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COMMON SHAREHOLDINGS – A LEGAL ANALYSIS

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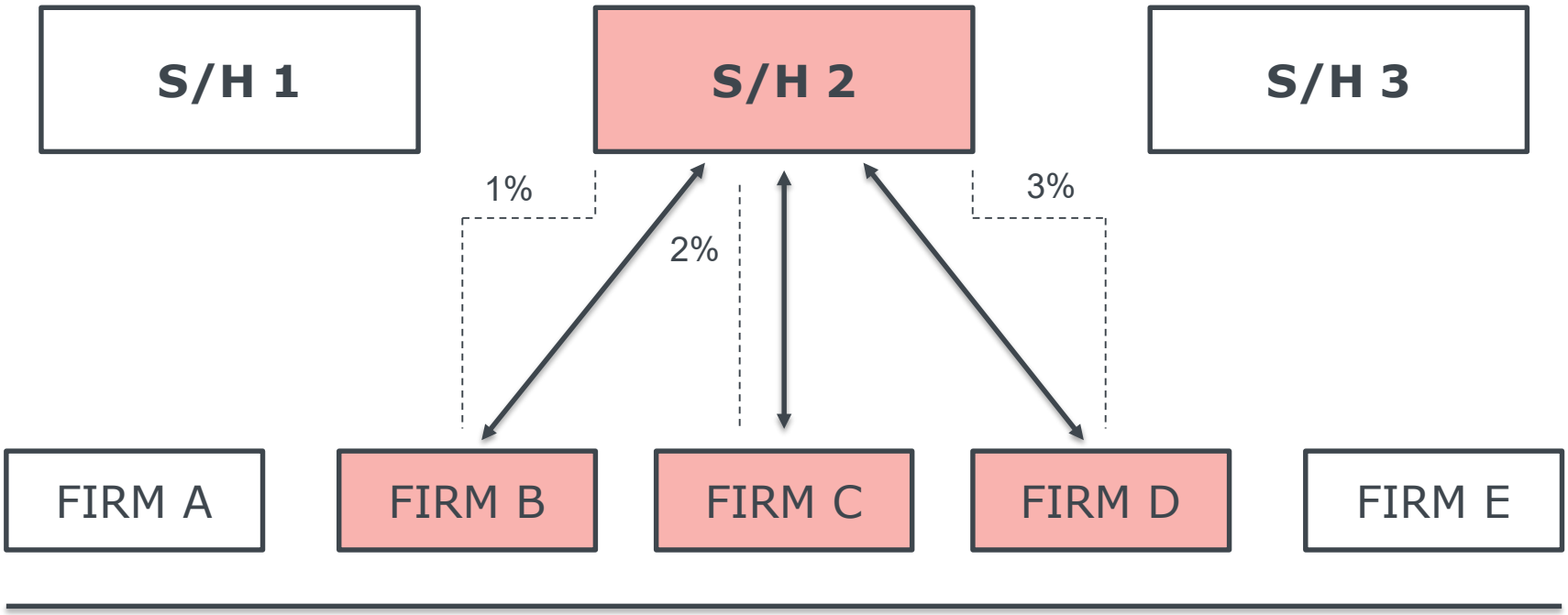
OVERVIEW

- Cartel laws can and should apply to common shareholder communications with firms
- Adding common shareholdings to merger analysis would be a waste of time
- Merger control laws should not be extended to acquisitions of common shareholdings

CARTEL LAWS CAN AND SHOULD APPLY TO COMMON SHAREHOLDER COMMUNICATIONS WITH FIRMS



- Cartel laws in most jurisdictions including Canada, US and EU apply to “hub-and-spoke” conduct

ADDING COMMON SHAREHOLDINGS TO MERGER ANALYSIS WOULD BE A WASTE OF TIME

- **Mechanisms** – would have to be proved, not hypothesized
- **Causation** – link between merger transaction and a <u>further</u> reduction of competition will rarely be present
  - Theory predicts that pre-existing common shareholdings will already result in market power being exercised
  - If the acquiree does not have common shareholders with the acquiror or other competitors, then standard maverick / follower analysis is sufficient
- "**Type 3 Costs**" – methodical analysis of common shareholding positions, mechanisms and causation will impose large time and cost burdens on third parties, merging parties and agencies

ADDING COMMON SHAREHOLDINGS TO MERGER ANALYSIS WOULD BE A WASTE OF TIME

- *Dow / Dupont* — SIEC:

  "the Parties are currently important and close competitors in several herbicide markets."

  [para 2605]

  "the Commission considers that Dow and DuPont are currently and have been in the past important and close competitors in herbicide innovation."

  [para 2703]

- *Dow / Dupont* — Common Shareholdings:

  "competitors would be unlikely to have the incentive to compete aggressively ... as regards innovation given the high level of common shareholdings among the main players in the industry."

  [para 3254]

MERGER CONTROL LAWS SHOULD NOT BE EXTENDED TO ACQUISITIONS OF COMMON SHAREHOLDINGS

- **Current Situation** – acquisition of small (e.g. 1%-5%) shareholdings is not subject to merger control in most jurisdictions
- **Expanded Filing Requirements** – would likely to generate large "Type 3 costs" while avoiding few, if any Type 2 (under-enforcement) errors:
  - Will impact large volume of capital markets transactions
  - Any individual transaction is unlikely to meet the "substantial lessening of competition" or (US / Canada), "significant impediment to effective competition" (EU) requirement for challenging a merger
  - Mechanism and causation issues will also make it difficult to meet the requirement for challenging mergers
  - Cost / benefit test does not justify regulatory intervention

CONCLUDING OBSERVATIONS

- Competition authorities can and likely will use cartel laws to address anti-competitive communications between common shareholders and competing firms
  - Institutional shareholders and publicly-traded firms with common shareholders should ensure they have effective compliance programs in place
- Assessing common shareholdings in merger reviews and/or extending merger reviews to acquisitions of common shareholdings would be very poor uses of scarce enforcement resources

QUESTIONS / DISCUSSION?

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Comments on the paper entitled "A Competition Law Analysis of Common Shareholdings" would be welcome

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