

The Food Delivery Services Case: Antitrust Risk of Minority Shareholdings

EU Competition Law Briefing

CASE AT.40795 – FOOD DELIVERY SERVICES



Source: Commission press release,
https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1356

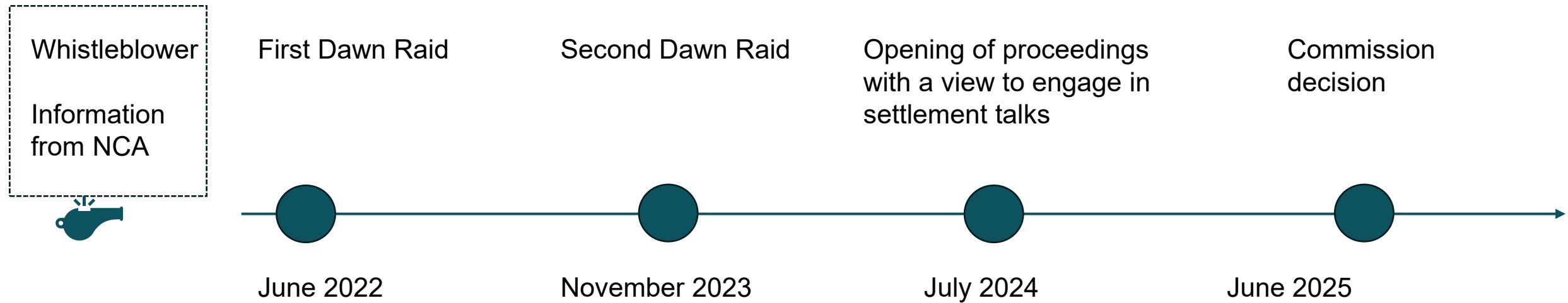
"This case is important because these practices were facilitated through an **anticompetitive use of Delivery Hero's minority stake in Glovo**. It is also the first time the Commission is **sanctioning a no-poach agreement**, where companies stop competing for the best talent and reduce opportunities for workers."

Teresa Ribera, Executive Vice-President for Clean, Just and Competitive Transition

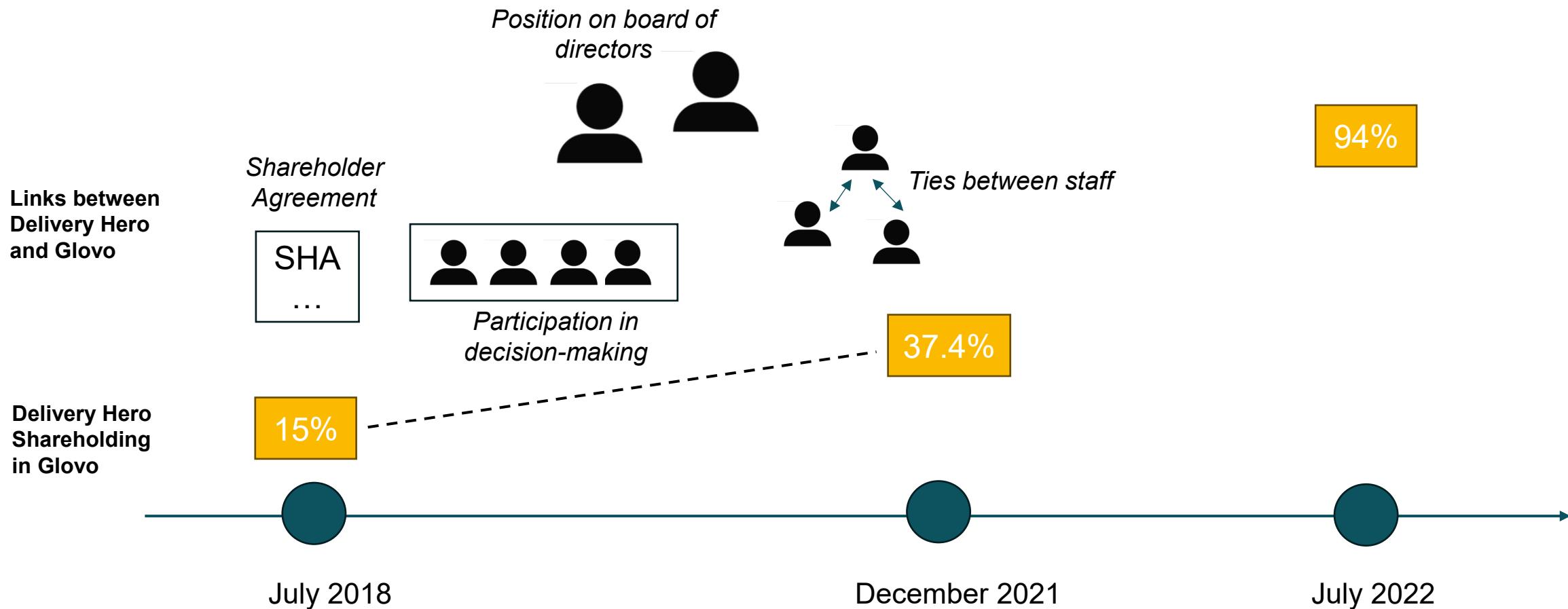
The Parties

- The companies subject to the Commission decision, **Delivery Hero** and **Glovo**, are both provider of food delivery services
 - Delivery Hero: 70 countries worldwide, of which 14 in the EEA
 - Glovo: >20 countries worldwide, of which 8 in the EEA
- July 2022: Delivery Hero acquired control over Glovo → Glovo became Delivery Hero's subsidiary

The Commission investigation



The events



Coordination between the parties

SHA
...

- SHA

- Contained reciprocal no-hire clauses



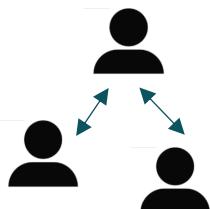
- Position on board of directors

- Access for Delivery Hero to Glovo board documents



- Participation in decision-making

- Approval of decisions
 - Influence on business strategy



- Ties between staff

- Knowledge-sharing discussions
 - (Bilateral) exchanges

No poach

- No hire obligation on Globo covering anybody having a management grade or senior capacity in Delivery Hero
- No hire obligation on Delivery Hero covering key employees
- "General no poach"

Information exchange

- Information shared between the parties comprised key parameters of competition such as
 - current and future pricing,
 - production capacities,
 - commercial strategy,
 - forecasts of demand/sales,
 - cost structure.
- Access for Delivery Hero to Glovo information, but also two-sided exchange ("can learn from each of other")

Market Sharing

- Principle to stop competing
 - No entry into markets where other party was present
 - Coordination of entry into countries where neither of them was present
 - Removal of overlaps

- The General No-Poach and the no-poach clauses included in the SHAs are **restrictions of competition by object**. They are a form of sharing of the sources of supply within the meaning of Articles 101(1)(c) of the Treaty and Article 53(1)(c) akin to a buyer cartel. (decision, para 71)
 - No-poach agreements **typically cause economic harm**. In particular, they can have negative effects on wages because the parties can no longer proactively offer higher wages to induce employees to switch, and/or provide counteroffers to induce their own employees to stay. By doing so, no-poach agreements are capable of preventing the efficient allocation of productive employees to productive firms. (decision, para 72)
- Given the non-controlling nature of the investments [...], the SHAs no-hire clauses are not subject to the rules on ancillary restraints applicable to concentrations. (decision para 74)

Legal assessment: information exchange

- [...] exchanges had as its object the restriction of competition [...] (decision, para 80)
- The fact that Delivery Hero held a minority shareholding in Glovo [...] and had representative(s) on Glovo's board with fiduciary duties to act in Glovo's interests does not alter the fact that **two independent undertakings exchanged commercially sensitive information** including through direct contacts at different levels of the undertakings. Nor can such a practice be justified by the need to protect Delivery Hero's investment in Glovo. **Delivery Hero could have protected its minority shareholding rights and financial interests through its representative(s) in the board of Glovo**, without any exchange of commercially sensitive information between that representative and staff in Delivery Hero.
 - In addition, in the context of the preparation of the acquisition of control by Delivery Hero over Glovo in 2022, any possible direct interaction between the Parties, for example for the purposes of integration planning, should have happened with **appropriate antitrust safeguards** in place.

(decision, para 79).

Legal assessment: market sharing

- The Parties **agreed to avoid competing with each other** in any national markets in the EEA. They took active steps to remove existing geographic overlaps and coordinated on entry into national markets. This constitutes market sharing which by its very nature is harmful to the proper functioning of normal competition on the markets concerned, and restricted competition by object [...] (decision para. 82)



Key Take Aways

- (1) Competition law in labor markets is real**
- The Commission applies the principles from its policy brief; no poach agreements are considered as restrictions by object
- (2) Owning a stake in a competitor is not illegal** – but unless the companies form a single "undertaking", they are independent "undertakings" and **competition law applies**
- (3) Minority shareholdings do not provide a justification for restrictions of competition**; parties are expected to implement safeguards:
 - Avoidance of Information exchange
 - Limitation of influence



Your free online legal information service.

A subscription service for legal articles on a variety of topics delivered by email.

cms-lawnow.com

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS LTF Limited (CMS LTF) is a company limited by guarantee incorporated in England & Wales (no. 15367752) whose registered office is at Cannon Place, 78 Cannon Street, London EC4N 6AF United Kingdom. CMS LTF coordinates the CMS organisation of independent law firms. CMS LTF provides no client services. Such services are solely provided by CMS LTF's member firms in their respective jurisdictions. CMS LTF and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS LTF and each member firm are liable only for their own acts or omissions and not those of each other. The brand name "CMS" and the term "firm" are used to refer to some or all of the member firms or their offices; details can be found under "legal information" in the footer of cms.law.

CMS locations:

Aberdeen, Abu Dhabi, Amsterdam, Antwerp, Barcelona, Beijing, Belgrade, Bergen, Berlin, Bogotá, Bratislava, Brisbane, Bristol, Brussels, Bucharest, Budapest, Casablanca, Cologne, Cúcuta, Dubai, Dublin, Duesseldorf, Edinburgh, Frankfurt, Funchal, Geneva, Glasgow, Gothenburg, Hamburg, Hong Kong, Istanbul, Johannesburg, Kyiv, Leipzig, Lima, Lisbon, Liverpool, Ljubljana, London, Luanda, Luxembourg, Lyon, Madrid, Manchester, Maputo, Mexico City, Milan, Mombasa, Monaco, Munich, Muscat, Nairobi, Oslo, París, Podgorica, Poznan, Prague, Reading, Rio de Janeiro, Riyadh, Rome, Santiago de Chile, São Paulo, Sarajevo, Shanghai, Sheffield, Singapore, Skopje, Sofia, Stavanger, Stockholm, Strasbourg, Stuttgart, Tel Aviv, Tirana, Vienna, Warsaw, Zagreb and Zurich.

Further information can be found at cms.law