' wholesale activities overlap only in relation to the potential sub-segments of women's apparel in Austria, Germany, Italy and Sweden.

(31) As explained below, based on the information available at this stage, none of the horizontal overlaps would lead to an affected market since the Parties' combined market shares would be below 20%

4.3.1.1. Non-food retail markets

(32) The Parties' activities overlap in the retail market for non-food products, which, according to the Commission's past practice, can be subdivided according to (i) sales channels and (ii) product categories.

(A) Sales channels

(33) Within the non-food retail segment the Commission has held in previous decisions that all home-shopping channels, in particular home-shopping by internet and home-shopping by catalogue, form part of the same relevant market.⁵ The Commission has left open whether distance selling (home-shopping by internet and catalogue) and brick-and-mortar retail form distinct product markets.⁶

(34) While Missguided is active only in the e-commerce sector (as regards non-food retail products), Apollo is active online but also in the segment of mail order and brick-and-mortar retail. Therefore, the *prima facie* competitive analysis focuses on the narrowest possible segmentation that would give rise to an overlap, which is the online non-food retail segment.

(B) Product categories

(35) The Parties' activities only overlap in the retail markets for (i) clothing and footwear and (ii) health and beauty. The Commission assessed previously that clothing could be distinguished from footwear and be possibly further discerned into women's, men's and children's apparel and underwear.⁷ In relation to health and beauty products, the Commission previously analysed potential narrower product categories within fragrances, colour cosmetics, deodorants and shower gels.⁸

⁵ COMP/M.5721 - OTTO / PRIMONDO ASSETS, 16 February 2010, paragraphs 20-22.

⁶ COMP/M.5721 - OTTO / PRIMONDO ASSETS, 16 February 2010, paragraphs 23-29.

⁷ COMP/M.5721 - OTTO / PRIMONDO ASSETS, 16 February 2010, paragraph 19.

⁸ COMP/M.7726 - COTY / PROCTER & GAMBLE BEAUTY BUSINESS, 16 February 2016, paragraphs 24-81.

(C) Geographic market

- (36) The Commission previously found that the geographic market for non-food retail home-shopping, regardless of sub-segmentation, is national in scope.⁹

(D) *Prima facie* assessment for clothing and footwear

- (37) The main overlap between the Parties' activities is in relation to the women's apparel online retail segment in Austria, Belgium, Germany, France, and the Netherlands. The Parties submit that their combined market share would be below 5% in any potentially relevant product and geographic market for clothing and footwear, including for the potential sub-segments (i) women's apparel, (ii) children's apparel, (iii) underwear/intimate apparel.
- (38) The Parties submit that the online retail market is highly competitive and fragmented with a number of retailers with higher market shares than the Parties' combined share.
- (39) In addition, the information submitted by the Parties seems to indicate that they do not compete closely. The Parties submit that Misguided and CBR target customers belonging to different age groups. Misguided addresses customers that are fashion-conscious 16–30-year-old females while CBR targets a wider age group (women between 25 and 50 years old) with a focus on modern fashion and proven trends. Walz Group sells a limited selection of women's apparel and maternity clothes that Misguided and CBR do not offer. According to the Parties, Misguided's main competitors are other e-commerce fashion retailers, such as [Confidential competitors] whereas the main competitors of Baby-Walz are BabyOne Franchise- und Systemzentrale GmbH, babymarkt.de GmbH, myToys.de GmbH, Weltbild, Bader and Klingel. From CBR Group's perspective, its main competitors are Espirit, s.Oliver, Tom Tailor and the Bestseller Group.

(E) *Prima facie* assessment for health and beauty

- (40) The Parties' activities overlap to a very limited extent in relation to health and beauty retail in the EEA. The Parties submit that their activities in the segment are minimal, with a combined market share of below 5% in any potentially relevant product and geographic market, including for the potential sub-segments (i) mass lip products, (ii) mass face products, (iii) mass eye products.

4.3.1.2. Non-food wholesale markets

- (41) The Parties' activities overlap to a very limited extent in the wholesale of women's apparel. The Commission has not adopted a definite market definition with respect to the scope of the relevant product market(s) for the wholesale of clothing and footwear, but analysed product categories.¹⁰ The Commission has in previous decisions considered the geographic market to be national in scope, but left the exact geographic delineation open.¹¹

⁹ COMP/M.5721 - OTTO / PRIMONDO ASSETS, 16 February 2010, paragraph 32.

¹⁰ COMP/M.6726 - AAEC / RABO INVESTMENTS / VECELIA / HVEG, 28 November 2012, paragraph 14.

¹¹ COMP/M.8710 – JD / SONAE MC / BALAIKO / JDSH / SPORT ZONE, 17 January 2018, paragraph 44.

- (42) The Parties submit that the combined market share of the Parties would be below 5% in any potentially relevant product and geographic market, including for the potential sub-segment of women's apparel.

4.3.1.3. Conclusion

- (43) On the basis of the information provided by the Parties, it can be provisionally concluded for the purpose of this Decision that the Transaction would *prima facie* not raise any competition concern as regards horizontal overlaps, in particular in view of the very low combined market shares of the Parties.

4.3.2. Vertical relationships

- (44) The Parties submit that there is no actual vertical relationship among their activities. Considering that the Parties are active in the wholesale and retail non-food segments, the Transaction would lead to potential vertical relationships. However, the Parties submit that there are no vertically affected markets.
- (45) Considering the marginal market shares of the Parties in any upstream or downstream market (see Section 4.3.1), it can be provisionally concluded for the purpose of this Decision that the Transaction would *prima facie* not raise any potential concerns related to vertical effects.

4.3.3. Conclusion

- (46) Therefore, on the basis of the information provided by the Parties, it appears *prima facie* that the Transaction is not likely to pose a threat to competition within the EEA, both with respect to horizontal and vertical relationships.

4.4. Balance of interests

- (47) Based on the above, it appears that while maintaining the suspension obligation could seriously affect the financial situation of Missguided and potentially of third parties, leading Missguided to face significant difficulties in maintaining supplies through the winter season and risking to run out of liquidity, no threat to competition caused by the Transaction can currently be identified, and a derogation does not appear to have adverse effects on one or more of the Parties or on any third party. Therefore, the Commission finds that a derogation can be granted in accordance with the application and to the extent specified below.

5. CONCLUSION

- (48) The Commission considers that the reasons given by the Parties for a derogation from the suspension obligation meet the requirements set out in Article 7(3) of the Merger Regulation.

- (49) On the basis of the above considerations, and in accordance with Article 7(3) of the Merger Regulation and Article 57 of the EEA Agreement, Apollo and Mr. Rajib Passi are granted a derogation from the obligations imposed by Article 7(1) of the Merger Regulation in accordance with their application and until the Commission takes a final decision under the relevant provisions of the Merger Regulation.

For the Commission

(Signed)

*Margrethe VESTAGER
Executive Vice-President*