Does the Saudi Competition Law Guarantee Protection to Fair Competition?

A Critical Assessment

By

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Declaration

No portion of the work referred to in the thesis has been submitted by the author in support of an application for another degree or qualification of this or any other university or other institute of learning.

Abstract

The University of Central Lancashire
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On 22 June 2004, the Saudi government adopted its first comprehensive competition law by Royal Decree No. M/25, named the 'Competition Law'. It consists of 21 Articles regulating competition in all business sectors.

This research aims to investigate the Saudi Competition Law (2004) and its regulations and rules. It investigates whether the Saudi Competition Law guarantees protection for fair competition. . It looks into the defects in the Saudi Competition Law and its enforcement. The research also explores reforms needed to improve the Saudi Competition Law and how such reforms can be achieved. The study employs two broad approaches to answer the research questions: the black letter and socio-legal models; and two particular methods (as well as analysis of legal material and existing related literature), i.e, interviews, and two case studies in communications and civil aviation sectors.

The findings show a conflict between the principles underlying Competition Law and currently implemented government policy. Barriers to entry, public and wholly-owned state companies' immunity, the government's privatisation policy, and the government role in the market contradict the general principles of the competition law. There is evidence of monopolistic practices, a lack of neutrality, and insufficient implementation of the law against government-owned companies. There also seems to be jurisdictional conflicts between the Council of Competition Protection (CCP) and authorities with similar functions. Critical assessment of the Saudi Competition Law revealed a number of problems in four areas: anti-competitive agreements, abuse of dominant position, mergers, and enforcement. Examining several cases showed some deficiencies in enforcement. The study suggests some recommendations for policy reform and modernisation of the Law and its regulations.

The Shariah Law adopted general rules for regulating competition issues. It prohibits two main practices: monopoly and damage.

Since this study is the first to address competition law in the Kingdom of Saudi Arabia, it is hoped that the research findings and outcomes will add to knowledge in this field, enabling greater understanding and leading to better application of the Saudi Competition Law, and thus be of benefit to both law researchers and to practitioners, investors (domestic and foreign), and consumers. This study is hoped to provide a framework for the countries of the Middle East, particularly the Arab countries, which are seeking to move toward more competitive markets, whether they have already adopted or are planning to adopt competition law.

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Dedication

بسم الله الرحمن الرحيم

In the name of Allah, Most Gracious, Most Merciful

(Allah commanded you to render back your trusts to those to whom they are due. And when you judge between man and man, that you judge with justice.)

Surah al- Nisa: Verse 58

To my mother and father for their unconditional love,

to my wife Hind for her love, support and understanding, and

to Sarah and Nasser the joy of my life.

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First and foremost, I would like to thank Allah for giving me the time, health, and ability to accomplish this work.

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I am also extremely grateful for the examination committee: Dr. Maher Dabbah, Reader in Competition Law Barrister, Queen Mary at the University of London and Dr. Bogusia Puchalska, Senior Lecturer, the University of Central Lancashire for their input and interest in this research.

Abbreviations

CAT	UK Competition Appeal Tribunal
CC	UK Competition Commission
CCP	Council of Competition Protection
GCEU	General Court of the European Union
CITC	Communications and Information Technology Commission
CMA	Capital Market Authority
CMLR	Common Market Law Reports
CompAR	Competition Appeal Reports
DG Comp	EC Commission's Competition Directorate-General
DGFT	Director General for Fair Trading
DOJ	Department of Justice
EA 2002	Enterprise Act (2002)
EC	European Community
CJEU	Court of Justice of the European Union
ECRA	Electricity and Cogeneration Regulatory Authority
ECSC	European Coal and Steel Community
EU	European Union
FTC	US Federal Trade Commission
GACA	General Authority of Civil Aviation
GCC	Gulf Cooperation Council
IRCL	Implementing Regulation of Competition Law (2004)
OFT	Office of Fair Trading
OJ	Official Journal
SAA	Saudi Arabia Airlines
STC	Saudi Telecom Company
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TRAPs	Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

Chapter One: Introduction

CHAPTER ONE: INTRODUCTION

1.1. Introduction

Competition law is a very significant regulation for any modern trading system. It attempts to encourage fair competition between merchants and protects consumers and small competitors by applying and preserving the principles of the free market. It aims to maintain lower prices and provide better quality and wider alternatives of goods and services. Competition law prohibits three main kinds of practice: anti-competitive agreements, such as fixing prices; abuse of a firm's dominant position in the market that entails the imposition of unfair prices of purchase or hindering competitors from entering the market; and merger operations which create dominant positions and affect fair competition.

Accordingly, and as a result of its growing significance, competition law has been extensively developed over the past two decades; currently, more than 113 countries have adopted such laws[1].

The theory of perfect competition postulates a model of the market place that achieves consumer benefit. For perfect competition, several elements are necessary:

- a large number of buyers and sellers;
- a homogeneous product;
- all buyers and sellers having accurate information on the market; and
- no barriers to entering or exiting the market[2].

By contrast, a monopoly represents a market where there is only one seller but many buyers. A monopoly can exist for various reasons: legal entry barriers may prevent other companies from entering into the market, and natural monopolies may arise when only one company is permitted or able in practice to operate and make profits in the market[3]. Studies have confirmed that prices in a monopolistic market are always higher than prices in a competitive market[4]; therefore, the existence of a monopoly often has

[1] Mourad, A., (2005), *Explanation of Protection Competition Law and Prohibited Unfair Monopolistic Practices*, Egypt: Abd El-Fattah Mourad, p. 23.
[2] Whish, R., (2003), *Competition Law*, 5th ed., London: Lexis Nexis Butterworths, p. 6.
[3] Jones, A. and Sufrin, B., (2004), *EC Competition Law: Text, Cases and Materials*, 2nd ed., Oxford: Oxford University Press, p. 8.
[4] Ibid, pp. 8–9 & Furse, M., (2004), *Competition Law of the EC and UK*, 4th ed., Oxford: Oxford University Press, p. 224.

negative effects on the market, causing damage to consumers and potential competitors alike[5].

Because of this, competition law aims to regulate the relationship between various parties who have conflicts of interests in the market—sellers on the one side and consumers or commercial buyers on the other—and regulating the relationship between potential sellers (competitors).

1.2. Background and Origin of Competition Law

The first jurisdiction in the world to adopt a modern legal system of competition law was the United States of America. The majority of the US antitrust (competition) laws were enacted during 1890–1950. At that time, monopolies dominated the US markets. Subsequently, the concept of competition law was transferred to Europe. The main provisions of competition rules were embodied in the Rome Treaty, which created the European Community (now the European Union), signed on 25 March 1957 and came into force in January 1958. Member states of the EU (such as the United Kingdom) must conform to the European Union objectives of achieving a common market between members. Thus for example the UK entered the European Community in 1973 and, in that year, the Fair Trading Act (FTA) 1973 was passed. The current law in force in the United Kingdom is the Competition Act 1998, framed in accordance with the EU objectives[6].

1.3. The Saudi Arabian Context

The Kingdom of Saudi Arabia is the largest country on the Arabian Peninsula. It is bordered by Jordan to the northwest, Iraq to the north and northeast, Kuwait, Qatar, Bahrain, and the United Arab Emirates to the east, Oman to the southeast, and Yemen to the south, with the Arabian Gulf to its northeast and the Red Sea to its west. According to the Ministry of Economy and Planning, the population stood at 23.98 million in mid-2007 and the Kingdom covered approximately 2,150,000 square kilometres (830,000 square miles)[7]. The Saudi economy is petroleum-based, as Saudi

[5] Ibid.

[6] Rodger, B. and McCulloch, A., (2004), *Competition Law and Policy in the EC and UK*, 3rd ed., London: Cavendish Publishing Limited, pp. 21–22 & Motta, M., (2004), *Competition Policy Theory and Practice*, Cambridge: Cambridge University Press, pp. 11–12.

[7] Available at http://www.mep.gov.sa/index.jsp?event=SwitchLanguage&Code=EN. Accessed on 20 January 2008.

Arabia has the world's largest oil reserve (more than 25% of the global reserve)[8]. Roughly 75% of budget revenues and 90% of export earnings come from the oil industry. The oil industry accounts for about 45% of Saudi Arabia's Gross Domestic Product (GDP) and about 48% of revenue generated by the private sector[9].

In the Saudi Arabian market, like many markets in the Middle East, there is considerable government domination over most goods and services—for example, communications, civil aviation, electricity services, and, most notably, oil. However, Saudi Arabia has made substantial changes to its legal system, and specifically to competition law, which is the subject of the present study. It is the aim of this study to investigate the effectiveness of competition law in Saudi Arabia.

The Saudi Government plans to continue privatising several public sector operations such as wholly-owned state companies and to redevelop current economic regulations. These plans are expected to have a positive impact on the country's economic status[10]. Furthermore, the Saudi Government has modified its foreign investment law by encouraging and permitting direct foreign investors (DFI) to participate in all commercial/economic activities in the country[11]. Many foreign investors seem to consider the Saudi market to be an ideal investment environment because of the high margin of profits, lower prices of raw materials, and minimum taxes on foreign companies. Consequently, the Saudi market could be expected to become a market place where there is strong competition between rivals. The government plans to encourage fair competition and investment in different sectors. This can be achieved by increasing the participation of the private sector, which entails reducing the Government's control of the market.

These new plans aim to achieve six goals:

1. better quality of goods and services;

2. price reduction through competition laws to ensure fair prices;

3. encouragement of direct foreign investment;

4. promotion of technical expertise;

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[8] Available at http://www.sagia.gov.sa/english/index.php?page=saudi-economy-overview. Accessed on 20 January 2008.

[9] Ibid.

[10] Annual report of the Saudi Arabian Monetary Agency, 2007, p. 22, available at http://www.sama.gov.sa/en/publications/annualrep/43annualrep_en.pdf. Accessed on 30 January 2008.

[11] The current Foreign Investment Law enacted by Royal Decree Number M/1, dated 10 April 2000.

5. improvement of the national systems of information technology; and

6. creation of new job opportunities[12].

In addition, the government of Saudi Arabia is trying to liberalise various trade sectors and promote the private sector position in certain sectors, such as the communications and civil aviation sectors[13].

I have been practicing as a lawyer and legal advisor in Riyadh, the Kingdom of Saudi Arabia for more than six years. While working on a number of legal cases in commercial law, I was frequently approached by clients seeking legal advice regarding competition. However, as Saudi Arabia not having any competition laws until 2004, this caused serious problems. Indeed, it would be fair to suggest that the absence of a clear and well-defined competition law in Saudi Arabia led to high levels of monopoly and cartel agreements.

On 22 June 2004, the Saudi Government adopted its first independent and comprehensive Competition Law by Royal Decree No. M/25, named the "Competition Law"[14], and its regulations, which are: "Implementing Regulation of Competition Law"[15] and "Rules Governing the Implementing Regulations of Competition Law"[16].

The Saudi Competition Law (2004) consists of 21 articles regulating competition in all business sectors. The articles prevent different kinds of behaviors such as anti-competitive agreements, abuse of dominant positions, and merger operations that adversely affect the level of competition.

Article 8 of the new law established an independent council, the Council of Competition Protection (CCP), as an official authority to enforce competition law and prevent monopolistic practices that affect legitimate competition. This Council is located in the Ministry of Trade and Industry and is comprised of nine members.

Saudi Arabia has three main reasons for enacting its own competition law. First, the Saudi Government wishes to develop its economic environment and enhance the climate of fair competition in the business sector, which entails changing and reforming its economic policy. Second, the Government plans to continue its privatisation of the

[12] Dabbah, M., (2007), *Competition Law and Policy in the Middle East*, Cambridge: Cambridge University Press, pp. 198-199.
[13] See examination of these sectors in Chapter Seven (Enforcement) as case studies.
[14] See Appendix A: the Competition Law (2004).
[15] See Appendix B: the Implementing Regulation of Competition Law (2004).
[16] Available on the CCP Website at http://www.ccp.org.sa

public sector, which creates a need for clearly codified competition law in order to ensure equitable management of all companies. Third, enactment of a competition law was one of the requirements and conditions that the Kingdom of Saudi Arabia was required to fulfill in order to join the World Trade Organisation (WTO).

Although the inauguration of the 2004 Competition Law and its regulations and rules was a positive development, it revealed other problems, such as staff incapacity, or rather lack of expertise, within organisations. This issue will be referred to throughout this research as it has caused difficulties in effectively implementing the law and severely hindered the achievement of the objectives of the new law such as an independence of the CCP and conflicts between the CCP and other authorities, such as the Communications and Information Technology Commission (CITC) in relation to who should be responsible for enforcing competition law.

1.4. Research Questions

This research aims to investigate the Saudi Competition Law (2004) and its regulations and rules. It looks into the following research questions:

1. Does the Saudi Competition Law guarantee protection for fair competition?

    - does the formal law in theory require fair competition?

    - how well has it been implemented in practice?

2. What are the defects, if any, in the Saudi Competition Law and its enforcement?

3. What reforms are needed, if any, to improve the Saudi Competition Law, and how can such reforms be achieved?

1.5. Significance and Objective of the Study

Competition law is a relatively new concept not only in Saudi Arabia but in the Middle East as a whole. Several countries in the region have recently adopted their own competition laws—for example, Yemen in 1999, Jordan in 2004, Egypt in 2005, and Qatar in 2006. In the past, the only form of competition dealt with by the legislation was intellectual property laws such as trademarks, trade names, and patents. However, this is no longer the case in many areas in the Middle East. In addition to the rules embedded under various national intellectual property legislations, the current competition laws have been developed to cover all unfair practices in the market, for instance, anti-competitive agreements, abuse of dominant position, and merger operations.

This study is the first to address competition law in the Kingdom of Saudi Arabia. Additionally, it is hoped that the research findings and outcomes will add to knowledge in this field, enabling greater understanding and better application of the Saudi Competition Law. Consequently, to the findings will benefit both law researchers and to practitioners such as judges and lawyers, as well as investors (domestic and foreign) and consumers. This study provides a framework for the countries of the Middle East, particularly the Arab countries, which are seeking to move toward more competitive markets, whether they have already adopted or are planning to adopt competition law.

1.6. Research Design Methodology

Research methodology can be described as "examination of the possible plans to be carried out, the journeys to be undertaken so that understanding can be obtained"[17]. There are two broad approaches which have been used in the design of this research which are: the black letter and socio-legal models; and two particular methods (as well as analysis of legal material and existing related literature), i.e. interviews, and case studies.

1.6.1. Black letter model

The black letter approach is an important method for conducting legal research and is, more specifically, "a particular way of interpreting what is deemed to count as legal research, including which materials are considered relevant"[18]. This approach focuses on law in theory rather than law in action[19]. Adopting this approach enables the researcher to formulate an inclusive interpretation for the Saudi Competition Law (2004) as a provision. In this way, the researcher is able to highlight its advantageous and disadvantageous aspects; the latter may cause overlap or ambiguity in enforcing the law. The black letter approach can be considered one of the most appropriate approaches for this research since the CCP has not yet issued any decision.

1.6.2. Socio-legal model

The socio-legal approach means the research will examine the law in action[20]. This approach involves assessing the application of competition laws in Middle East

[17] Polkinghorne, D. E., (1983), *Methodology for the Human Sciences: Systems of Inquiry*, New York, USA: New York Press, p.15.
[18] *Ibid*, p. 44.
[19] *Ibid*, p. 118.
[20] *Ibid*, p. 180.

countries that have a similar culture and background to that of Saudi Arabia, such as Egypt, who adopted their competition law in 2005. The findings from this approach are expected to lead to a better enforcement system for the application and implementation of the Saudi Competition Law (2004).

1.6.3. Semi-structured interviews

Semi-structured interviews are generally considered an effective means for collecting information from individuals or small groups[21]. The present study employed semi-structured interviews as an important and collection method resulting in valuable data. The procedure involved preparing a variety of questions focusing on ambiguous issues in the Saudi Competition Law and identified the application system of the law in action through its implementation by the Council of Competition Protection (CCP). Ten participants were selected for the interviews: three official members (the Secretary General and two Members of the Competition Protection Council) and seven private lawyers involved in the area of competition law and its enforcement in Saudi Arabia[22].

Interviews lasted between 30–90 minutes and were conducted face-to-face at the interviewees' workplaces.

1.6.4. Case studies

As stated earlier, the Saudi Government is applying a new commercial policy in the market with the aim to liberalise a number of sectors. Therefore, the research examined two major economic sectors in Saudi Arabia—communications and civil aviation—as case studies. This investigation aimed to evaluate the enforcement of Saudi Competition Law and to assess the competition level in these sectors. The in-depth analysis helped the researcher to identify the challenges and barriers obstructing the effective application of the law in order to provide recommendations for reform and modernisation of the Saudi Competition Law (2004) and its regulations.

1.7. Limitations and Difficulties

Like any research, the present study has certain limitations. Generally speaking, competition law is a new phenomenon in the Middle East, which raises two major issues for consideration: first, there are a limited number of legal cases that have key

[21] Burton, D., (2000), *Research Training For Social Scientists*, London: SAGE Publications.
[22] See Appendix C: Interviews Schedules.

elements that can be analysed in evaluating and assessing the actual enforcement of the Saudi Competition Law (2004); second, there is a scarcity of publications, such as books, articles, and studies (either in Arabic or in English), which investigate various aspects of competition law in the region.

Research design methodology that incorporates various data resources has been employed, as described in the previous section, helping to minimise the effect of these limitations and to ensure an in-depth analysis.

1.8. Thesis Structure

This thesis is divided into eight chapters. The first chapter is an introduction, in which context is provided, the problems and background are stated, and the structure of the thesis is described. Chapter Two discusses the legal framework of a number of competition laws in the world—namely, those in the USA, the EU, the UK, and the WTO. Chapter Three examines the competition regulations under the Shariah Law and fundamental issues in the Saudi competition law and policy. Chapter Four investigates the control of anti-competitive agreements in the Saudi Competition Law (2004). Chapter Five discusses the control of abuse of dominant positions under the Saudi Competition Law (2004). In Chapter Six, issues related to the control of mergers in the Saudi Competition Law (2004) are explored. Chapter Seven investigates the enforcement system under the Saudi Competition Law (2004). Finally, Chapter Eight presents the conclusion and recommendations for the development of the Saudi Competition Law (2004) and its enforcement.

Chapter Two: Competition Law in Context

2.1. Meaning and Origin

According to the Macmillan English Dictionary, competition means "the activities of companies that are trying to be more successful than others"[23]. In a legal context, there are many definitions of "competition", but competition can generally be defined as:

> … the principal regulator of commercial forces in a capitalist market, presuming that individual competitors' motivating force derives from the pursuit of self-interest. The struggle for superiority in the marketplace is defined by the objective to persuade consumers on grounds of quality and value to make a particular purchase[24].

Normal competition between parties is a commercial relationship between a specific number of merchants that sell similar goods or provide similar services at the same time to a particular group of customers. The merchants aim to increase their profits by selling their products or services in the same area of the marketplace. Competition law concerns the behaviour of sellers and regulates the relationships between sellers and buyers in the market. Thus, competition law aims to ensure equal rights and helps the seller in the struggle with other rivals who sell their products in that market[25]. Competition law applies to a variety of trades and personal services in the markets such as banking services, financial services, insurance services, and computer networks services. There are significant differences between the application of competition rules according to economic theory and its actual application in the marketplace[26].

2.1.1. Application of Conditions

The concept of competition requires the application of conditions to the activities of merchants in the marketplace. There are three conditions:

1. **Merchants**: competition law applies only to merchants, whether they are individuals or registered legal firms. The merchants aim to make profits and the law regulates this;
2. **Homogeneity of goods or services**: competition law applies when the merchants sell or provide similar kinds of products or services. Competition

[23] *Macmillan English Dictionary*, (2002), China: Macmillan Publishing plc,.
[24] Willimsky, S., *The Concept(s) of Competition*, European Competition Law Review, 1997, 18(1), p. 54.
[25] Goyder, D. G., (2003), *EC Competition Law*, 4th ed., Oxford: Oxford University Press, pp. 8–9.
[26] Ibid.

occurs between firms—for example, in the airlines industry where tickets are sold, or in the communications industry, which provide mobile phone services; and

3. **Same marketplaces**: the merchants sell or provide similar goods or services in the same markets or cities, such as London or UK markets.

2.1.2. Prohibitions of Competition: in Law and Practice

Competition law allows competitors to practice any kind of commercial activities in the marketplace, though it prohibits the use of illegitimate methods of making profits and affecting the profits of competitors, such as price fixing. In addition, there are other laws prohibiting some kinds of behaviour that are different from those proscribed under competition law. These prohibitions can take two different forms: prohibited competition by law and prohibited competition by contract[27].

Prohibited competition by law means that the law prohibits specific commercial activities for particular people. For example, in Saudi Arabia, laws prohibit any public service employee[28], judge,[29] or lawyer[30] from practicing any direct or indirect commercial activity, such as the sale of goods or provision of services. The reason why competition is forbidden for particular people is to protect the independence and dignity of the public services, which is a stated aim of the law.

Prohibited competition by contract means that the agreement itself prohibits another party from undertaking particular commercial practices, such as the agreement between parties in a contract of employment that prohibits the employee from practicing similar activities to the employer during the period of the agreement[31].

2.2. Background of Competition Law

This section aims to explore the significance of competition law. It examines a number of jurisdictions—namely, the USA, the EU, the UK, and the WTO.

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[27] Al-Okili, A., (1995), *The Commercial Law*, Jordan: Maktabah Dar Althaqafah Publishing and Contributing, p. 153.
[28] Article (13) (a) in Civil Service Act by Royal Decree Number (M/49), dated 27 June1977.
[29] Article (51) in The Law of Judiciary by Royal Decree Number (M/78), dated 1 October 2007.
[30] Article (3) (1)(a) in The Implementing Regulations of The Code of Lawyers Practice by Minister of Justice Decree Number (4649), dated 17 August 2002.
[31] Al-Qalubi, S., (1978), *Theory of Commercial Practices*, Egypt: Dar Al-Nhdah Al-Arabia, pp. 396–397.

2.2.1. The United States of America

The first country to adopt a modern system of competition law was the United States of America, in order to combat prolific monopolies in their local markets. Major provisions of the USA antitrust (competition) laws were enacted during the period 1890–1950, such as the Sherman Act 1890, the Clayton Act of 1914, and the Federal Trade Commission Act 1914. The pioneer of antitrust law was Senator Sherman (1890), after whom the Sherman Act 1890 was named[32]. The following is a brief description of these acts.

The Sherman Act 1890

The Sherman Act 1890 prevents two types of anti-competitive behaviour:

Section 1 of the Act states that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court[33].

Section 1 prohibits direct restraint of agreements whether the agreements contain explicit or implicit agreements conducive to restraint of trade. The Act does not define the kind of restrictive agreement that is held illegal, but every contract in restraint of trade is prohibited. There are different activities which are considered a violation of the Act if the restraint is not reasonable. This principle is known as the '*rule of reason*', which was applied in *Standard Oil v United States (1911)*[34]. In this case, the defendants faced charges of conspiring to restrain trade and establish a monopoly in the petroleum products sector. The court deemed that contracts in restraint of trade were illegal only if they contained unreasonable restraints of trade, and found the defendants guilty as they operated unreasonably. Violations of the Sherman Act are divided into two types: illegal

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[32] Hovenkamp, H., (1994), *Federal Antitrust Policy The Law of Competition and its Practice*, USA: West Publishing, p. 50

[33] Section 1 of the Sherman Act (1890).

[34] *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951).

per se and illegal only if unreasonable (*rule of reason*). In *National Society of Professional Engineers v United States (1978)*,[35] the court stated that:

> There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anti-competitive that no elaborate study of the industry is necessary to establish their illegality – they are illegal *per se*; in the second category are agreements whose anti-competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed[36].

Section 2 states that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court[37].

Section 2 of the Sherman Act is concerned with monopolisation. The offence of monopoly comprises two aspects: controlling monopoly, and the acquisition or continuation of monopoly.

Regarding the control of the power of monopoly, the Act does not define size or percentage of the market share to be considered as a monopoly, but 70% demonstrates at least that the firm is monopolistic[38]. There are significant issues regarding what constitutes monopoly: firstly, the capacity to set prices without consideration of the competition; and secondly, the power to create barriers to prevent entry into the market. The Sherman Act does not prohibit monopoly itself; rather, conduct aimed at acquiring or maintaining monopoly power was prohibited according to the Act. Monopolisation can be defined as "control power of monopoly to prevent other competitors from entering the market or from increasing their market share"[39].

The Sherman Act provides four ways to enforce the prohibitions. Firstly, it made violation of the Act a criminal offence; therefore, any person who violates this Act may be punished by fine and/or imprisonment. Secondly, courts are empowered to grant

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[35] *National Society of Professional Engineers v United States*, 435 U.S. 679 (1978).
[36] Agnew, J. H., (1985), *Competition Law*, London: Allen & Unwin, pp. 193–194.
[37] Section 2 of the Sherman Act (1890).
[38] *Paramount Pictures v United States*, 334 U.S. 131 (1948).
[39] Agnew, J. H., (1985), *Competition Law*, London: Allen & Unwin, p. 195.

injunctions to either the Department of Justice (prosecutors) or a private party to stop violations of the Act. An injunction in monopoly cases can also require divestiture, which is the breaking up of the monopoly. If the defendant does not obey an injunction it will lead to an action for contempt. Thirdly, any person who has been injured and damaged due to violations of the Act can sue for damages.

The compensation award for damages can be up to three times the genuine loss suffered. Each injured party, such as competitors and consumers, can take an action for damages. Finally, any property which is owned due to violation of Section 1 of the Act can be seized by the Government[40].

Letwin (1956) applauded the Sherman Act because the Act granted power to the federal government and a new responsibility to control the local economy. However, the lack of experience of the lawmakers at that time created an ambiguously implemented Act that was difficult to interpret by courts[41]. Therefore, Levitt (1952) believed that the Sherman Act needed to be replaced to adopt a new system based on precondition competition and the technological system to prevent monopoly and oligopoly in the contemporary industry[42].

The Clayton Act 1914

The Clayton Act of 1914 declared four restrictive or monopolistic acts as illegal but not criminal: price discrimination, where the seller is selling the same product at different prices to different buyers (Section 2); tied and exclusive dealing contracts, which are made with a condition to stop the buyer dealing with the seller's rivals (Section 3); the acquisition of competing companies (Section 7); and interlocking directorates, which have common board members in different competing companies (Section 8). Section 2, dealing with price discrimination, was revised in the Robinson-Patman Act of 1936, and with regards to dealing with acquisitions in the Celler-Kefauver Act of 1950[43].

The Federal Trade Commission Act 1914

The Federal Trade Commission Act (FTC) of 1914 established the FTC, an independent agency that would regulate unfair trade practices. Section 5 of the FTC Act (as amended

[40] Ibid pp. 195–196.
[41] Letwin, W., *Congress and the Sherman Antitrust Law: 1887-1890*, University of Chicago Law Review. 1956, 23(2), p. 255.
[42] Levitt, T., *The Dilemma of Antitrust Aims: Comment*, American Economic Review. 1952, 42(5), p. 895.
[43] Neale, A., (1970), *The Antitrust Laws of United States of America*, Cambridge: Cambridge University Press, p. 3.

in 1938), the Act's individual fundamental provision, provides: "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful". The Act does not make violation of it a criminal offence and the FTC shares responsibility for the enforcement of the Clayton Act with the Department of Justice (DOJ)[44].

The Robinson-Patman Act of 1936 amended provisions on price discrimination in the Clayton Act. The Celler-Kefauver Act of 1950 amended the Clayton Act provisions relating to mergers. An additional important legislation is the Hart-Scott-Rodino Act of 1976, which amends the merger provisions of the Clayton Act by granting the DOJ and the FTC the power to review all the merger provisions[45].

Wood et al. (1993), Lin et al. (2000), and Abbott (2005) examined the development of USA competition law to date, finding that it had had a significant impact on the shape of several sectors of the American market[46].

Dabbah (2003) explored the antitrust (competition) system in the US and pointed out five features in the US model, as follows:

First, the enforcement system in the US contains two authorities: the Federal Trade Commission (FTC) and the Department of Justice (DOJ). However, neither has the authority to grant exemptions to firms from the prohibitions of antitrust laws or making a binding decision. Second, US antitrust laws criminalised several violations, such as price-fixing (therefore, executives of firms may be jailed if firms violated of the law); third, in different states, attorney generals have the power to bring actions to enforce US antitrust laws, regardless of whether the FTC and the DOJ have found a different decisions. Fourth, the US system of antitrust grants private parties to take actions for their injuries; and fifth, the system sets the amount of the damages as compensation three times actual loss[47].

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[44] Gellhorn, E., (1986), *Antitrust Law and Economics*, USA: West Publishing Co., pp. 30–31.

[45] Motta, M., (2004), *Competition Policy Theory and Practice*, Cambridge: Cambridge University Press, p. 6.

[46] Wood, D. and Anserson, J., *The Politics of U.S. Antitrust Regulation*, American Journal of Political Science. 1993, 37(1), p. 34 & Lin, P., Raj, B., Standfort, M. and Slottje, D., *The US Antitrust System and Recent Trends in Antitrust Enforcement*, Journal of Economic Surveys. 2000, 14(3), p. 257 & Abbott, A., *A Brief Overview of American Antitrust Law*, University of Oxford Centre for Competition Law and Policy. 2005, paper (L) 01/05.

[47] Dabbah, M., (2003), *The Internationalisation of Antitrust Policy*, Cambridge: Cambridge University Press, p. 274. A large numbers of publications have been written on the USA antitrust (competition) laws. For example: Neale, A., (1970), *The Antitrust Laws of United States of America*, Cambridge: Cambridge University Press; Hovenkamp, H., (1994), *Federal Antitrust Policy The Law of Competition*

2.2.2. The European Union

The first competition policy in the European Community was established by the Paris Treaty of 1951, which created the European Coal and Steel Community (ECSC). The ECSC Treaty forbade cartels in Articles 65 and 66[48]. The main provisions of competition rules were present in the Rome Treaty, which was signed on 25 March 1957 and came into force in January 1958. The Rome Treaty established the European Economic Community (EEC), known as the European Community (EC) after adoption of the European Union Treaty in 1992[49]. The Treaty consists of 314 Articles renumbered later by the Treaty of Amsterdam in October 1997. The EC aims to create common markets between all Member States through four principles: the free movement of goods, services, persons, and capital[50]. Recently, the Lisbon Treaty, known as the Treaty on the Functioning of the European Union (TFEU), was signed on 13 December 2007 and came into force on 1 December 2009. The new Treaty renumbered the Rome Treaty and replaced the "European Community" with the European Union[51].

The EU legislation consists of two types of competition rules: primary legislation and secondary legislation. The first EU legislation for competition law contains significant Articles on competition (from 101 to 109) in the Lisbon Treaty (ex-Articles 81 to 89 of the EC). The second legislation in EU competition law is the instructions of the Council Regulation, which contains important regulations such as:

- Regulation 1/2003 (on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty);
- Regulation 139/2004 (the EC Merger Regulation);

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and its Practice, West Publishing, United States of America; and Peritz, R., (1996), *Competition Policy in America, 1888–1992 History, Rhetoric, Law*, New York: Oxford University Press.

47 Neumann, M., (2001), *Competition Policy History, Theory and Practice,* UK: Edward Elgar Publishing Limited, p. 39.

47 Rodger, B. and MacCulloch, A., (2004), *Competition Law and Policy in the EC and UK Competition Law*, 3rd ed., London: Cavendish Publishing Limited, p. 18.

47 Whish, R., (2003), *Competition Law*, 5th ed., London: Lexis Nexis Butterworths, pp. 49–50.

47 For more details see Whish, R., (2009), *Competition Law*, 6th ed, Oxford: Oxford University Press, & Graham, C., (2010), *EU and UK Competition Law*, Essex: Pearson Education Limited.

48 Neumann, M., (2001), *Competition Policy History, Theory and Practice,* UK: Edward Elgar Publishing Limited, p. 39.

49 Rodger, B. and MacCulloch, A., (2004), *Competition Law and Policy in the EC and UK Competition Law*, 3rd ed., London: Cavendish Publishing Limited, p. 18.

50 Whish, R., (2003), *Competition Law*, 5th ed., London: Lexis Nexis Butterworths, pp. 49–50.

51 For more details see Whish, R., (2009), *Competition Law*, 6th ed, Oxford: Oxford University Press, and Graham, C., (2010), *EU and UK Competition Law*, Essex: Pearson Education Limited.

- Regulation 772/2004 (on the application of Article 81(3) of the Treaty to categories of technology transfer agreements);
- Regulation 2790/1999 (on the application of 81(3) of the Treaty to categories of vertical agreements and concerted practises);
- Regulation 2658/2000 (on the application of 81(3) of the Treaty to categories of specialisation agreements);
- Regulation 2659/2000 (on the application of Article 81(3) of the Treaty to categories of research and development agreements)[52].

Article 101 concerns anti-competitive practices between undertakings, called 'collusion'. The Article prohibits any agreement between undertakings or decisions by associations of undertakings and concerted practices that may affect trade between Members States. Article 102 aims at controlling 'abuse of dominant position' between undertakings, which may affect trade. Article 106 presents rules that apply to public undertakings or to undertakings that are awarded particular privilege, whilst Articles 107- 109 prohibit State aid to undertakings by Member States which can distort competition[53].

Article 2(3) states the general aims of the Lisbon Treaty as follows:

> The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance[54].

Article 2B(b) sets out the purpose of the Union:

"The establishing of the competition rules necessary for the functioning of the internal market[55]".

The EU established three main institutions for the enforcement of competition law: the European Commission, the General Court of the European Union (GCEU), and the Court of Justice of the European Union (CJEU).

[52] Middleton, K., (2005), *Blackstone's UK and EC Competition Documents*, 4th ed, Oxford: Oxford University Press.
[53] Albors-Llorens, A., (2002), *EC Competition Law and Policy,* Devon: Willan Publishing, pp. 2–3.
[54] Article 2(3) of the Lisbon Treaty.
[55] Article 2B(b) of the Lisbon Treaty.

The European Commission is responsible for taking legal action against violations of the law, such as anti-competitive agreements in Article 101, abuse of dominant position in Article 102 of the TFEU, and mergers under the Merger Regulation 139/2004. The Directorate General of the Commission for Competition Policy (DG COMP) is the Directorate of the Commission, and is in charge of competition policy. The DG COMP comprises a Director General and three Deputy Director Generals, responsible for mergers, antitrust, and state aid[56].

After the Modernisation Regulation was enacted, the Commission shared the responsibility of enforcing Articles 101 and 102 with the domestic competition authorities of the Member States and domestic courts[57].

The General Court of the European Union (GCEU) was established in 1989 by the Single European Act 1986 and was known as the Court of First Instance (CFI)[58]. The GCEU is considered to be the first stage before the Court of Justice of the European Union. The GCEU has the power to review the Commission Decisions under Article 263 of the TFEU (ex-Article 230 of the EC Treaty). The judgments of the GCEU are subject to appeal to the Court of Justice of the European Union[59].

The Court of Justice of the European Union (CJEU) hears appeals from the GCEU on points of law only. The CJEU concerns itself with points of law referred to it by national courts under Article 267 of the TFEU (ex-Article 234 of the EC Treaty)[60].

Article 267 of the TFEU Treaty grants domestic courts of Member States power to apply EU competition rules. Article 267 also gives domestic courts the right to pass any particular questions to the CJEU on issues of EU law which exist during the proceedings[61].

Dabbah (2004) investigated EU adoption of a vital competition law system. The EU competition system aims to enhance the single market between members of the European Union, which began with the Rome Treaty (1957)[62]. Heide (2005) found that the Council Regulation No. 1/2003 was an important development for implementation

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[56] Graham, C., (2010), *EU and UK Competition Law*, Essex: Pearson Education Limited, pp. 31-33.
[57] Whish, R., (2003), *Competition Law*, 5th ed., London: Lexis Nexis Butterworths, pp. 53–54.
[58] Arnull, A. M., Dashwood, A. A., Ross, M. G. and Wyatt, D. A., (2000), *Wyatt and Dashwood's Wuropean Union Law*, 4th ed, London: Sweet & Maxwell.
[59] Rodger, B. and MacCulloch, A., (2004), *Competition Law and Policy in the EC and UK Competition Law*, 3rd ed., London: Cavendish Publishing Limited, p. 45.
[60] Whish, R., (2003), *Competition Law*, 5th ed., London: Lexis Nexis Butterworths, p. 56.
[61] Dabbah, M., (2004), *EC and UK Competition Law: Commentary, Cases and Materials*, Cambridge: Cambridge University Press, pp. 13–14.
[62] Ibid, p. 9.

of Articles 101 and 102. The new regulation replaced the Council Regulation 17/1962 which was enacted 1962. The advantage of the new regulation is that it gives the courts in each country more responsibility to enforce the competition rules[63].

2.2.3. The United Kingdom

In the United Kingdom, the first Act in relation to competition was the Profiteering Act 1919 which aimed to deter price increases after World War I. After World War II, the White Paper on Employment Policy 1944 highlighted issues of unemployment in the UK. The Monopolies and Restrictive Practices (Inquiry and Control) Act 1948 was motivated by the idea that competition in the marketplace would help in attaining full employment. The Restrictive Trade Practices Act 1956 was adopted, and later extended by the Resale Prices Act 1964. The Monopolies and Mergers Act 1965 enacted merger controls for the first time. The UK entered the European Community in 1973 and, in that year, the Fair Trading Act (FTA) 1973 was passed, creating the post of Director General for Fair Trading (DGFT), who would assist in supervising the enforcement of competition law in the UK by the Office of Fair Trading (OFT). Since the OFT is the enforcement body of the UK Competition Act, it will be discussed fully in Chapter Six (Enforcement). The 1973 Act covered monopolies and mergers, but the powers of the DGFT to regulate anti-competitive practices were extended by the Competition Act 1980. The current law is the Competition Act 1998, which is in line with the European Union's aims to achieve a common market between members[64].

The Competition Act 1998 was enacted on 9 November 1998 and entered into force on 1 March 2000. The law contains two types of prohibitions: "Chapter I prohibition", which prohibits agreements effect on the restriction of competition, such as vertical agreements; and "Chapter II prohibition", which forbids the abuse of a dominant position. The Act repealed previous competition law legislation, such as the Restrictive Practices Court Act 1976, the Restrictive Trade Practices Court Act 1976, the Resale

[63] Heide, M., *EC Competition Law: A Revolution*, University of Tilburg. 2005, p. 17. There are a number of books that have investigated the EC competition law. For example: Goyder, D. G., (2003), *EC Competition Law*, 4th ed., Oxford: Oxford University Press; Korah, V., (2004), *An Introductory Guile to EC Competition Law and Practice*, 8th ed., Oxford: Hart Publishing; Korah, V., (2006), *Cases and Materials on EC Competition Law,* 3rd ed, Oxford: Hart Publishing; Lane, R., (2000), *EC Competition Law*, England: Pearson Education Limited; Cini, M. and McGowan, L., (1998), *Competition policy in The European Union*, London: Macmillan Press Ltd,; Jones, A. and Sufrin, B., (2004), *EC Competition Law: Text, Cases and Materials*, 2nd ed., Oxford: Oxford University Press.

[64] Rodger, B. and McCulloch, A., (2004), *Competition Law and Policy in the EC and UK*, 3rd ed., London: Cavendish Publishing Limited, pp. 21–22 & Motta, M., (2004), *Competition Policy Theory and Practice*, Cambridge: Cambridge University Press, pp. 11–12.

Prices Act 1976, the Restrictive Trade Practices Act 1977 and the Competition Act 1980[65].

Maher (2000) states that the Competition Act is a significant piece of legislation in the UK because it regulates different types of practices: anti-competitive agreements, abuse of dominant positions, and mergers between firms[66]. Furse (1998) writes that the Competition Act 1998 involves four main points: anti-competitive agreements (the Chapter I prohibition), the abuse of dominant position (the Chapter II prohibition), the power of enforcing the Act, and establishing the necessary institutional adjustments. The Act closely conforms with the EU Treaty of Rome (1957) Articles 101 and 102 to avoid conflict between laws[67]. Dabbah (2004) claims that the UK competition law has significantly developed in creating competition system over the past fifty years and that the Competition Act 1998 is more effective because the authorities have the power and resources to enforce the law[68].

2.2.4. The World Trade Organisation

The World Trade Organisation (WTO) was established as a result of the Uruguay Round (UR) of negotiations to develop the international trade system. The agreement to establish the new organisation was formally signed in Marrakesh, Morocco on 15 April 1994 and came into force on 1 January 1995. The WTO has four duties:

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[65] Whish, R., (2003), *Competition Law*, 5th ed., London: Lexis Nexis Butterworths, , p. 61; Furse, M., (2004), *Competition Law of the EC and UK*, 4th ed., Oxford: Oxford University Press, p. 38; Rodger, B. and MacCulloch, A., (2004), *Competition Law and Policy in the EC and UK Competition Law*, 3rd ed., London: Cavendish Publishing Limited, , p. 292.

[66] Maher, I., *Legislation Juridification, Codification and Sanction in UK Competition Law*, Modern Law Review. 2000, 63(4), p. 549.

[67] Furse, M., *The Competition Bill – A Competition Law That Can Compete*, Journal of Business Law. 1998, Mar, p. 2.

[68] Dabbah, M., (2004), *EC and UK Competition Law Commentary, Cases and Materials* Cambridge: Cambridge University Press, p. 14. There are a large body of literature on the UK Competition Act such as: Freeman, P. and Whish, R., (1999), *A Guide To The Competition Act 1998*, Wiltshire: Redwood Books; Singleton, S., (1999), *Blackstone's Guide to the Competition Act 1998*, London: Blackstone; Flynn, J. and Stratford, J., (1999), *Competition: Understanding The 1998 Act*, Bembridge: Palladian Law Publishing Ltd; Rodger, B. and MacCulloch, A., (2000), *The UK Competition Act A New Era for UK Competition Law*, Oxford: Hart Publishing; Green, N. and Roberson, A., (1999), *The Europeanisation of United Kingdom Competition Law*, Oxford: Hart Publishing. Some of these references investigate the EC and the UK competition law. For example: Furse, M., (2004), *Competition Law of the EC and UK*, 4th ed., Oxford: Oxford University Press; Dabbah, M., (2004), *EC and UK Competition Law Commentary, Cases and Materials* Cambridge: Cambridge University Press; Slot, P. and Johnston, A., (2006), *A Introduction To Competition Law*, Oxford: Hart Publishing; Middleton, K., Rodger, B. and MacClloch, A. (2003), *Cases and Materials on UK and EC Competition Law*, Oxford: Oxford University Press,; Rodger, B. and MacCulloch, A., (2004), *Competition Law and Policy in the EC and UK Competition Law*, 3rd ed., London: Cavendish Publishing Limited; Whish, R., (2003), *Competition Law*, 5th ed., London: Lexis Nexis Butterworths.

- to provide the forum for negotiations among its members and any future negotiations of agreements;
- to adopt a new international regulation for disputes settlement;
- to administer the Trade Policy Review Mechanism; and
- to cooperate with the International Monetary Fund (IMF) and with World the International Bank[69].

The WTO incorporates several important agreements such as the General Agreement on Trade in Services (GATS); the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRAPs); and the Understanding on Rules and Procedures Governing Settlement of Disputes.

The WTO has so far failed to adopt a comprehensive agreement on competition policy. However, there are a number of provisions relating to competition in the WTO agreements[70]. The Agreement on Technical Barriers to Trade (TBT Agreement) aims to encourage international trade between members in the field of technology. The TBT Agreement allows members to transfer technology from developed countries to developing countries. Article 7.4 provides that:

> Members shall not take measures which require or encourage local government bodies within their territories to act in a manner inconsistent with the provisions of Articles 5 (Procedures for Assessment of Conformity by Central Government Bodies) and 6 (Recognition of Conformity Assessment by Central Government Bodies).

WTO members are prohibited from encouraging local private bodies that will lead to discrimination against foreign products (which violates competition laws)[71].

The General Agreement on Trade in Services (GATS) contains several articles regarding competition:

Article VIII: 1 of GATS prohibited each member of the WTO from monopolising any services in its territory because it would conflict with that member's obligations under Article II and specific commitments. Article II: 1 of the GATS provides that:

> With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service

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[69] Art III, available at the WTO Website at http://www.wto.org/english/docs_e/legal_e/04-wto.doc. Accessed on 10 March 2008.

[70] Matsushita, M., Schoenbaum, T. and Mavroidis, P., (2003), *The World Trade Organization: Law, Practice and Policy*, Oxford: Oxford University Press, p. 545.

[71] Available at http://www.wto.org/english/docs_e/legal_e/17-tbt.doc. Accessed on 10 March 2008.

> suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.

Article VIII: 2 of the GATS prevent suppliers of services from abusing the monopoly position, which will be inconsistent with such commitments.

Article VIII: 3 stated that a member should start the consultation procedure when there is a reason for a monopoly supplier in its territory.

Article VIII: 4 provides that any member should inform the Council of Trade in Services when granting a monopoly to a firm in its territory.

Article VIII: 5 of the GATS states that:

> The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (*a*) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory[72].

Intellectual Property and Trade-Related Investment Measures, Article 40(2) of the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Properties), allowed members to adopt legislation that prevents or controls any practices that will have an effect on competition—for example, exclusive grant back conditions[73]. Article 40 indicates restrictive conditions that may be prohibited by the domestic law of members and this provision, which is a relation between the TRIPS Agreement, one of the WTO agreements, and competition policy and law[74].

Article 9 of the TRIMS Agreement (Agreement on Trade-Related Aspects of Investment Measures) provides that:

> Not later than five years after entering into force, the Council for Trade in Goods shall conduct a review of the operation of this agreement and propose to the Ministerial Conference amendments to its text. In the course of this review, the Council for Trade in Goods shall consider whether the Agreement should be complemented with provisions on investment policy and competition policy[75].

Article 11.1(b) of the Safeguards Agreement prevents voluntary export restraints of trade and orderly marketing agreements. Article 11.3 seeks to ensure that members do

[72] Available at http://www.wto.org/english/docs_e/legal_e/26-gats.doc. Accessed on 15 March 2008.
[73] Available at http://www.wto.org/english/docs_e/legal_e/27-trips.doc. Accessed on 15 March 2008.
[74] Matsushita, M., Schoenbaum, T. and Mavroidis, P., (2003), *The World Trade Organization: Law, Practice and Policy*, Oxford: Oxford University Press, p. 549.
[75] Available at http://www.wto.org/english/docs_e/legal_e/18-trims.doc. Accessed on 20 March 2008.

not “encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1”[76].

Antidumping law in the General Agreement on Tariffs and Trade (GATT) and WTO involves two agreements: Article VI of GATT (1994) and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1994) as follows:

Article VI of the GATT (1994) stated that:

> The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting part or materially retards the establishment of a domestic industry.

The purpose of the Agreement is to apply the provisions of Article VI of GATT 1994[77].

Matsushita (2002) and Nikomborirak (2003) found that competition law and policy is one of the most complex issues for WTO members that failed to establish a special agreement relating to international competition policy[78].

As mentioned in chapter 1, the Kingdom of Saudi Arabia became a member of the WTO in December 2005. There is a requirement to establish a free market and adopt competition law in order to fulfill the obligations under the WTO.

In this chapter, I have discussed the legal framework of a number of competition laws—namely, the USA, the EU, the UK, and the WTO.

The next chapter investigates the Saudi Competition Law (2004).

[76] Available at http://www.wto.org/english/docs_e/legal_e/25-safeg.doc. Accessed on 20 March 2008.
[77] Available at http://www.wto.org/english/docs_e/legal_e/19-adp.doc. Accessed on 27 March 2008.
[78] Matsushita, M., Basic Principles of the WTO and the Role of Competition Policy, *Journal of World Investment*. 2002, 3(4) & Nikomborirak, D., Competition Policy in WTO: How to Make It a Developing Countries’ Agenda, *Thailand Development Research Institute Quarterly Review*. 2003, 18(4).

Chapter Three: The Saudi Competition Law (2004)

3.1 Introduction

The Saudi government is moving toward free market economic policy, which is one of the requirements for joining the WTO. It aims to enhance the national economy and create competitive markets; thus, the government adopted the Competition Law in June 2004. Article 1 of the Competition Law states two aims: to protect and promote lawful competition and prevent monopolistic practices that lead to unfair competition.

This chapter aims to examine competition regulation under the Shariah Law, such as preventing monopoly and causing of damages to other, and investigates relevant aspects of the Saudi legal system, such as the judiciary and the Board of Grievances. It also provides details on the development of competition regulation in Saudi law and discusses the aim, application, and exceptions of the Competition Law (2004).

3.2 Competition Regulation in the Shariah Law (Islamic Law)

In order to analyse, explore, and discuss the Saudi Competition Law (2004), it is necessary to review the origin, history, and implication of the Saudi legal system in general. This section will present a discussion of the Islamic legal system, its origin, sources, and features, followed by an examination of contemporary competition law in Islam and the Saudi Arabia.

3.2.1 Sources of the Shariah Law

The Shariah Law (Islamic Law) has two main sources. The primary source consists of the *Holy Qur'an* and the *Sunnah* of Prophet Muhammad (His sayings)[79]. In addition to the primary sources, Islamic Law throughout the Islamic jurisprudence *(Usul Al Feqeh),* has given plenty of room for the jurists to interpret the primary sources by creating instruments and methods such as *Ijtihad* (interpreting a text in such a way as its legal implications became apparent) and Comparative *Qiyas* (which is concerned with deriving a particular ruling from general statements), or adopting a specific interpretation[80]. These came to be known as the secondary sources of Islamic Law, which are applied to new areas of law where there is specific applicable text in the *Qur'an* or the *Sunnah* concerning the area in question. In fact, these secondary sources

[79] Doi, A., (1997), *Shariah: The Islamic Law*, London: Ta Ha Publishers Ltd, pp. 21 & 45.
[80] Sait, S. and Lim, H., (2006), *Land, Law & Islam: Property and Human Rights in the Muslim World*, London: Zed Books.

have added flexibility, enabling the Shariah Law to be adaptable to every new social development, every aspect of life, and all periods of time.

Bowen (2003: 9) states that:

> Far from being an immutable system of rules, Islamic jurisprudence (*Fiqh*) is best characterized as a human effort to resolve disputes by drawing on scripture, logic, the public interest, local custom, and the consensus of the community. In other words it is as imbricated with social and cultural life as is Anglo-American law or Jewish legal reasoning[81].

Schacht (1964) notes that Islamic Law represents a remarkable case of a 'jurist's law', and that it was shaped and further developed by private specialists[82].

Islamic Law may be divided into two categories: '*Ibadat*, obligations regarding worship, and *Mu'amalat*, civil/legal obligations. The law of competition would fall into the second category. Under this category, the basic law (*Nusus*) is limited compared to the other categories. Therefore, the law has been developed owing to the availability of a large room for *Ijtihad*. Jurisprudence of the Shariah Law has been developing since early Islam. Different opinions and schools have emerged; however, at present there are four schools of thought at play in the Islamic World. These are: the *Hanafi*, *Maliki*, *Shaf'I*, and *Hanbali* schools. They are known as "personal schools," that is, "groups designated as followers of a leading jurisconsult". Such schools are considered equally orthodox[83]. Each school has benefited from the flexibility feature of the Islamic Law, using the *Ijtihad* and other Islamic instruments to develop their own view and thoughts on debated issues in law[84]. Shalabi (1985) investigates that all four schools agreed on the main primary sources of Shariah Law. The major differences between the four schools refer only to minor branches, not to the fundamental principles of belief. The differences arose from factors such as word meanings, narrations of *Hadeeths* (the Sunnah), admissibility of certain principles, and methods of analogy[85].

Mohammed (1994) explains that the Shariah Law is based on fundamental principles the regulate the economic sector. These general Islamic principles are:

First principle: concerns respect for private ownership;

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[81] Bowen, J., (2003), *Islam, Law and Equality in Indonesia*, Cambridge: Cambridge University Press.
[82] Schacht, J., (1964), *An introduction to Islam law*, Oxford: Clarendon Press, p. 28.
[83] Shalabi, M., (1985), *Introductory in The Shariah Law*, Beirut: Dar-Al-Nahdah Al-Arabia, p. 209.
[84] Philips, B., (2000), *The Evolution of Fiqh*, Riyadh: International Islamic Publishing House.
[85] Shalabi, M., (1985), *Introductory in The Shariah Law*, Beirut: Dar-Al-Nahdah Al-Arabia, pp. 209–210.

Second principle: prevents aggression;

Third principle: prohibits abuse of any the rights;

Fourth principle: prevents monopolies;

Fifth principle: prohibits lending with interest;

Sixth principle: prevents any contract between parties that contains usury or ignorance in their obligations that may lead to a dispute;

Seventh principle: concerns the necessity to pay alms;

Eighth principle: Concerns freedom of the economic sector[86].

3.2.2 Competition regulation in the Shariah Law

The basis of Islamic competition law refers to the Shariah Law and covers two main aspects: prevention of monopoly and prevention of damage.

1. Prevention of monopoly

Monopoly practices are strongly sanctioned by God '*Alluah*' in the *Holy Qur'an*, who says "…and whoever inclines to evil actions therein or to do wrong, him We shall cause to taste from a painful torment"[87]. According to *Ibn Kathir*, an interpreter Scholar in Shariah Law, one of the meanings of this verse is to prevent the hoarding in Mecca[88]. The Prophet Muhammad also clearly prohibits monopoly when he says: "He who hoards (monopolizes) is a sinner"[89].

Islamic scholars have various definitions of monopoly, depending on the principles of each school. In the *The Hanafee* School, there are several definitions, but Al-Robi, (1991) has defined monopoly according to *the Hanafee* School as "buying the food from the market or from neighbouring markets and withholding it for forty days, waiting for price increases"[90].

[86] Mohammed, A., (1994), *The Aspects and Developments of The Shariah Law*, 2nd ed., Mecca: Organization of Islamic Word, pp. 170–178.
[87] Khan, M and Al-Hilali, M. (1996), *Interpretation of the Meaning of Noble Qur'an,* Riyadh: Darussalam, Surah Al-Hajj, verse. 25.
[88] Ibn Kathir, A. (2000), *Tafsir Ibn Kathir (Abridged)*, Riyadh: Darussalam,. vol. 6, p. 552.
[89] Al-Mundhiri, A. (2000), *The Translation of the Meanings of* Sahih *Muslim (Summarized)*, Riyadh: Darussalam, , vol. 1, p. 480.
[90] Al-Robi, R., (1991), *The Economic Dimension of Islamic Principle of Monopoly and The Opining of Scholars*, Mecca: UmalQura University, p. 11.

In *the Maalikee* School*, Maalikee* scholars define monopoly as "hoarding of goods for making profit when the prices increased, but hoarding food for eating is not considered to be monopolising"[91].

In the Shaafiee School, *Shaafiee* scholars defined monopoly as "buying food when the consumers needed to sell it again at more than its original price"[92].

Ibn Qudamah (1970), under *the Hambalee* School, defines prohibited monopoly as existing when three conditions are met:

- the goods should be bought;
- the goods should be necessary for the consumers;
- buying goods is a process which might cause harm for other buyers or consumers[93].

Al-Robi (1991) states that the common elements between the above scholars' definitions are as follows:

- the basic notion of monopoly indicates both the goal and the result of monopoly, which causes harm to the consumers by the increase in prices;
- the goods which caused harm to the consumers are necessary and the consumers do not have any other alternative in terms of the quality or price; and
- the goal of the monopolising person is to buy the goods from the market and withhold them to create scarcity[94].

Al-Doury (1983)[95], Mohammed (1994)[96], and Al-Shaiqi et al. (2000)[97] believe that monopoly is more widely applicable than just to food purchases, which the scholars mentioned, and that a monopoly contains any goods or services that a merchant hoards, (and the withholding of which causes harm for the consumers), such as clothes, fuel, and medicines.

Al-Fiqi (2002) states that the prohibition of monopoly has three conditions, which can be listed as follows:

[91] Al-Homiri, M., (1906), *The Large Code*, vol. 10, Egypt: Al-Kiriah Publistion, p. 122.
[92] Al-Hithami, S., (1897), *Tohfa Alminhaj Bisarah Almintaj*, vol. 2, Egypt: Dar-Alfiker, p. 120.
[93] Ibn-Qudamah, A., (1970), *Al-Mugni*, vol. 4, Egypt: Cairo Library, p. 244.
[94] Al-Robi, R., (1991), *The Economic Dimension of Islamic Principle of Monopoly and The Opining of Scholars*, Mecca: UmalQura University, p. 14.
[95] Al-Doury, K., (1983), *The Monopolies and its Effect in Islamic Law*, Iraq: Kahtan Al-Doury, p. 32.
[96] Mohammed, A., (1994), *The Aspects and Developments of The Shariah Law*, 2nd ed., Mecca: Organization of Islamic Word, pp. 173–174.
[97] Al-Shaiqi, A. and Al-Kmali, A., Hadiths of the Monopoly, *Journal of Law*, 2000, 24(2), p. 367.

- the monopolised goods or service should be redundant and not needed by the owner for a period of one year;
- the owner of the monopolised goods or service should have waited for the price of the goods or services to have increased to sell them at an inflated price; and
- the period that the goods or service were monopolised should be when the consumers needed the goods or service[98].

Although it is prohibited in the Shariah Law, the Saudi Competition Law (2004) does not prevent legal monopoly in the market. The Saudi government grants one company exclusive permission to operate in the market for certain commodities and services. The Saudi market has two main types of monopolies:

First, government monopoly controls various public sectors, such as the civil aviation, and public transportation services. In theory, this is understandable as the Shariah Law allows the government as a public sector to control essential services for social objectives (which is called state monopoly). However, the Shariah Law prohibits abuse of this right for example by increasing the prices and reducing the quality;

Second, the private sector has a legal monopoly position in several types of business under the Commercial Agencies Law (1962)—for example, car trading. This type of prohibition is clearly illegal in the Shariah Law[99].

The above mentioned points indicate that the monopoly regulation of the Shariah Law does not have an actual influence on the Saudi Competition Law (2004) at the moment. The Saudi Competition Law (2004) does not prevent the abuse of government controlling the public sector services and does not prohibit monopoly in some privet sectors.

2. Prevention of damage

The Prophet Muhammad prohibits causing damage to others because he says: "You should neither harm yourself nor cause harm to others"[100]. The Shariah Law prevents any sort of harm against any person, which is considered a significant general principle and applies in all kinds of law (e.g., family, civil, criminal, and commercial). Consequently, unfair competition absolutely has a negative effect in all parties in the market.

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[98] Al-Fiqi, M., (2002), *Shariah Law: Comparative Study*, Riyadh: Dar- Almarik Publication, p. 226.
[99] For more discussion see Chapter Five (Abuse of Dominant Position).
[100] As-Sanani, M., (1996) Bulugh Al-Maram Attainment of the Objective according to Evidence of the Ordinances, Riyadh: Darussalam, p. 324.

In theory, the Saudi Competition Law (2004) prohibits some types of practices and agreements, such as price fixing and market sharing, that are expected to cause damages to other parties in the market, such as consumers and small competitors. However, the CCP (the competition authority) is not sufficient for prohibiting unfair practices and agreements[101].

This section described the legal basis for prevention of monopoly and prevention of damage in the Shariah Law. However, these general rules were expand and developed further by *Hambalee* Scholars to include other types of monopoly which will be discussed next.

3.2.3 *Hambalee* Scholars developed other kinds of monopolies practices

Hambalee Scholars, such as Abin-Timiah and Abin-Alqim, have widened the principle of monopoly to contain other kinds of monopolistic practices for cases which are not mentioned in previous definitions, such as buying monopoly, service monopoly, exclusiveness, and collusion.

1. Buying monopoly

Abin-Alqim (1961) considers monopoly to be the purchase of specific goods or services to prevent other buyers from buying the same goods or services, which is unfair to other sellers[102]. This practice is called 'exclusive purchasing or dealing' and is prohibited in Article 5(4) of the Saudi Competition Law (2004) as an example of abuse of dominant position.

2. Service monopoly

Abin-Timiah (1980) states another type of monopoly in relation to services—for instance when consumers are in need of the services of farmers, weavers or builders and they refused to do the work. The Head of the Islamic state should force them to provide these services and pay them a fair salary[103]. Refusal to supply is considered abuse of dominant position, which prohibited in Article 4(5) in the Saudi Competition Law (2004).

[101] See more details in Chapter Four (Anti-Competitive Agreements).
[102] Abin-Alqim, S., (1961), *The Rule Ways in The Islamic Policy*, Cairo: Al-Moasash Al- Arabiah, p. 226.
[103] Abin-Timiah, A., (1980), *The Computation in Islam*, Egypt: Al-Mtbaah Al-Salafiah, p. 16.

3. Exclusiveness

Abin-Timiah (1980) claims that monopolisation by a group of sellers that sell particular goods or provide to a specific group of buyers is a form of unfair behaviour because they do not allow other sellers to sell these kind of goods or service directly to the buyers[104]. Such arrangements are known as 'exclusive agreements' and are prohibited under Article 5(3) of the Saudi Competition Law (2004) because they constitute abuse of dominant position in the market.

4. Collusion

Abin-Alqim (1961) recognises another type of monopoly: the agreement between the sellers or the buyers to increase prices, which is called 'price fixing'[105]. Collusion is prohibited under the Chapter I prohibition in the UK Competition Act 1998 and Article 4(1) in the Saudi Competition Law (2004).

Al-Amir (2006) states that the majority of Islamic Scholars approve of the prohibition of monopoly in concurrence with the evidences of the *Holy Qur'an* and *the Sunnah* of Prophet Muhammad because it causes harm and damage for other buyers or consumers[106]. *The Holy Qur'an* forbids monopoly "*…and whoever inclines to evil actions therein or to do wrong, him We shall cause to taste from a painful torment*"[107]. According to Ibn Kathir, an interpreter scholar in Shariah Law, one of the meanings of this verse is to prevent the hoarding in Mecca[108]. The Prophet Muhammad clearly prohibits monopoly and damage when he said: "*He who hoards (monopolizes) is a sinner*"[109] and said: "*You should neither harm yourself nor cause harm to others"*[110].

3.2.4 Monopolisers' punishment in the Shariah Law

Abd-Alsamee (2007) discussed the punishment of monopolisers, highlighting that the Head of the Islamic State has the discretionary right to punish monopolisers, in each

[104] Ibid, p. 13.
[105] Abin-Alqim, S., (1961), *The Rule Ways in The Islamic Policy*, Cairo: Al-Moasash Al- Arabiah, p. 355.
[106] Al-Amir, M., (2006), *The Monopolies and its Treatment in Shariah Law*, Egypt: Dar- Al-Feker Al-Jameei, , p. 14.
[107] Khan, M. and Al-Hilali, M., (1996), *Interpretation of the Meaning of Noble Qur'an,* Riyadh: Darussalam, Surah Al-Hajj, verse. 25.
[108] Ibn Kathir, A., (2000), *Tafsir Ibn Kathir (Abridged)*, Riyadh: Darussalam, vol. 6, p. 552.
[109] Al-Mundhiri, A., (2000), *The Translation of the Meanings of* Sahih *Muslim (Summarised)*, Riyadh: Darussalam, vol. 1, p. 480.
[110] As-Sanani, M., (1996), Bulugh Al-Maram Attainment of the Objective according to Evidence of the Ordinances, Riyadh: Darussalam, p. 324.

case, with one or more punishments, such as whipping, jail, fine, and confiscation of monopolised goods[111].

The Saudi Competition Law (2004) provides a fine sanction, which is up to 5 million Saudi Riyals for violation of the law. However, adopting imprisonment sentence as a criminal offence would enhance the efficiency of the Competition Law to deter violators, and comply with the Shariah Law punishment system[112].

3.2.5 Precautionary measures

The Shariah Law applies a principle called the 'market price'; therefore, it prohibits other types of sales which lead to monopoly or unfair competition, such as receiving goods outside the market before the seller's arrival, and sale by a resident on behalf of a nomad[113]:

Prophet Muhammad prohibited receiving goods outside the market before the seller's arrival, saying: "*One should not go out to buy goods before the seller's arrival at the market place. If the master of goods arrives after goods were sold, he still has the option (to approve the sale or not)*"[114]. He also said "*You should not try to cancel the purchases of one another (to get a benefit thereof), and do not go ahead to meet the caravan (for buying the goods) but wait till it reaches the market*"[115].

Prophet Muhammad also forbids the sale by a resident on behalf of a nomad. He said: "*Do not go to meet the caravan on the way (for buying their goods without letting them know the market price), a town dweller should not sell the goods of a desert dweller on behalf of the latter*." Ibn Abbas (one of the early Islamic scholars) was asked, "*What does he mean by not selling the goods of a desert dweller by a town dweller*?" He said, "He should not become his broker"[116]. The aim of such a precautionary rule is preventing any potential monopolistic action.

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[111] Abd-Alsamee, A., (2007), *The Monopoly in The Balance of Shariah Law*, Egypt: Al-Jaddedah, Dar-Al-Jameah, p. 107.
[112] More discussion in Chapter Seven (Enforcement).
[113] Al- Jawani, M., (2005), *The Commerce Principles in The Islamic Economic*, Beirut: Dar-Al-Kotob Al-Almiah, pp. 401–405.
[114] Al-Mundhiri, A., (2000), *The Translation of the Meanings of Summarized Sahih Muslim (Summarised)*, Riyadh: Darussalam, vol. 1, p. 480.
[115] Khan, M., (1996), *Summarized Sahih Al-Bukhari*, Riyadh: Darussalam, p. 480.
[116] Ibid, pp. 479–480.

3.2.6 Price fixing agreements

There is a strong relationship between monopoly and price fixing. Al-Husini (2000) defined price fixing as "setting the prices of goods or services by the head of the Islamic State and enforcing these prices on people"[117].

There are two general price fixing situations: price fixing in normal situations and price fixing of expensive goods or services.

1. Price fixing in normal situation

Abo-Rkia et al (1998)[118], Al-Fozan (2001)[119], and Afifi (2003)[120] state that the majority of Islamic Scholars agreed to prohibit price fixing in normal situations according to the evidence of the *Holy Qur'an* and the *Sunnah* of Prophet Muhammad. In the *Holy Qur'an*:

> O you who believe! Eat not up your property among yourselves unjustly except it be a trade amongst you, by mutual consent. And do not kill yourselves (nor kill one another). Surely Allah is Most Merciful to you[121].

In the *Sunnah* of Prophet Muhammad:

> When prices were high in Al-Madina in the time of Allah's Messenger, the people said, 'O Allah's Messenger, prices have become high, so fix them for us'. Allah's Messenger replied, '*Allah is the One Who fixes prices, Who withholds, gives lavishly and provides, and I hope that when I meet Allah the Most High, none of you will have any claim on me for an injustice regarding blood or property*[122].

Accordingly, the Islamic State should not interfere to change the normal prices in the market.

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[117] Al-Husini, M., (2000), *The Rules of Fix Price in The Shariah Law*, Beirut: Dar-Al-Bashair Al-Islamia, p. 13.
[118] Abo-Rkia, M., Al-Ashqar, M., Al-Ashqar, O. and Shobir, M., (1998), *Shariah Law Research in Recent Economic Caese*, Jordan: Dar-Al-Nafaes.
[119] Al-Fozan, S., (2001), *Transactions Jurisprudence*, Riyadh: Dar- Ashbilia, p. 47.
[120] Afifi, A., (2003), *The Monopoly According to Shariah Law*, Cairo: Mktabat Wahbah, p. 224.
[121] Khan, M. and Al-Hilali, M., (1996), *Interpretation of the Meaning of Noble Qur'an,* Riyadh: Darussalam, Surah Al-Nisa, verse. 29.
[122] As-Sanani, M., (1996), *Bulugh Al-Maram Attainment of the Objective according to Evidence of the Ordinances,* Riyadh: Darussalam, p. 284.

2. Price fixing of expensive goods or services

Al-Drini (1994)[123] and Al-Saboni (2002)[124] state that most Islamic Scholars believe price fixing is a necessary action when merchants decide to increase prices; and therefore, that the Head of the Islamic State is required to reduce the prices and impose fair prices to all parties' sellers and buyers in the market.

3.2.7 Prevention of dumping practices

The Shariah Law also prohibits dumping. Dumping refers to selling at a lower price to eliminate other competitors. The practice of dumping does not have particular rules in the Shariah Law. The Shariah Law requires the sellers to apply price of the market. However, dumping practices can be prohibited under the Shariah Law according to the general principle that prevents causing damage to others[125], as these practices cause damages for other sellers in the market.

As mentioned earlier, Prophet Muhammad forbids causing damage to people, saying: "*You should neither harm yourself nor cause harm to others*"[126].

The Shariah Law applies a principle called "prevention damage" as a result of unfair practices in the market. Prevention damage is considered a significant general system for all regulations of the Shariah Law such as commercial, civil, administrative, and family law. This principle gives the judges under the Shariah Law more flexibility to covers all types of unfair practices in the market, for instance anti-competitive agreements, abuse of dominant position, and merger operations.

3.2.8 Enforcement regulation under the Shariah Law (*Hosbah*)

The *Hosbah* rule (enforcement) means the Head of the Islamic State must appoint a person or group of persons to supervise and enforce commercial rules of the Shariah Law in the market. This function has developed from the Prophet Muhammad and became an administrative body in Saudi Arabia called 'the Commission for the Promotion of Virtue and Prevention of Vice'. Generally, *Hosbah* has four main commercial functions:

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123 Al-Drini, M., (1994), *Comparative Research in Shariah Law*, Beirut: Moasash Al- Risalah, p. 587.
124 Al-Saboni, M., (2002), *Transactions Jurisprudence*, Beirut: Al-Mktabah Al-Asriah, p. 117.
125 Al-Gazali, M., (2007), *Dumping Problem*, Egypt: Dar-Al-Jameah Al-Jaddedah, p. 242.
126 As-Sanani, M., (1996), *Bulugh Al-Maram Attainment of the Objective according to Evidence of the Ordinances*, Riyadh: Darussalam, p. 324.

- prevents cheating in the commercial activities;
- prohibits unlawful trading in the market;
- forbids monopoly; and controls the prices of goods[127].

Indeed, the Saudi Competition Law (2004) grants the CCP the power to enforce the provisions of the law, which contains supervision on the commercial transactions in the Saudi market. The CCP function is the same as that of the *Hosbah* rule under the Shariah Law.

3.2.9 Impact of the Shariah Law on the Saudi Competition Law (2004)

The discussion so far shows that the Shariah Law sets out a general competition system. It includes comprehensive rules that regulate all aspects of competition which are: anti-competition agreements, abuse of dominant position, mergers operations, and enforcement.

The legal base of Competition under the Shariah Law involves two main rules:

1. Preventing monopoly

The Shariah Law clearly prohibits monopoly (legal monopoly), which grants one private company the exclusive right to operate in the market. The Saudi Competition Law (2004) does not prohibit monopoly but it prohibits abuse of dominant position in Articles 4 and 5. This indicates that the Saudi Competition Law (2004) does not comply with the Shariah Law in this point.

2. Prohibiting damage

The Shariah Law applies a flexible principle, which is known as the 'prevent damage' principle. This principle prohibits competitors' companies to cause harm to other consumers and competitors; it regulates two issues in competition rules—namely, anti-competitive agreements and mergers operations. Generally, this indicates that the Saudi Competition Law (2004) follows the Shariah Law principles in regulating anti-competitive agreements and mergers operations aiming to prevent damage to others.

3. Enforcement authority

The Shariah Law created the *Hosbah* rule (enforcement), which has power to prevent and enforce competition rules in the Shariah Law. In the legal cases, the Shariah Law

[127] Al-Driwesh, A., (1989), *The Rules of The Market in The Islam*, Riyadh: Dar Alam Alkotob, pp. 464-469.

also grants the judge the discretion power to assess and apply these general and flexible principles. Accordingly, the Shariah Law has significant regulations for competition rules; however, these rules are not enforced, which means the Shariah Law has no actual ability to change the policy and behaviour of economic actors in the Saudi market.

In fact, the critical issue in both competition rules is the efficiency of the enforcement, which indicates a lack of sufficient enforcement in the Saudi markets. Hence, enacting the Saudi Competition Law (2004) does not change the policy of the monopolistic and unfair practices in the Saudi markets, which means the law is thus far largely ineffective in deterring leading companies from violations.

3.3 The Legal System of the Kingdom of Saudi Arabia

The Kingdom of Saudi Arabia is an Islamic country; it established its legal system on the basis of the Shariah Law (Islamic Law): *the Holy Qur'an* and the *Sunnah* of Prophet Muhammad (may peace and blessings be upon him)[128].

The legal system of the Kingdom of Saudi Arabia has seen significant development since it was enacted on 12 August 1927 with the creation of the first law of judiciary. The legal system contains a multiplicity of judicial departments, which are: ordinary jurisdiction (Islamic courts), administrative jurisdiction (the Board of Grievances), and Dispute Settlements Authorities[129].

3.3.1 Law of Judiciary

The current Law of Judiciary was enacted by Royal Decree No. M/64, in 1974. The Islamic Courts deal with all disputes and crimes[130]. These courts include the Supreme Judicial Council, which consists of eleven members[131]. Their main responsibility is to look into issues addressed by the Minister of Justice that require establishing general principles[132], and to review death, amputation, or stoning sentences[133].

The Court of Appeals has a chief and a number of judges, and is divided into a number of panels—for example, criminal cases and personal status[134]. The function of the Court

[128] Coulson, N., Law and Religion in Contemporary Islam, *Hastings Law Journal*. (1978), 29, pp. 1449–1452.
[129] Algamdi, N., (2000), *The Judicial Competence in Islamic Law with application in Saudi Arabia*, Riyadh: Mktabah Al-Roushd, , p. 122.
[130] Article 26.
[131] Article 6.
[132] Article 8(1).
[133] Article 8(4).
[134] Article 10.

of Appeals is to look into the appeals against the judgment from general or summer courts. The judgment of the Court of Appeal is reviewed by three judges, except in cases that deal with death, stoning, and amputation sentences, which should be reviewed by five judges[135].

General courts have one or more judges[136]. Judgments of the general court shall be rendered from a sole judge, except in cases concerning death, stoning, and amputation, which should be rendered from three judges[137].

Summary Courts consist of either a sole judge or a number of judges[138]. Judgments of a Summary Court shall be referred by an individual judge[139].

3.3.2 The Board of Grievances

The Board of Grievances was first established in 1954 according to the Fourth Chapter of the Law Cabinet, which created a new department at the Bureau of the Cabinet called the "Department of Grievances". The role of the department was to receive all the complaints presented to the Cabinet. The department investigated them and provided a report to the King. On 5 July 1955, the government enacted the law of the Board of Grievances by Royal Decree No. 9659/3/2[140].

The current Board of Grievances Law was adopted on 5 September 1982 by Royal Decree No. M/51, and from that date the Board has been an independent administrative judicial commission responsible directly to the King[141]. More details about the role of the Board of Grievances in enforcing the Competition Law will be presented later in Chapter Seven (Enforcement). The Competition Law grants the Board of Grievance to hear an appeal against the decision of the Legal Committee in the Council of Competition Protection (CCP) as an administrative decision[142].

Article 8 of the Board of Grievances Law states that the jurisdiction of the Board of Grievances is as follows:

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[135] Article 13.
[136] Article 22.
[137] Article 23.
[138] Article 24.
[139] Article 25.
[140] Al-Durreb, S., (1999), *The Judicial Regulation in The Kingdom of Saudi Arabia According to Shariah Law and Judicial Authority*, Riyadh: Imam Mohammad Bin Saud Islamic University Press, p. 485.
[141] Article 1.
[142] Article 14(3) of the Competition Law (2004).

a- Cases relating to the rights provided for in the Civil Services and Pension Laws for government employees and their heirs and claimants.

b- Cases of objection filed by parties against administrative decisions, where the reason of such objection is lack of jurisdiction, a deficiency in the form, a violation or erroneous application or interpretation of laws and regulations, or the abuse of authority.

c- Cases of compensation filed by parties concerned against the government and independent public corporate entities resulting from their actions.

d- Cases filed by parties concerned regarding contract-related disputes where the government or an independent public corporate entity is a party thereto.

e- Disciplinary cases filed by the Bureau of Control and Investigation.

f- Penal cases filed against suspects who have committed crimes of forgery as provided for by law, crimes provided for by the Law of Combating Bribery, and crimes provided for by Royal Decree No. 43, dated 15 June 1958, and crimes provided for by the Law of Handling Public Funds issued by Royal Decree No. 77, dated 26 October 1975, and penal cases filed against persons accused of committing crimes and offenses provided for by law, where an order to hear such cases has been issued by the President of the Council of Ministers to the Board.

g- Requests for implementation of foreign judgments.

h- Cases within the jurisdiction of the Board in accordance with special legal provisions.

i- Requests of foreign courts to carry out precautionary seizure on properties or funds inside the Kingdom[143].

j- With consideration to the rules of jurisdiction set forth by law, the Council of Ministers may, at its discretion, refer any matters and cases to the Board of Grievances for hearing.

The Board of Grievances practices its function through circuits specified by a decision of the President of the Board[144]. The Board of Grievances contains a number of Judicial Circuits, as follows:

1. Administrative Circuits: these twenty Circuits are located at the Board in Riyadh, as well as at its three branches. Each Circuit consists of three members. The

[143] This paragraph was added to this Article per royal Decree No. M/5 dated 14/5/ 2000.
[144] Article 6.

Administrative Circuits' function is to look into cases where the government is one of the parties whether plaintiff or as defendant, according to Paragraph b of Article 8[145].

2. Penal Circuits: located at the Board in Riyadh, as well as at its three branches. Each Circuit consists of three members and is responsible for cases under Paragraph f of Article 8.

3. The Disciplinary Circuits: these Circuits are located in Riyadh City, as well as at the branches of the Board on other provinces. Each Circuit consists of three members and is responsible for cases under Paragraph e of Article 8[146].

4. Commercial Circuits: these Circuits were previously called the "Committee of Concluding Commercial Disputes". This Committee consisted of three members (two of them are judges of the Shariah Courts and one legal advisor)[147].

3.3.3 Legal committees

There are a number of independent legal committees that practice special legal competence, such as:

- The Committees of the Commercial Papers;
- The Committees of Labour and Adjudicating Disputes;
- The Tariff Committee;[148]
- The Financial and Disputes Settlement Committee;
- The Standardization and Specification Authorized Committee;
- The Catering Judiciary Committee;
- The Committee of Trade Malpractice and Fraud; and
- The Trade Bonds Committee[149].

3.3.4 New Saudi legal system

On 1 October 2007, the government enacted a significant and comprehensive legal system (on process) by Royal Decree No. M/78, which aimed to reorganise the Saudi

[145] Al-Tawail, M., (1995), *Public Administration in the Kingdom of Saudi Arabia*, Riyadh: Institute of Public Administration, p. 114.
[146] Ibid.
[147] Al-Durreb, S., (1999), *The Judicial Regulation in The Kingdom of Saudi Arabia According to Shariah Law and Judicial Authority*, Riyadh: Imam Mohammad Bin Saud Islamic University Press, pp. 452–453.
[148] Al-Tawail, M., (1995), *Public Administration in the Kingdom of Saudi Arabia,* Riyadh: Institute of Public Administration, pp. 118–124.
[149] Al-Hageel, S., (2001), *Human Rights in Islam and Their Applications in the Kingdom of Saudi Arabia,* Riyadh: Imam Mohammad Bin Saud Islamic University Press, p. 89.

legal system. The new system provides laws to regulate the Judiciary and Board of Grievances and establishes the executive mechanism of the Judiciary and Board of Grievances. The objective of the new legal system is to achieve the following:

- to establish specialist courts for the first time under ordinary jurisdiction, such as family status courts, commercial courts and labour courts;
- to establish two stages in the legal system (courts of first instance and courts of appeal) because the previous law did not achieve this function; and
- to terminate the operation of the independent legal committees.

1. The Law of the Judiciary

Article 9 of the law established for the first time the judicial history of Saudi Arabia specialist courts as follows:

1- Supreme Court;
2- Courts of Appeal; and
3- Courts of First Instance:
    a- Ordinary courts
    b- Summary courts
    c- Family status courts
    d- Commercial courts
    e- Labour courts.

The significance of the new legal system lies in its ability to establish specialist commercial courts to look into commercial cases, such as competition cases, and is intended to assist in the application and effective enforcement of the competition law.

The new law replaced the law of the Judiciary issued by Royal Decree No. M/64, dated 1974, stated in Article 85.

The new Judiciary law provides a transition period to allow courts to prepare for the new legal system. A time limit was not set for this preparation because, for example, the application of the new legal system may take more time than was needed for establishing the new courts. In addition, current laws were modified to harmonise with a new legal system (for example, Shariah litigation law and criminal procedures law).

2. The Law of Board of Grievances

Article 8 created, for the first time, a new system for administrative courts. The Board of Grievances Court contains:

- The Supreme Administrative Judicial Court;
- The Administrative Appeal Courts; and
- The Administrative Court.

This law repealed Board of Grievances Law No. M/51, dated 10 May 1982, by Royal Decree according to Article 26. The executives of the Board of Grievances set down a transitional period, which shall not exceed three years starting from the date of amendment and application of Shariah litigation law, criminal procedures, and litigation regulation of the Board of Grievances.

3.4 Development of Competition Regulations in Saudi Arabia

The Saudi government enacted on 31 May 1931, by Royal Decree No. 32, the Law of the Commercial Court, which prevents (in general, according to Article 5) any behaviour that may negatively affect the commercial sector (such as fraud or unfair competition practices). Any merchant infringing Article 5 shall be punished by imprisonment from ten days to three months or fined from ten pounds (now Riyals) to fifty Pounds, according to the type of his infringement, in accordance with Article 147.

Competition regulation in Saudi Arabia has three aspects: the law of trademarks, the law of patents, and the law of trade names.

3.4.1 The law of trademarks

The government has adopted three trademarks laws. The first law of trademarks was enacted on 13 September 1939. This law protected the owner of the trademark from competitors using his trademark (according to Article 27: a, b, c). Anyone who infringes this law shall be punished by imprisonment for a period not exceeding one year and receive a fine from ten to one hundred pounds. The law also created other offences, such as forging a registered trademark or putting, in bad faith, a trademark owned by another on his products or sale items, or offering for sale or to possess with intention of selling products carrying a counterfeit, an imitated, or unlawfully affixed or used trademark. Under Article 28 (a, b), anyone who breaks this law shall be punished by imprisonment for a period not exceeding six months and a fine from five to fifteen pounds. The law also applies in other cases—For instance, where a person unlawfully inscribes on his trademarks or business papers a statement that would lead to the belief that they have been registered, or if an unregistered trademark is used. Under Article 31, anyone who has been convicted shall pay compensation for the damages sustained to the owner of the trademark. Significantly, Article 39 stated for the first time issues relating to *unfair competition*. In addition, the Article allowed any person to sue anyone who causes damage through unfair behaviour.

The second law of trademarks was passed on 6 February 1984. This law replaced the law of trademarks issued on 13 September 1939, according to Article 64. The law retained some articles from the previous law—for example, Article 31 was similar to the earlier Article 54. Article 49 increased the penalties in Article 27 (a, b, c) to sentences of one year maximum and a fine of up to 50,000 Saudi Riyals (one or both punishments). Article 28 was replaced by Article 50, which states that offenders can be imprisoned for a period not exceeding three months and receive a fine not exceeding 20,000 Saudi Riyals (US $5300).

The law included new articles, such as Article 51 for repeat offenders, who shall be punished by a penalty not exceeding twice the maximum punishment specified for the offence and closure of the place of business or the project for a period not less than fifteen days and not exceeding six months, in addition to publication of the judgment at the expense of the offender.

The current law of trademarks issued on 7 August 2002 repealed the trademarks law dated 6 February 1984, in accordance with Article 58. The new law contained some similar articles to those found in the previous law; for example, Article 51 became Article 45, Article 52 became Article 46, and Article 54 became Article 48.

Article 43 is now more stringent than Article 49 stating “Without prejudice to any harsher penalty, the following shall be punished by imprisonment for a period not exceeding one year and a fine not less than 50,000 Saudi Riyals (US $13,000) and not exceeding one million riyals”. Article 50 amended Article 44 to read “Without prejudice to any harsher punishment, the following shall be punished by imprisonment for a period not exceeding three months and a fine not less than 20,000 riyals and not exceeding 250,000 riyals” (US $67,000).

3.4.2 The law of patents

The Saudi government has enacted two laws of patents. The first law was adopted on 16 April 1989. In Article 22, the owner of the patent has the right to sue anyone who made a profit from his invention without his consent. According to Article 47, anyone who infringes this law shall be punished by a fine not exceeding 50,000 riyals.

The current law was passed on 5 July 2004 and is now called the Law of Patents, Layout Designs of Integrated Circuits Plant Varieties and Industrial Models. This law replaced the Law of Patents issued on 16 April 1989, in accordance with Article 64. Article 34 increased the fine in Article 47 in the previous law to 100,000 Saudi Riyals maximum (US $27,000). Article 22 became Article 47.

3.4.3 The law of trade names

The first and current Law of Trade Names was created on 20 November 1999. In Article 11, it states that if the trade name is used other than by its owner or is used by its owner in a way that violates the law, those concerned can ask the Minister of Commerce to prevent its use or strike it off the Commercial Register (if already registered). They may also resort to the Board of Grievances for compensation if appropriate. Anyone who uses a trade name contrary to the provisions of this law, such as competitors, shall be punished with a fine not exceeding 50,000 Riyals. The penalty may be doubled in the event that the violation is repeated, according to Article 12.

3.5 The Saudi Competition Law (2004)

As mentioned earlier, the Law of the Commercial Court was introduced as the first Law dealing with competition issues in 1932. Generally, Article 5 of the law prohibited any illegal practice that may have an effect on the economic sector, including unfair competition practices. Article 147 stated two kinds of punishment for violation the law: imprisonment of up to three months or a fine of up to fifty Pounds (now Riyals).

Before the Competition Law (2004) was passed, the Saudi legislation regulated competition-related issues under specific intellectual property laws—namely, the Law of Trademarks, the Law of Patents, and the Law of Trade Names. So, the laws protected competition in these fields only. The enactment of the Competition Law (2004) is considered a significant development, extending the protection to all market activities and preventing any unfair practice (for instance, prohibiting anti-competitive agreements such as cartels and abuse of dominant position).

The Saudi Competition Law was enacted by Royal Decree No. M/25 on 22 June 2004, and contains rules in one piece of legislation regarding anti-competitive agreements, abuse of dominant positions, and merger operations causing dominant position[150]. The

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[150] This law is briefly mentioned here. However, a full explanation will be discussed in the following chapters.

Law was published in the Official Gazette in July 2004 and entered into force on 31 December 2004. Article 4 involves two types of prohibition practices: anti-competitive agreements and abuse of dominant position—for example, price fixing of goods or services. Article 5 contains other particular rules that forbid those with a dominant position from abusing their power by, for example, selling goods or services lower than the true price to force other competitors out of the market. The Royal Order was issued alongside the formation of the Council of Competition Protection (CCP) No. A/292 on 9 October 2005. The Implementing Regulation of the Competition Law (IRCL) was issued by Decision of the Council of Competition Protection No. 13/2006 on 16 December 2006. On 9 September 2008, the CCP amended some articles in the Implementing Regulation of the law (1, 4, 6, and 23) by Decision No. 25/2008, and the CCP also approved the following Governing Rules:

- Rules Governing Exceptions and Exemptions;
- Rules Governing Dominant Position;
- Rules Governing Economic Concentration;
- Rules Governing the Work of the Judicial Investigation Officers; and
- Rules Governing the Committee for Settlement of Violations of Competition Law.

Dabbah (2007) found that adopting the first Saudi Competition Law is a very significant process. The establishment of the Competition Protection Council emphasised the intention of the government to apply and enforce the law. The law has two key aims: efficiency and consumer welfare. Generally, the law follows the EU competition law on matters such as anti-competitive behaviours, abuse of dominance, and damage of mergers[151].

3.5.1 The aims of the Competition Law (2004)

The Competition Law states that the aim of the law is to "protect and promote fair competition and combat monopolistic practices that affect lawful competition"[152]. Article 2 of the Implementing Regulation of the Competition Law (IRCL) explains this aim in the following two points:

1. protecting and promoting fair competition through reasserting market principles and goods traded therein, as well as free and transparent pricing; and

[151] Dabbah, M., (2007), *Competition Law and Policy in the Middle East*, Cambridge: Cambridge University Press, p. 200.
[152] Article 1 of the Competition Law (2004).

2. Combating monopoly or practices affecting fair competition by commission, omission causing an act violating fair competition.

In theory, the Competition Law emphasises that its aim is to protect fair practices and at the same time prohibit collusion between firms or any behaviour that causes restraint of freedom for commercial activities in the market; therefore, the Saudi legislature adopts new economic policy in this regard.

In fact, applying competition theory in the Saudi market and stating that the Competition Law aims to protect and encourage fair competition between corporations is considered a significant first step toward achieving a more liberal and competitive market.

3.5.2 Discussion of the aim of the Competition Law (2004)

The Saudi Competition Law (2004) aims to prevent unfair practices and encourage lawful behaviours in the markets. In this section, a discussion of the aim of the Saudi Competition Law in light of the context of the Saudi state and society will be presented. Economics, policies, and culture/religion aspects will be addressed below.

1. Economics

The Saudi government has two main proclaimed economic policies:

First, it encourages direct foreign investment by means of the Foreign Investment Law (2000) to increase the competition level. The Foreign Investment Law (2000) indicates particular permitted commercial activities for the foreign investors; therefore, it limits market access in the Saudi markets, which violates Article of 4(4) of the Saudi Competition Law (2004). Nevertheless, the Saudi market has stringent entry requirements, which include complicated conditions before getting a licence to operate in the market;

Second, the Saudi government applies privatisation policy, which aims to enhance the participation of the private sector in the domestic economy. It transfers several public sectors to the private sector, such as the communications and electricity sectors. This economic policy is expected to enhance the development of the Saudi economy and its growth. However, the Saudi privatisation policy does not achieve this aim, because the government is still the main player in the Saudi market, which does not create affective competitive markets and economic progress. On the other hand, within the privatised sector (such as the CITC) there is insufficient enforcement of competition rules due to a number of reasons—for instance, the jurisdictional conflicts between the CCP and the CITC.

Consequently, there is a clear conflict between competition law and economic policy in the Saudi competition system. This conflict restricts the enforcement of the law and the efficiency of competition (discussed in Section 3.5.4 below).

2. Policies

The WTO is an important international trade organisation. The Saudi government decided to join to the WTO to enhance its position in the international trade system. Membership represents the foundational underpinnings of the present competition law. Saudi Arabia's accession to the WTO in 2005 represented the finale of a process that began on 13 June 1993[153].

The recognition of the Kingdom of Saudi Arabia necessitated it modifying its internal policies. To join the WTO, the Saudi Arabia was required to[154]:

- reform its legal systems;
- establish a free market; and
- expand its basic economic goals.

To satisfy the requirements of the WTO, the Kingdom of Saudi Arabia went through an exceptional multifaceted process[155], and made the necessary commitment, demonstrating that it desired to be a member of the global community of trading nations[156].

The Saudi Arabia is currently planning the market principles of a free economy, through ensuring that private enterprise would be the focus within its transformation[157]. This was considered to be a significant challenge, as were the above changes, which must be brought about in accordance with the Islamic values of the nation. Therefore, the process of change was coordinated, as well as balanced, in meshing these two principles and the concepts involved.

[153] World Trade Organization, *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, 2005, Document WT/ACC/SAU/61.
[154] Loeffler Tuggey Pauerstein Rosenthal LLP, Terms of Saudi Accession, *Middle East Policy Council Journal*, 2005, 12(4).
[155] World Trade Organization *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, 2005, Document WT/ACC/SAU/61.
[156] Loeffler Tuggey Pauerstein Rosenthal LLP, Terms of Saudi Accession, *Middle East Policy Council Journal*, 2005, 12(4).
[157] This aim is stated in the introduction of the Saudi Competition Law (2004).

The Saudi government has made a considerable effort to liberalise various trade sectors and promote the private sector position. Two prominent examples are the telecommunications and civil aviation sectors[158]. These examples of the new policy show a transfer from the economic policy of a monopoly market to a competitive market.

As mentioned earlier, the Saudi Legal system utilises the principles of Islamic Law in its courts, judicial, and legal systems[159]. The commercial laws of the country, as a result of its acceptance into the WTO, have undergone modifications to adhere to contemporary business and economic principles[160].

This foundation is a critical component in understanding the legal system of the Saudi Arabia and its implications with respect to competition law.

The legal as well as the religious system within the country are important competition-related factors. They have an impact upon the framing of the legal procedures as determined by the Ministry of Commerce[161]. This represents a significant difference from Western philosophical beliefs that are based principally on common law, where religion plays no role in the design of the legal system[162].

The decision to make internal legal and administrative changes in order to facilitate the country joining the WTO is aimed at increasing transparency as well as codification with regard to the application of law[163].

3. Culture and religion

In section 3.2 above, we discussed the prohibition of monopoly by Shariah principles. This section involves a description of competition culture in the Saudi society.

The market of Saudi Arabia, like many markets in the Middle East, demonstrates substantial government domination over most of its goods and services, such as communications, civil aviation and electricity services. Consequently, the result of long monopolistic position in the Saudi market created an absence of competition culture in all parties in the market, even to the relevant competitors. However, the enactment of

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158 See Chapter Seven (Enforcement), for full details.
159 Coulson, N., Law and Religion in Contemporary Islam, *Hastings Law Journal*. 1978, 29, pp. 1447–57.
160 U.S. – Saudi Arabian Business Council, *Saudi Arabia's Business Law*, available at http://www.us-sabc.org/i4a/pages/index.cfm?pageid=3360. Last visited on 15 July 2008.
161 The Ministry of Commerce and Industry in Saudi Arabia.
162 Vogel, F., (2000), *Islamic Law and Legal System: Studies of Saudi Arabia*, Boston: Brill Publishers, p. 4.
163 Ibid.

the Saudi Competition Law (2004) (six years since) enhanced the situation, since the Saudi market witnessed many violations and the CCP has not issued any decision yet for punishing the violators.

3.5.3 Application of the Competition Law

Article 1 of Competition Law (2004) states that the application of the law is as follows:

> Provisions of this Law shall apply to all firms working in Saudi markets except public corporations and wholly-owned state companies.

Article 3 of IRCL describes the application and the exception of the law as:

> a. The provisions of "the Law" and "the Regulations" shall apply to all firms operating in the Saudi markets and various activities thereof. They shall also apply to any activity taking place abroad that leads to consequences contrary to fair competition within the Kingdom.
> b. The following shall be exempted from the provisions of Paragraph (a) above
> 1. Any company or corporations fully owned by the state.
> 2. Any "commodity" whose price is fixed pursuant to a resolution by the Council of Ministers or a provisional decision by "the Minister" in response to extraordinary circumstances, an emergency or a natural disaster[164].

1. 'Firm'

The Competition Law defines a 'firm' as a:

> Factory, establishment or company owned by natural or corporate person(s), and all groupings practising commercial, agricultural, industrial or service activities, or selling and purchasing commodities or services[165].

Royal Decree No. M/6 passed the Saudi Companies Law 1965, which states that the company must be owned by two or more partners [166] and it sets out eight forms of company that shall be registered legally in the country. Therefore, the term 'firm' covers all types of commercial enterprise—for instance, joint liability companies, limited partnerships, particular partnerships, limited liability companies, joint stock companies, co-operative companies, partnerships limited by shares, and companies with variable capital[167]. It also includes all enterprises owned by only one person, termed

[164] Article 3 of the IRCL.
[165] Article 2 of the Competition Law (2004).
[166] Article 1 of the Competition Law (2004).
[167] Article 2 of the Competition Law (2004). For more details about Saudi commercial law see Al-Jaber, M., (1994), *The Saudi Commercial Law*, Al-Koobar: Dar Al-Wataniah Al-Jadedah; Yahia, S., (1976), *Commercial Law in The Saudi*, Egypt: Al-Mktabah Al-Msriah Al-Hadethah,; Abed-Al-Hameed, R. and Bahnasi, S., (1998), *The Saudi Commercial Law*, Egypt: Dar Al-Nahdah Al-Arabia.

'*establishments*' under Saudi law as. In Saudi law there is a lack of particular rules for regulating individual establishments; however, the Commercial Register Law, which was enacted by Royal Decree No. M/1 on 17 July 1995, states that all companies and establishments shall be registered in the Commercial Register in the Ministry of Commerce and Industry[168].

2. 'Firms working in the Saudi market'

This paragraph (firms working in the Saudi market) provides significant comprehensive jurisdiction to the Competition Law. Consequently, the law applies to all kinds of companies and establishments that work and operate in the Saudi market, whatever their type. For example, this shall apply to limited liability companies and joint stock companies, no matter the type of ownership, such as national or foreign investment, or what activities are undertaken, such as providing goods or services.

The Saudi market includes all the territory which falls inside the geographical border of Saudi Arabia.

3. 'Various activities'

This clause (various activities) applies the Competition Law to all types of activities undertaken in the Saudi market, whether commercial, agricultural, financial, or industrial. However, the Saudi legal system subjects some particular sectors to their own laws, which contain similar rules applied in competition issues, for example, the Communications Law 2001. These additional laws aim to regulate some issues in competition law that arguably may conflict with the provisions of the Competition Law (2004) and also may affect its competence and efficiency. These laws are as follows:

1. Communications sector

The Communications Law was enacted by Royal Decree No. M/12 on 3 June 2001 and aims to regulate the communications sector in general—for example, it provides for advanced telecommunications services and promotes and encourages fair competition in the telecommunications field[169]. The Communications Law contains, in Chapter Six under competition rules, articles which deal with similar matters found in the Competition Law: for example, Article 24 prevents any practices that create dominant operation in the communications market and any practices that restrict or distort

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168 Article 2 of the Competition Law (2004).
169 Article 3(1 and 3) of the Communications Law 2001.

competition; Article 25 mentions that operators shall obtain permission before starting merger procedures; and Article 26 prohibits abuse of dominant position.

In addition, the Telecommunication and Information Technology Regulation was issued by Council of Ministers Resolution No. 74 on 27 May 2001. Article 2 established an independent commission named "The Saudi Telecommunication Commission", which was amended on 21 July 2003 according to Cabinet Decision No. 133 to the "Communications and Information Technology Commission" (CITC). Article 3 describes the role of CITC as regulating the communications sector, including regulating competition matters in Articles 24, 25, and 26.

The Communications Law does not refer to the Competition Law because the law was adopted before the Competition Law, which causes real conflict and ambiguity between these laws, as follows:

First of all, the Communications Law and the Competition Law were enacted by Royal Decree, which means all the laws are in the same level of legal hierarchy according to the Saudi legal system. On the other hand, the process of enacting new law emerges under two situations generally: first, new law abolishes old law, and second, the new law itself states that the new law shall abolish any conflict with any other laws. In this case, the new law (Competition Law) did not mention or provide a solution for this conflict; this, in practice, led to ambiguity. A question arises in the case of assignment of jurisdiction for applying the law in competition issues. For example: would the CCP under the Competition Law (2004) have such authority or is authority vested with the CITC under the Communications Law 2001?[170]

2. Capital market sector

The Capital Market Authority (CMA) was established by the Capital Market Law, issued by Royal Decree No. M/30 dated 31 July 2003[171]. The CMA has several functions—for instance, to regulate and develop the Saudi Capital Market and approve mergers of investment funds. On 3 October 2007, the Board of the Capital Market Authority adopted by Regulation No. 1-50-2007 "Merger and Acquisition Resolution".

The Regulation states in Article 16(a), in the section entitled 'Compliance of the Offer with Competition Law', that:

[170] More discussion below.
[171] Article 4(a) of the Capital Market Law 2003.

> Where an offer would, if completed, be subject to the Competition Law, the offeror must state that this is the case in its announcement. The offeree company and the offeror must notify the Council of Competition Protection pursuant to the provisions of the Competition Law[172].

The law does not provide when the Competition Law applies in merger and acquisition operation, however, or in the relationship between the CCP in the Competition and the Capital Market Authority laws in merger and acquisition operations. In other words, it is unclear whether it is the CCP or the CMA that has the power to approve merger and acquisition cases[173].

3. Civil aviation sector

The Civil Aviation Law was issued on 23 August 2005 by Royal Decree No. M/44, and on 22 March 2005 "the Regulation of General Authority of Civil Aviation" was adopted by Cabinet Decision No. 33. Article 2:1 established an independent Commission named the "General Authority of Civil Aviation" (GACA). Article 4 states that the main goal of this Commission is to regulate the civil aviation and air transport sector and the promotion of investment in the country (domestic and foreign).

The law does not include any regulation for any competition aspects. On the other hand, there are three operators in the civil aviation sector: *Saudi Airlines*, the capital of which is 100% government owned, and two other new private operators: *Nas Fly*, based in the Riyadh City and *Sama Fly*, based in the Dammam City. Regulation of civil aviation provides uncertain competence in the violation cases in this sector between the GACA, which has a function similar to that if the CCP.

4. Electricity sector

The Electricity Law was issued by Royal Decree No. M/56 on 22 November 2005. The general aim of the law is re-regulation of the electricity services sector—for example, by improving the electricity services sector that serves consumers and at the same time encouraging the private sector to participate in investment in the electricity sector174. Article 10 mentions competition under Chapter 5: ("Taking into account the stipulations of the Competition Law…")

Article 10 consists of rules on competition: Article 10(3) prohibits any agreement or arrangement which restricts or distorts competition in the Electricity Industry; Article

[172] Article 16(a) of Merger and Acquisition Resolution No. 1-50-2007.
[173] See discussion in Chapter Six (Control of Mergers).
[174] Articles 2(1) and 2 of the Electricity Law 2005.

10(4) prevents dominant positions that may restrict competition; and Article 10(6) states that any merger or acquisition between firms needs to obtain approval from the Electricity and Cogeneration Regulatory Authority (ECRA). The ECRA was established pursuant to Council of Ministers Resolution No. 154 on 21 May 2007. Article 2 sets out that the ECRA is responsible for regulation of the electricity sector.

The Electricity Law has competence in competition issues, such anti-competitive agreements, abuse of dominant position, and mergers operations, which conflict with the provision of the Competition Law. The Electricity Law was enacted in 2005, following the adoption of the Competition Law in 2004. However, the legislative power does not express the relationship between the Competition and the Electricity Laws in regard to competition issues such as application and jurisdiction.

4. 'Consequences contrary to fair competition within the Kingdom'

The Rules Governing Exceptions and Exemptions define consequences contrary to fair competition within the Kingdom as having "an effect of the conduct that substantially lessens competition in a market within the Kingdom"[175]. The law applies to any practice outside the Saudi border as having an "*extra-territoriality application*". For example, if two international firms have agreed in London (head office) to collude in price fixing of particular goods which are sold by its branch in the Saudi market, then according to the law this kind of agreement is prohibited and shall be subject to the rules of the Saudi Competition Law. The extraterritoriality principle is a very complex issue[176]. In the UK, section 2(3) of the Competition Act 1998 includes a rule for the extraterritoriality principle; however, the relationship between implementation and effects is not quite clear[177].

However, effective application of extra-territoriality may cause several problems, such as the following:

- First, conflict with the sovereignty of other country that violates international law;
- Second, different jurisdiction systems and varying competition laws and procedures; and

[175] Section 2 of the Rules Governing Exceptions and Exemptions.
[176] For more information see chapter 7 (Extraterritoriality) on Dabbah, M., (2003), *The Internationalisation of Antitrust Policy*, Cambridge: Cambridge University Press.
[177] Rodger, B. and MacCulloch, A., (2004), *Competition Law and Policy in the EC and UK Competition Law*, 3rd ed., London: Cavendish Publishing Limited.

- Third, there is a difficulty with providing evidence on practice and agreement, especially when it occurs outside the Saudi territory.

3.5.4 Discussion of the application of the Competition Law

The study of the application of the Saudi Competition Law Article 3 demonstrated that there are conflicts between Competition Law and government policy, which include five main problems in applying the law. These are examined in the following sections, which are exceptions from the Competition Law; privatisation policy; government role in the market; jurisdictional conflicts; and barriers to entry.

1. Exceptions

The Competition Law provides two exceptions from the application of the law: public companies, and corporations that are owned totally by the government. These exceptions will be discussed in detail in Sections 3.5.5 and 3.5.6 below.

2. The government role

The government is the main player in the Saudi market. It has two main roles in this respect: monopolising services such as national civil aviation services and owning more than 70 per cent of market shares, such as in the communications and electricity sectors. Participation of the government in the commercial activities could as previously discussed cause lack of neutrality and insufficient enforcement of the Competition Law (2004). However, applying the new privatisation policy recommended below would reduce the role of the government automatically.

3. Privatisation policy

The Saudi government is transferring ownership of some parts of the public sector to the private sector, which is known as '*privatisation*'. The privatisation principle is defined as "the sale of a business or industry that was owned and managed by the government"[178]. However, privatisation policy in Saudi Arabia includes cases where the government transfers only between 30–49% (in general) from the capital of the company to the private sector and the government keeps the rest, which still allows the government to control the company, according to the Companies Law. Currently, the government owns many large shares in different companies in the market; for example, in the communications sector the government owns 70% of the main operator, *Saudi*

[178] *Macmillan English Dictionary*, (2002), China: Macmillan Publishing plc.

Telecom Company (STC), while the remaining share of 30% is owned by the private sector[179].

Privatisation policy in the Saudi Arabia also affects the application of the Competition Law because the government owns large shares in the market and the Council of Competition Protection (CCP), which is responsible for applying the law, is dependent on the government, which may cause come conflict of interest and lack of neutrality. In the communications sector, for example, if *Saudi Telecom Company (STC)* violates the Competition Law, the CCP or the CITC has the responsibility of enforcing the law under the Communications Law (2001). Conflict of interest may arise in this case because *Saudi Telecom Company (STC)* and the CCP are both run by the government.

Accordingly, the Saudi government privatisation policy should be changed and the government should adopt a new policy of reducing the government shares in the stock companies to no more than 49 per cent of the company capital.

4. Jurisdictional conflicts

As mentioned earlier, the regulation of competition issues in the Saudi legislation provides conflict and ambiguity between the Competition Law (2004) and other laws. For example, in the communications sector, the CITC has the power to investigate and enforce the Communications Law in violation cases such as anti-competitive agreements in Article 24, abuse of dominant position in Article 26, and merger operations in Article 25 in the communications sector. The CITC role conflicts with the function of the CCP under the Competition Law, which has the same duty.

The conflict between the Saudi Competition Law (2004) and other laws seemed to be a recurring theme in data collected from the interviews conducted during this study. Interviewees showed two interpretations on the application of the Competition Law and its relationship with other laws[180]. The majority of interviewees, (see section 1.6.3) believe that the Competition Law has general applicability over all sectors and they also emphasis application of the law according to Article 3, which states clearly that the law applies to all activities. However, they believe that any laws which conflict with the Competition Law, such as the Communications and the Electricity Laws, should be

[179] The Saudi *Stock Exchange,* available at http://www.tadawul.com.sa
[180] The interpretation contains two kinds: first, the Secretary General and two Members of the CCP, and second, seven private lawyers.

amended to comply with the Competition Law as these laws have similar articles for regulating competition in different sectors[181].

Only two interviewees (Members of the CCP and private lawyers) believe that the Saudi legislature should adopt two types of regulation for each sector, with the Competition Law as a general law and other laws as special laws, such as the Communications and the Electricity Laws. For example, if a violation occurs in the communication sector between first operator *Saudi Telecom Company (STC*) and second operator *Mobily*, there should be two ways to start legal proceedings:

In the first (compulsory in each sector), a complaint is made to the legal committee of the Communications and Information Technology Commission (CITC) and its decision can be appealed to the Board of Grievances. However, any party not agreeing with the judgment of the Board of Grievances has the right to appeal, which is the second type of legal proceedings.

In the second (general way), a complaint is made to the legal committee of the Council of Competition Protection (CCP) according to the Competition Law, and the decision of the CCP can be appealed to the Board of Grievances[182].

In fact, the second interpretation of applying the law (if ratified) causes the following problems:

- This interpretation causes conflicts of law as each sector has its own authority, which means different authorities for applying the law; and
- This interpretation makes the law more complicated and causes ambiguity in understanding the law and its procedures.

For example, in the communications sector, if *STC* abused its dominant position in the market, there are two legal procedures. First, the Communications Law grants the Legal Committee under the CITC the primary power to investigate and apply the Communications Law and the decision of the Legal Committee can be appealed before the Board of Grievances. Second, if the plaintiff does not agree with the Legal Committee, he can complain to the Legal Committee in the CCP according to the Competition Law. The decision of the Legal Committee can also be appealed before the Board of Grievances.

[181] The Secretary General and a Member of the CCP no 2 and private lawyers nos 5, 6, 7, 8, 9 and 10.
[182] A Member of the CCP no 3 and a private lawyer no 4.

Certainly, neither interpretation provides a practical solution for the conflicts between laws and which authority who should deal with competition rules. Therefore, I believe that the best way to solve this conflict in the Saudi competition system is to grant the CCP the general competency for enforcing all competition rules with concurrency between the CCP and other authorities when the violation occurs in other regulatory sectors.

5. Entry barriers

The government policy has created several entry barriers, including legal barriers. Legal barriers require that the investor, whether domestic or foreign, must obtain a license to work in the Saudi markets. The Commercial Agencies Law (1962) increased the level of the barriers to entry in the Saudi market. These barriers conflicts with Article 4(4) of the Competition Law (2004), which states very clearly that preventing any firm from exercising its right to enter the market is prohibited.

3.5.5 Exceptions

Article 3 in IRCL excepts two sorts of entities and activities from the law, as follows:

1. 'Public corporations and wholly-owned state companies'

In the first exception, the law excepts public corporations and wholly-owned state companies. Making an exception for public corporations which practise commercial activities causes many problems in applying the law and sometimes conflicts with the aim of the law itself. For instance, in the civil aviation sector, Saudi Arabia Airlines is still a public corporation and a wholly-owned state company, which means that the Competition Law does not apply to this company. This kind of exception is in conflict with the aim of the law; therefore the Competition Law (2004) should be applied to all companies that engage in commercial activities and provide goods or services.

2. 'Commodity whose price is fixed pursuant to a resolution by the Council of Ministers or a provisional decision by the Minister'

The law (Article 3) states two exceptions to the rule forbidding price fixing of any commodity:

First, the law grants the Council of Ministers a permanent right to fix prices. Currently, the government fixes prices and provides subsidies for a few necessary goods such as rice, baby milk, medicines, petrol, and gas for social objectives. Second, the law gives the Minister of Commerce and Industry a temporary right to fix prices in extraordinary circumstances, such as in an emergency or a natural disaster.

3.5.6 Discussion of the exceptions to the application of the Competition Law

Article 3(b) of the IRCL provides two kinds of exceptions from the application of the Competition Law: Public corporations and wholly-owned state companies and price fixing by the Council Ministers or by the Minister of Commerce and Industry.

The government protects public corporations and wholly-owned state companies from other competitors in the market, which ordinarily would be considered prohibited monopolies. This has an effect on the efficiency of the Competition Law. The reason for the exception of public corporations and wholly-owned state companies from the application of the Saudi Competition Law is justified by reference to the economic concept in the Shariah Law (Islamic Law). The Shariah Law allows the Islamic State (the government) to monopolise particular necessary services which are not considered to be forbidden monopolies under the Shariah Law, such as the oil industry because it is the main revenue of the Saudi Arabia. The aim of Shariah Law is to ensure the provision of fair services to the public, while at the same time the Shariah Law prohibits control of the private sector of essential services and goods, which may cause damage to consumers (for example the provision of electricity and water services)[183].

In fact, the exception from the application of the Saudi Competition Law (2004) for public corporations and wholly-owned state companies which work commercially and provide goods or services in the market continues to allow the government to monopolise certain goods and services. This clearly conflicts with the aim of the Competition Law (2004), as stated in Article 1. Furthermore, this exception does not encourage competition in the market, since there is an effect on the efficiency of the law.

In other jurisdictions, competition law typically applies to all undertakings. For example In the UK competition regime, the Competition Act 1998 "covers any natural or legal person engaged in economic activity, regardless of its legal status and the way in which it is financed"[184]. According to this definition, the term 'undertaking' covers all kinds of

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[183] Al-Driwesh, A., (1989), *The Rules of The Market in The Islam*, Riyadh: Dar Alam Alkotob.
[184] *The Chapter I Prohibition* (OFT Guideline 401), para 2.5.

commercial enterprise—for example, companies, partnerships, individuals, trade associations, agricultural associations, and state-owned corporations[185].

The Court of Justice of the European Union (CJEU) emphasised the same meaning of the definition in the case of *Hofner and Elser v Macrotron GmbH*, which stated that:

> the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed[186].

The second exception is price fixing by the Council Ministers or by the Minister of Commerce and Industry. The general principle of the competition law holds that, whether under the Shariah Law or in western theory, markets should operate according to the principle of supply and demand in the market without interference from the government. Despite this, the Saudi government has a monopoly of several goods in the market—for example, petrol and gas—and it also uses subsidy to fix the prices of other goods such as rice, baby milk, and medicines for social objectives.

The law permits the Minister of Commerce and Industry to fix the price of any commodity in extraordinary circumstances, such as in an emergency or a natural disaster. The IRCL does not describe the meaning of extraordinary circumstances, but it may mean the price fixing of particular goods when the traders have agreed between themselves (collusion) to increase the prices. However, the decision of the minister must be of limited duration and approved by the CCP.

Excepting public corporations and wholly owned state companies has a negative impact on the application of the Saudi Competition Law because it protects the government against other competitors in the market; therefore, the exceptions laid out in Article 3 should be abolished. The government interferes in the market by fixing the price of some goods with the aim to protect the public, which is the purpose of competition law; however, these interferences should be limited.

3.6 Conclusion

There are main conclusions to be drawn in this chapter. First, the Shariah Law and its enforcement already had principles with which to deal with competition regulation fourteen centuries ago by preventing monopoly and causing damages to other people as

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[185] Flynn, J. and Stratford, J., (1999), *Competition: Understanding The 1998 Act*, Bembridge: Palladian Law Publishing Ltd.

[186] Case C-41/90 [1991] ECR I-1979, [1993] 4 CMLR 306, para 21.

a broad principle to establish fair competitive market to all parties, such as consumers or rivals traders. Through these systems, it prohibits any practices which may affect normal pricing, such as monopoly, price fixing, and dumping. Guided by these principles, Islamic Scholars developed the competition theory under the Shariah Law to extend prohibition to other kinds of agreement and practice, such as exclusive agreement and collusion between merchants in the market. On the other hand, the Saudi markets within the Islamic State have seen a spread of government monopolies in the markets as the result of the government abusing its right to control and monopolise the major services; this is because the Islamic States and their Islamic Scholars have failed to develop or adopt a modern legal system, derived from the Shariah Law, to regulate market activities.

Second, Saudi Arabia has been developing its legislation by reforming and adopting a new legal system, especially commercial laws, which includes establishing for the first time commercial courts; this may lead to better understanding and application of the competition law.

Third, competition law plays a very important function in any legal system in the world. It regulates market activities, such as anti-competitive agreements, abuse of dominant position, and mergers operations, which affect fair competition and encourage the free market principle. The Saudi government realised the vital advantage of competition law in the market as a result, in June 2004, the Competition Law was adopted, which is considered a significant step toward achieving a competitive market;

Fourth, The Saudi Competition Law (2004) provides two kinds of exceptions: 1. public corporations and wholly-owned state companies, and 2. any commodity whose price has been fixed by the Council of Ministers or the Minister of Commerce and Industry.

The exception of public corporations and wholly-owned state companies from the application of the Competition Law creates a problem: the Competition Law aims to regulate the commercial market activities as a whole by adopting fair competition system and the exceptions hinder and conflict this aim; however the law as enacted protects public corporations and wholly-owned state companies that provide goods or services from fair competition. These exceptions are of major importance given that the government is still controlling some very significant services in the Saudi market.

Fifth, the Saudi Competition Law (2004) indicates a number of conflicts between competition law and policy and in some cases – the jurisdictional conflicts – between different provisions of Saudi competition law itself. These conflicts arise in four main practices: the government privatisation policy, the government participating in the commercial activities in the market, jurisdictional conflicts between the CCP (competition council) and other regulatory sectors, and barriers to entry in the Saudi markets that cause problems and affect the efficiency of the Saudi Competition Law (2004).

Recommendations

The exceptions in Article 3 should be abolished because these exceptions grant the government the ability to protect its public companies against private company competition and continue monopolising goods and services. Consequently, the Competition Law (2004) should be applied to all companies and establishments that operate commercially and provide goods and services in the market and grant the CCP sufficient power to enforce the law. The government has the right to exclude the oil sector from applying the Competition Law since it is the main revenue of the Saudi economy.

The privatisation policy of the government should be modified by using two methods. First, the government should apply a genuine privatisation policy by transferring at least 51% of the capital of all government-owned companies to the private sector, making the government responsible only for application and supervision of the law; and second, the government should ensure and enhance the application of the law and its procedures, even against the government itself, by granting the CCP independence. This level of independence does not presently exist, as the CCP is located in the Ministry of Commerce and Industry and headed by the Minister (this is discussed further in Chapter Seven).

The government should not have a main function in the market, as this conflict with its duty as responsible for applying the Competition Law. As a result, the government's role should be reduced by privatisation policy, as mentioned above.

The jurisdictional conflict between the CCP and other authorities—for instance the CITC—should be solved as follows: first, the CCP should be given the power to deal with competition cases even in other sectors; and second, the importance of concurrency between the CCP with other regulators sectors should be emphasised.

The government should consider removing all the legal barriers to entry that hinder access of investors, especially domestic investors, into the market. This could be achieved by amending the current laws and regulations.

In this chapter, I have discussed the regulation of competition under the Shariah Law and the competition law and policy in the Saudi Arabia.

The following chapters examine the provisions of the Saudi Competition Law (2004) in more detail.

Chapter Four: Control of Anti-Competitive Agreements

4.1 Introduction

The control of anti-competitive agreements is a significant part of competition law. The term anti-competitive agreements does not have a fixed definition; however, it generally includes any agreement involving '*collusion*' between merchants' parties that aims to restrict competition in the market, such as cartel agreements[187]. Consequently, competition law has particular rules which protect consumers and small competitors from any kind of unfair practice.

The Saudi Competition Law (2004) contains particular provisions for anti-competitive agreements that forbid practices, agreements, and contracts between undertakings. These rules are found under Article 4 in the Saudi Competition Law (2004).

The aim of this chapter is to assess the provisions regarding anti-competitive agreements in the Saudi Competition Law (2004), which involves several issues. First, it investigates the prohibitions of practices, agreements, and contracts which come under the heading of control of anti-competitive agreements. Second, it looks at the prohibition illustrative list, which contains eight prohibitions as examples, such as price fixing and market sharing. Third, it discusses the burden of proof system under the Shariah Law as the main source of the Saudi laws. Fourth, it examines exemptions system under the Saudi Competition Law (2004). Fifth, it explores legal cases related to anti-competitive agreements in the Egyptian Competition regime. This chapter also provides suggestions aimed at reforming the Saudi Competition Law (2004).

4.2 The Prohibitions

Generally, the Saudi legislature applies a free market policy, which means the prices of goods and services are set according to the principle of supply and demand in the market; therefore, most of the prohibitions of anti-competitive agreements have the aim of ensuring a free market in goods and services.

The Saudi Competition Law (2004) prevents two situations in the market: first, control of the demand of the goods or services leading to monopoly; second, control of the supply of goods and services causing dumping. Consequently, the market model is a natural market (supply and demand) without interference from any trader in the market.

[187] Dabbah, M., (2004), *EC and UK Competition Law Commentary, Cases and Materials*, Cambridge: Cambridge University Press.

Article 4 of the Saudi Competition Law (2004) is extremely important because it prohibits the main kind of practices, agreements, and contracts between companies, whose aim is to affect commercial activities in the market. Article 4 contains different components of the definition, which must be considered separately, as follows:

4.2.1 Practices, agreements or contracts

The law prohibits three main types of prohibited action: practices, agreements, or contracts as follows:

- **Practices**: practising a prohibited action in the market—for example, price discrimination—whether there is agreement or not;

- **Agreements**: two or more firms making an agreement that aims to violate the Competition Law—for instance an agreement on price fixing; and

- **Contracts**: two or more companies have agreed on a contract that contains violation of the Competition Law, such as including a tie-in clause.

4.2.2 Current or potential competitors

Article 4 prohibits practices, agreements, and contracts between two kinds of competitors. 'Current competitors' mean horizontal competitors who provide the same products or services (competition in the same level) in the market, such as competition between the suppliers in the mobile phone services. 'Potential competitors' are defined as vertical competitors, who sell or provide different products or services in the market (competition in different levels), for example competition between sellers and contributors.

4.2.3 Written or verbal, expressed or implied

There are two types of agreements:

- 'Expressed agreement' is defined as an agreement, whether written or verbal, between traders that aims to fix prices for particular goods or services. As a consequence of this, traders want to achieve price fixing directly from the agreement; and

- ‘Implied agreement’ is described as an agreement, whether written or verbal, between merchants that do not overtly aim to fix prices, but the impact of the agreement causes price fixing.

4.2.4 Objective

The law prohibits any practices, agreements, or contracts if they have to the objective of either restricting freedom of commerce *or* hindering competition between firms; therefore, these two objectives should be the criteria for applying the law regarding any practices, agreements, or contracts.

4.3 Discussion of the Prohibitions

In general, the prohibitions under Article 4 prohibit behaviour which aims to restrict commerce and fair competition in any form in the market, such as practices, agreements, and contracts. These prohibitions explain that the activities in the market must run according to the principle of supply and demand, which means preventing monopoly on the one hand and on the other hand forbidding predation prices of goods and services.

On the other hand, Article 4 of the Saudi Competition Law (2004) shows that there is a lack of control of anti-competitive agreements, as discussed in the following:

1. Associations of undertakings

The Competition Law (2004) does not contain any rule for associations of undertakings. In Saudi Arabia, the Council for Saudi Chambers of Commerce and Industry (CSC) has a similar function to that of trade associations generally. The Council was created by Royal Decree M/6 in March 1980 and its head office is located in Riyadh. The main aim of the Council is to encourage participation of private sector in order to develop the Saudi economy, and it includes four bodies: the Board of Directors, the Executive Committee, the General Secretariat, and the Chambers of Commerce and Industry in Saudi Arabia. The Council consists of different committees that cover all business sectors, for example, the national commerce committee, the car dealers committee, the transport committee, the fresh dairy producers committee, etc.[188]. In April 2009, the car dealers committee of the chamber of commerce in Jeddah City violated Article 4(1) of

[188] The Council for Saudi Chambers of Commerce and Industry, available at http://www.saudichambers.org.sa

the Competition Law (2004) by making an agreement for price fixings of cars in the Saudi markets[189].

In the UK Competition Act 1998, the OFT[190] does not define 'associations of undertakings', enabling the phrase to cover all types of associations. For instance a decision by a trade association consists of the constitution or rules of an association of undertakings or its recommendations or other activities. The 'decisions' by a trade association includes a non-binding recommendation to its members[191]. The OFT Guideline presents the application and enforcement of Article 101 of the TFEU and the Chapter I prohibition of the UK Competition Act 1998, particularly in relation to trade associations and the rules of self-regulating bodies[192].

2. Concerted practices

Concerted practices are also not regulated under the Competition Law (2004). In January 2008, the major dairy companies increased the prices of dairy products in the same time in the whole Saudi markets[193]. Concerted practices involved price fixing, which violated Article 4(1) of the Competition Law (2004).

In the UK competition regime, the meaning of 'concerted practices' shall be interpreted to be consistent with the European Union law; concerted practices are defined by the CJEU as:

> a form of co-ordination between enterprises that has not yet reached the point where there is a contract in the true sense of the word but which, in practice, consciously substitutes a practical co-operation for the risks of competition[194].

In *Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd* the OFT found collusion and concerted practice between those companies, which violated the Chapter I prohibition[195]. The OFT Guideline provides examples which it considers concerted practice, such as knowingly entering into practical co-operation and direct or indirect contact that influences the market[196].

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189 More discussion in Chapter Seven (Enforcement).
190 The OFT was established as a corporate body by Section 1 of the Enterprise Act 2002. The general function of the OFT was to review commercial activities in the market in order to protect consumers in the UK.
191 *The Chapter I Prohibition* (OFT Guideline 401), para 2.9.
192 *Trade associations, professions and self-regulating bodies* (OFT Guideline 408).
193 More discussion in chapter seven (Enforcement).
194 *ICI Ltd v Commission* 48/69, [1972] ECR 619, [1972] CMLR 557, para 64.
195 *The Chapter I Prohibition* (OFT Guideline 401), para 2.8.
196 Ibid, para 2.13.

3. Assessment of the prohibitions rules

The Competition Law and its regulations do not mention how the CCP will apply these rules on the prohibited practices, agreements, or contracts. In the UK, the OFT will assess an agreement in its economic context[197]. In the case of *The Institute of Independent Insurance Brokers v. Director General of Fair Trading*[198], the UK Competition Appeal Tribunal (CAT) stated that it would first examine the object of any agreement to establish if the agreement determination restricted competition; if found not to do so, the agreement would be considered not to affect competition[199].

4. Voidness of prohibited actions

The Competition Law (2004) does not provide that prohibited actions are void. By comparison, the UK Competition Act mentions that any agreement or decision that infringes the prohibitions will lead to voidness of these agreements or decisions[200]. However, in the UK the national court only has the right to decide if the agreement or decision is considered void as a whole, and applying sanction does not mean the agreement or decision is totally void. The court will rule the agreement or decision totally void if the agreement or decision conflicts with the prohibition; if not, the agreement or decision will only be partially void[201].

4.4 Illustrative List

Article 4 prohibits several practices and agreements, but this Article states particular prohibitions as examples only; these are included in the '*prohibition illustrative list*', and are as follows:

4.4.1 Price fixing

The first prohibition concerns the control of the price of goods and services in the market, which is known as '*price fixing'*. Price fixing is defined as 'an agreement between companies to charge the same price for a particular product, in order to keep the price high'[202].

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197 *The Chapter I Prohibition* (OFT Guideline 401), para 2.14.
198 Case No 1003/2/1/01 [2001] CAT 4, [2001] CompAR 62.
199 [2001] CAT 4, [2001] CompAR 62, paras 169-170.
200 Section 2(4) of the Competition Act 1998.
201 Slot, P. and Johnston, A., (2006), *An Introduction To Competition Law*, Oxford: Hart Publishing, p. 62.
202 *Macmillan English Dictionary*, (2002), China: Macmillan Publishing plc.

Article 4(1) forbids any practices or agreements or contracts between firms or establishments that contain price fixing, such as increasing or decreasing prices. Furthermore, Article 4 prevents also agreement or practice between potential competitors that causes damage to fair competition. The IRCL describes, as examples, two forms of price fixing: First, 'fixing prices, service charges or terms of sale, and the like'[203]; second, 'setting different prices on a certain commodity according to where it is sold'[204]. Through price fixing, firms and establishments aim to control the supply side of goods and services in the market; as a result they get high and stable profits because they collude to increase the prices; this deprives consumers of the benefits of fair competition. Price fixing is a common practice in the Saudi market and currently the CCP has been investigating two legal cases. The first is a price fixing case between *dairy companies* that violated Article 4(1). The CCP studied this case and found that there was no collusion between *dairy companies*, because the dominant position company (*Al Maraeei*) was the first to increase its prices, which is called '*price leadership'*. Other companies increased their prices later on, so for that reason the CCP found no violation of Competition Law[205].

The second case is a price fixing case between *cement firms* that violated Article 4(1), and is still under investigation by the CCP[206]; however, the CCP has not provide any statement regarding this case, which means no violation has been found thus far. In a similar case, violation under the Egyptian Competition Law (2005) was found in the cement sector, which contained two prohibitions agreement price fixing and market sharing[207].

4.4.2 Limitation or control of goods and services

Article 4(2) prevents any limitation or control of goods and services from or to the market—for example, hiding or unlawfully storing. The IRCL describes an example for such limitation or control as: 'setting a limit for production of goods or the rendering of services'[208]. The law and IRCL do not explain the meaning of unlawful storing; however, it is normally taken to indicate that the trader may store only necessary goods for his regular business rather than excess amounts in order to restrict supply; hence,

[203] Article 4(1) of the IRCL.
[204] Article 4(8) of the IRCL.
[205] The Secretary General of the CCP.
[206] *Ibid*.
[207] See section 4.9 below for more discussion in this case.
[208] Article 4(2) of the Competition Law (2004).

unlawful storing is different than a monopoly, with which the trader controls 100% of the goods to sell them at high prices. This practice aims to restrain or remove goods and services and leads to control of the supply side of the market, thus increasing prices. At present, the CCP has been investigating one legal case in which a trader is suspected of violating Article 4(2) by *iron storing* in the Saudi market, but the case is still under investigation[209]. The CCP did not state any information in this case, which means has not yet found violation.

4.4.3 Affecting prices

Article 4(3) prohibits any practices that lead to control of the demand side of the market. This prohibition is opposite of the previous prohibition in Article 4(1) and 4(2). The prohibited practice aims to increase the quantity of products to affect prices by initiating a decrease in prices. IRCL describes one goal for such practices by giving an example: 'selling at less than the cost price in order to force competitors out of the market', which is called '*predatory pricing*'[210]. This prohibition example is also stated for dominant position firms in Article 5(1). The prohibition illustrative list shows that there are overlaps between anti-competitive agreements in Article 4 and abuse of dominant positions in Article 5, which causes ambiguity and some inconsistencies[211].

4.4.4 Entry and exit barriers

Article 4(4) forbids any restriction on any firm from working in the market or preventing any firm from exiting the market. IRCL explains this as 'taking measures to hinder the entry of an 'entity' into 'the market' or forcing it out of the market'[212]. In theory, this prohibition allows any firm or establishment to enter into or exit from the market at any time, which is considered a condition for perfect competition theory. There are current regulations in the commercial sector that create legal barriers to enter the Saudi market. The Implementing Regulation of the Foreign Investment Law[213] states that the amount of capital invested in the Saudi market shall not be less than: 25 million Saudi Riyals (US $6.5 million) for the agricultural sector, 5 million Saudi Riyals for the industrial sector and 2 million Saudi Riyals for other sectors, for example the

[209] The Secretary General of the CCP.
[210] Article 4(9).
[211] The Secretary General of the CCP.
[212] Article 4(5).
[213] The law was enacted by Royal Decree No. 1/M, dated 10 April 2000.

commercial sector[214]. A number of laws—for instance, the Electricity Law in Article 5(1) and Civil Aviation Law in Article 9—require a company to obtain a license to operate in the commercial sector. Furthermore, in the Communications Law, any firm that desires to operate in the Saudi market must pay for the permit: as an example of which, a second operator, *Mobily,* paid 12 billion Saudi Riyals and a third operator *Saudi Zen* paid 24 billion Saudi Riyals[215]. These barriers are not mentioned in the law or the IRCL, nor are they referred to in the other laws and regulations, which causes conflict and ambiguity in the application of Competition Law.

4.4.5 Refusal to supply

This prohibition is known in competition law as '*refusal to supply'*. Article 4(5) prevents another kind of practice that aims to deprive goods and services in the market from a particular rival firm or establishment since that causes damages to that firm or establishment. The rationale for this act is to affect the demand side of the market because if the owner of goods and services deprives others in the market it puts that owner in a powerful position, which could lead to him making greater profits than other competitors and the de facto establishment of a monopoly.

4.4.6 Market sharing

This prohibition in competition law is called *'market sharing'*. Article 4(6) forbids practices or agreements that indicate collusion between firms and establishments to divide the market according their area, distribution, category of customers and seasons. IRCL explains two examples for this prohibition:

- 'Dividing markets on the basis of geographical areas, sale or purchase quantities, customers, or any other basis adversely affecting competition'[216]
- 'Discriminating among clients in prices, facilities, and services'[217].

4.4.7 Bid-rigging

This prohibition is known in competition law as '*bid-rigging'*. Article 4(7) prohibits any conspiracy between merchants on tenders, whether in government or the private sector, to control prices, sales or purchases and services. The IRCL describes an example:

[214] Article 6(a, b and c) of the Implementing Regulation of the Foreign Investment Law.
[215] Private lawyer no. 4.
[216] Article 4(3) of the IRCL.
[217] Article 4(4) of the IRCL.

‘complicity in tenders. Submission of declared joint bids shall not be considered complicity, provided that the purpose thereof is not to violate competition in any way’[218].

4.4.8 Freezing or restricting of manufacturing, development, distribution or marketing

Finally, Article 4(8) prevents a general prohibition between traders that aims to restrict movement of any goods or services and causes damages to consumers or other competitors in the market.

On November 2010, the CCP has completed an investigation of the first legal case under the Saudi competition system that involved anti-competitive agreements and violated Article 4 of the Competition Law (2004). The CCP received a complaint three years ago from the Ministry of Health that contained suspicion over eight large medical companies for violation of the provisions of the Competition Law. The CCP investigated this case and found five violations of the Competition Law: price fixing, market sharing, imposing on the client to refuse dealing with other competitor firm, information preventing, and bid- rigging which may result in a fine of up to 25 million Saudi Riyals (US $6.5 million), 5 million Saudi Riyals (US $1.3 million) for each violation. The CCP is bringing legal action against eight companies before the Legal Committee[219].

4.5 Discussion of the Illustrative List

The illustrative list prevents any unfair practice or agreement that aims to restrict competition. However, the illustrative list includes several issues which may affect the regulation of anti-competitive agreements, as follows:

1. Ambiguity of the prohibitions

There are overlaps between the prohibitions in Article 4 and Article 5, including the exemptions. Article 4 regulates anti-competitive agreements and abuse of dominant position, and Article 5 comprises other rules for regulating abuse of dominant position; hence, this causes ambiguity and lack of consistency[220]. By way of comparison, in the UK, the Competition Act 1998 contains of two types of prohibitions. The first, “Chapter

[218] Article 4(6) of the IRCL.
[219] The CCP’s Website, available at http://wwwccp.org.sa, last accessed on 4 December 2010.
[220] The Secretary General of the CCP.

I prohibition", seeks the prevention of anti-competitive agreements such as price fixing agreements. The second, "Chapter II prohibition", forbids the abuse of dominant position (for instance, through imposition of unfair purchase or selling prices). So, the UK Competition Act regulates the prohibitions in separate sections, which may avoid ambiguity and uncertainty in enforcing the Act.

2. Prohibition of horizontal agreements

The Saudi Competition Law (2004) states that the prohibitions illustrative list in Article 4 merely provides examples. The illustrative list consists of eight prohibitions relating to horizontal agreements only (for instance, price fixing and market sharing). However, there are two categories of anti-competitive agreements: first, horizontal agreements that involve two or more companies operating in the same level in the market (for example two manufactories). Second, vertical agreements that consist of two or more companies operating in different level in the market (for instance manufactory and distributor). Vertical agreements include fixing resale prices and imposing export bans[221].

3. Absence of any supplementary

The CCP does not provide in its guidelines any other illustrative lists of anti-competitive practices and agreements that may affect competition, such as joint purchasing, or selling and exchanging price information.

By comparison, in the UK competition system, the OFT provides extra examples of anti-competitive agreements that may be considered as restricting competition, such as joint purchasing or selling, sharing information, exchanging price information, exchanging non-price information, restricting advertising, and setting technical or design standards[222].

4. Entry barriers prohibition

The illustrative list provides eight prohibitions (such as price fixing and predatory prices) as examples. It includes preventing any firm from exercising its right to entry or exit out of the market at any time according to Article 4(4) of the Saudi Competition Law (2004). However, there is a high barrier to entry in the Saudi market, which emphasises the conflict between the competition law and actual government policy (discussed in Chapter Three).

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221 Graham, C., (2010), *EU and UK Competition Law*, Essex: Pearson Education Limited.
222 *The Chapter I Prohibition* (OFT Guideline 401), para 3.3.

Moreover, the efficiency of the competition authority plays a significant role in enforcing the competition rules. The CCP does not have the required power to apply the illustrative list of the anti-competitive agreements, such as independence; this will be discussed in Chapter Seven.

5. Cartel arrangements

The CCP applies two approaches to anti-competitive agreements—*per se* prohibition and the rule of reasons prohibition—but not criminal offence. The Rules Governing Exceptions and Exemptions states that four actions that are considered to have an effect on fair competition within the Saudi market are prohibited *per se*; these are price fixing, entry or exit barriers, bid-rigging, and predatory prices. The CCP applies *the rule of reasons* to all the kinds of prohibitions in the illustrative list, which means they will prohibit any agreement if it impacts on the fair competition but not otherwise, such as price discrimination and markets sharing[223].

The UK Enterprise Act 2002 adopted a new criminal offence of 'cartel' practice in the UK competition system. The cartel offence is based on sections 1 and 2 of the Sherman Act 1890 in the USA[224]. The Part 6 section 188(2) of the Act provides five kinds of arrangement: price fixing, limitation of supply, limitation of production, the sharing of markets, and bid-rigging. Consequently, the UK Act applies *per se* prohibition in all arrangements of cartel agreements.

6. Oligopoly problem in the Saudi markets

Generally, the Saudi markets are described as oligopolistic markets that involve few companies that provide similar product or services—for example, in the communications and civil aviation sectors. The major reason for oligopoly is the high legal barrier to entry in the Saudi market (discussed in Chapter Three). Oligopoly is defined as a "market characterised by a small number of firms which realise they are interdependent in their pricing and output policies. The number of firms is small enough to give each firm some market power"[225]. The concept of an oligopolistic market assumes that companies do not need to make an agreement in order to increase their prices or restrict productions. However, companies determine their behaviour in the

[223] Section 2 of the Rules Governing Exceptions and Exemptions.
[224] Furse, M. and Nash. S., (2004), *The Cartel Offence*, Oxford: Hart Publishing.
[225] Graham, C., (2010), *EU and UK Competition Law*, Essex: Pearson Education Limited.

market in co-operation with other companies, which leads to tacit collusion[226]. The problem here is that tacit collusion is not prohibited under the Saudi Competition Law (2004).

Accordingly, investigating the regulation of the Saudi anti-competitive agreements in Article 4 indicates that the Law does not control all anti-competitive practices or agreements that restrict fair competition between firms and establishments. Taking into account the main role of the competition authority to apply the law and prevent illegal practices in the market, which is considered an important challenge for the CCP[227].

4.6 The Burden of Proof

Saudi Arabia is an Islamic country, which means its legal system is based on the Shariah Law. The burden of proof in the Shariah Law is placed on the plaintiff to provide evidence to support his case. The Messenger of Allah said:

> *Were people given what they claim (without proving their claim) some would have claimed the lives and property of others. But the oath is required from the claimant and the evidence from the defendant*[228].

Generally, evidence in the Shariah Law includes three kinds: first, confession of the defendant, which is considered the highest level of evidence; the second involves witnesses who must be two men or a man and two women. Witnesses may include legal or economic studies and reports from the relevant Competition Authorities. In the *Holy Quran*, Allah says "*And get two witnesses out of your own men. And if there are not two men (available), then a man and two women…*[229]"*;* and finally, if the plaintiff does not have evidence, an oath is required from the defendant. Accordingly, the burden of proof under the Saudi legal system requires the CCP to prove that the particular company has violated the Competition Law (2004).

4.7 Exemptions

The law provides that the CCP has the power to grant exemption from application rules in Article 4 to any practices and agreements that violate competition according to two

[226] Jones, A. and Sufrin, B., (2004), *EC Competition Law: Text, Cases and Materials*, 2nd ed., Oxford University Press, Oxford, pp. 818-819.
[227] More details in Chapter Seven (Enforcement).
[228] Al-Mundhiri, Z., (2000), (Summarized) *The Translation of the Meaning of Sahih Muslim*, Riyadh: Darussalam, vol. 1, pp. 536-537.
[229] Khan, M. and Al-Hilali, M. (1996), *Interpretation of the Meaning of Noble Qur'an,* Riyadh: Darussalam, Surah Al-Baqarah, verse. 282.

conditions: to improve the performance of firms such as increasing the quality of goods and services; and to realise a benefit for the consumer exceeding the effects of restricting freedom of competition, according to the rules in the IRCL[230].

Section 2 of the Rules Governing Exceptions and Exemptions states that the CCP's approach for assessing anti-competitive agreements and granting exemption under Article 4 of the Saudi Competition Law (2004). It contains seven factors:

1. Effect of the exemption on suppliers or purchases;
2. Exemption time period;
3. Expected impact of the exemption;
4. Result of the exemption on purchasers or potential new suppliers in the market;
5. Imports and exports opportunity;
6. Outcome of the exemption on consumers; and
7. Consequence of the exemption on any government regulation.

Article 5 in IRCL explains the procedures that firms and establishments must follow in order to request such an exemption. First, firms and establishments must apply for exemption to the CCP in writing and include supporting documents[231]. Second, the CCP after examining the request has two options; to approve or reject the request with justification[232]. Third, if the CCP approves the exemption request it may specify in the approval decision certain exemption terms and conditions and may also shorten or extend the term of the exemption[233]. Fourth, the CCP has the power to cancel the exemption at any time[234]. IRCL states that the CCP makes its decisions regarding the granting of an exemption in accordance with rules governing exceptions and exemptions[235]. Rules Governing Exceptions and Exemptions are contained in the procedures for determining exemptions called '*formal conditions*'. These include, for example, the application process for exemptions, time period for CCP decisions, the CCP process for conducting a review of the application, register of applications for

[230] The Secretary General and the Members of the CCP and private lawyers.
[231] Article 5(1) of the IRCL.
[232] Article 5(2) of the IRCL.
[233] Article 5(3) of the IRCL.
[234] Article 5(4) of the IRCL.
[235] Article 5(5) of the IRCL.

exemptions, and reviewing or cancelling of an exemption[236]. The CCP also has the discretionary power to approve or decline any exemptions in each case separately[237].

4.8 Discussion of Exemptions

As discussed in Chapter Three, Article 3(b) of the IRCL provides two kinds of exceptions from the application of the Competition Law: public corporations and wholly-owned state companies and price fixing by the Council Ministers or by the Minister of Commerce and Industry.

The Saudi exemption system for anti-competitive agreements indicates some defects, which are:

1. Ambiguity of exemption policy

Exemption rules under the anti-competitive agreements emphasises the lack of clarity of policy for the Saudi legislator. It grants the CCP the authority to assess each practice and agreement separately. Consequently, the ambiguity in the regulation negatively affects the efficiency of the law.

2. Eliminating competition

The Competition Law (2004) provides a negative exemption system for anti-competitive agreements. It contains two conditions: first, developing the performance of companies, such as increasing the quality or lower price of goods and services. Second, deriving benefit for the consumer exceeding the effects of restricting freedom of competition. Therefore, the CCP has discretionary power to exempt any agreement which eliminates competition.

In theory, these conditions aim to encourage firms and establishments in the market to improve their performance, which should lead to better quality and lower prices. On the other hand, the Law provides that agreement that may lead to eliminating competition is likely to be exempt. The regulation of exemption of anti-competitive agreements should not eliminate competition because it conflicts with the function of competition law, which aims to protect consumers from unfair practices in the market.

By comparison, the UK Competition Act 1998 also provides exemptions from Chapter I prohibitions, which are mentioned in Sections 4 to 11. Two types of exemption are presented: block exemptions and parallel exemptions. The Act provides that under the

[236] Section 2(1-5).
[237] The Secretary General and the Members of the CCP and private lawyers.

exemption criteria in Section 9 an agreement may be exempted if it leads to development of production or distribution, or encourages technical or economic improvement taking into account benefit to the consumers, but not eliminating competition.

3. Hard- core restrictions

Article 4 of the Saudi Competition Law allows the CCP to exempt any kind of anti-competitive agreements—for example, price fixing and market sharing. However, the CCP provides four prohibitions: price fixing; entry or exit barriers; predation prices and bid-rigging as *per se* prohibitions.

By comparison, within the EU competition regime, hard- core restrictions—price fixing, market sharing, and control of outlets—will not benefit from the exemption because these agreements inevitably have the aim of preventing or restricting competition[238].

4. *De minimis*

The CCP applies the "*de minimis*" principle, which means if the practices and agreements have minor effect on competition it will not prohibited[239]. However, the CCP does not state its approach for applying the *de minimis* principle.

The term '*appreciability'* is not mentioned in the UK Competition Act, but the concept of appreciability plays a significant part in understanding the meaning of the scope of the prohibition. It indicates that the prohibition of an agreement is dependent upon its effect on competition, so any agreement that only has a minor effect on competition is excluded from the prohibitions. In the UK, the appreciability principle follows the EU law according to Section 60, and agreements that do not have appreciable effect on competition will not be considered as violations of the law. Section 60 under the UK Competition Act 1998 provides that the consistency in its application with the EU as much as possible which may lead to enhancement of enforcement of the Act, in terms of efficiency and cost-effectiveness. Consequently, many significant judgments in UK competition cases had applied the same definition and decision as in the EU case law.

In the EU, the Commission applies a "*de minimis*" restriction for any agreement that has a slight effect on competition: at present, market shares should be less than 10% in horizontal agreements and under 15% in vertical agreements[240].

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[238] Graham, C., (2010), *EU and UK Competition Law*, Essex: Pearson Education Limited, pp. 108-109.
[239] Section 2 of the Rules Governing Exceptions and Exemptions.

4.9 Application in Legal Cases

In Saudi Arabia, there are still only a few cases through which the practices of the CCP can be challenged and examined[241]. For this reason, the research will examine case law in the Egyptian Competition Law below, which has similar laws and background to that of Saudi Arabia[242].

The Egyptian Criminal Court has recently pronounced a significant judgment concerning an anti-competitive agreement which found a violation of the Competition Law.

4.9.1 Prosecution of nine cement companies[243]

The Egyptian Competition Law was enacted on 15 February 2005 by the Law no. 3, year 2005, and entered into force in May 2005. The cement sector in the Egyptian market indicated that a large price increase took place in the cement sector without valid justification; as a result, on 16 July 2006 the Minister of Commerce and Industry ordered the Egyptian Competition Authority (ECA) to begin an investigation in order to ascertain whether there any agreements or practices which violate the provision of the Competition Law and affect competition in this sector.

The ECA started its investigation, which included the identification of the relevant market. The relevant market includes two aspects: first, the relevant production market, which is cement production, and second, the relevant geographical market, which is the whole country (Egypt). The investigation covered the period between the law coming into force in May 2005 until receiving the order from the Minister in July 2006.

On 3 October 2007, the ECA completed its report, which showed that all companies had violated Article 6(a),(d) of the Competition Law 2005, as follows:

First, homogeneity of the cement product, which means the consumers cannot find other products because there is no practical option;

Second, the low numbers of cement companies in the market (nine companies only) leads them to plan for agreements;

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[240] Slot, P. and Johnston, A., (2006), *An Introduction To Competition Law*, Oxford: Hart Publishing Oxford, pp. 54-55.
[241] Further details in Chapter Seven (Enforcement).
[242] More details about the Egyptian Competition Law see Dabbah, M., in Dabbah, M. and Hawk, B., (2009), *Anti-cartel Enforcement Worldwide*, vol.1, Cambridge: Cambridge University Press.
[243] Case No. 2900/2008.

Third, there were direct communications between the companies to increase prices, and three managers of the companies have confessed to this agreement;

Fourth, the ECA presented a number of witnesses and experts from different fields, such as economics, and traders and distributors in the cement sector, which emphasised agreement between the companies to increase prices; and

Fifth, prices increased by up to 96 % without a valid reason.

The Criminal Court was convinced by the evidence brought by the ECA. Therefore, on 25 August 2008; the Court found that 20 managers and employees in nine companies were guilty of two cartel violations through making an agreement between the companies in the market to increase the cement prices, which violated Article 6(a), and on the basis that the companies agreed to restrict marketing processes in the relevant market through dividing market shares between companies, which violated Article 6(d).

The Court imposed 10 million Egyptian Pounds for each defendant in this case, 200 million (US $35 million) in total, and the judgment has subsequently been ratified by the Appeal Court[244].

The above decision demonstrated the effective enforcement of the Egyptian Competition Law (2005) to the Arab world.

4.10 Conclusion

Article 4 of the Saudi Competition Law (2004) prevents three types of action—practices, agreements, and contracts—that aim to restrict trade or violate fair competition between firms in the market. It also prohibits two kinds of agreements: first, horizontal agreement, which means an agreement between the competitors (current competitors) that provide the same product—for example, agreement between sellers. Second, vertical agreement, which indicates that an agreement between different rivals (potential competitors) that product different goods—for instance, agreement between trader and contributor. Moreover, Article 4 forbids any sort of agreement, whether written or unwritten, or expressed or implied.

The illustrative list contains eight prohibitions as examples, which are: price fixing, limitation of production or illegal storing, affecting prices, preventing a firm from

[244] Appeal No. 22622/2008, the Egyptian Competition Authority Website, available at www.eca.gov.eg

entering or existing in the market, refusal to supply, market sharing, bid-rigging and freezing production or development or distribution or marketing.

The burden of proof principle under the Shariah Law requires from the Competition Authority (the CCP) to provide evidence which indicates that specific company has violated provisions of the Competition Law (2004). The evidence may contain defendant confession or witness for example legal or economic studies.

The exemption mechanism under the Saudi Competition Law states that the CCP may exempt any agreement according to two conditions: first, improving the performance of firms which leads to increase the quality of services and goods. Second, getting benefit for the consumers.

The CCP adopts two approaches for the prohibitions in illustrative list: first, *per se* prohibition, but not criminal offence, for four prohibitions which are: price fixing; entry or exit barriers; bid-rigging and predation prices. Second, *the rule of reasons* prohibitions to all other prohibitions such as price discrimination and markets sharing.

Assessment of the provisions for control of anti-competitive agreements under the Saudi Competition Law (2004) shows that it lacks a number of regulations. These are summarised as follows.

The regulation of the Saudi Competition Law (2004) does not mention any rule for associations of undertakings. However, the Council for Saudi Chambers of Commerce and Industry has responsibility as an official trade council; therefore the decisions of the Council for Saudi Chambers of Commerce and Industry do not prohibit according to the Law.

Control of anti-competitive agreements under the Saudi Competition Law (2004) does not regulate concerted practices which are considered another type of agreements. So, the anti-competitive agreements rules in Article 4 do not prohibit coordination between companies in the market.

The CCP does not explain in the Rules Governing its approach for assessing anti-competitive agreements rules in practice. Accordingly, it indicates lack of enforcement policy for the CCP.

The Saudi Competition Law does not mention any impact of prohibition practices, which indicates that any violation of the Competition Law will be in force and the CCP is required to impose a fine only, which indicates a lack of efficiency in the law.

The prohibitions of the Saudi Competition Law (2004) induce ambiguity in its regulation, because Article 4 itself regulates three main aspects: anti-competitive agreements, abuse of dominant position and exemptions, which causes ambiguity and misunderstanding these prohibitions.

Under the Saudi competition regime, the Governing Rules of the CCP do not illustrate extra types of prohibition that are considered anti-competitive agreements—for instance, joint purchasing or selling and exchanging price information.

In the Saudi market, the prohibition against preventing firms and establishments from entering or existing in the market is inconsistent, because in practice there are a number of legal barriers to entry into the Saudi market, whether national or foreign investors. For instance, the Foreign Investment Law sets out particular activities in the market in which foreign investors are allowed to participate and the amount of capital that must be invested. Additionally, in particular sectors, such as communications, a company is required to obtain a licence to operate, and this licence must be paid for.

The CCP applies *per se* prohibition for four kinds of cartel agreements: price fixing, entry, or exit barriers, bid-rigging, and predation prices, but does not provide that cartel agreement is a criminal offence. On the other hand, the CCP applies *the rule of reasons* prohibition on all other anti-competitive agreements, such as price discrimination and markets sharing.

The exemptions system of anti-competitive agreements does not operate under a clear policy. The Law grants the CCP exclusive power to exempt any practices and agreements without comprehensive guidelines. Consequently, the CCP do not adopt rules for block and parallel exemptions, which leads to ambiguity and inefficiency of the law.

As mentioned above, the Competition Law (2004) provides that the CCP is in charge of granting company exemptions over any anti-competitive agreements and practices. On the other hand, the Law sets two conditions for exemption: first, developing the performance of companies, such as increasing the quality or lowering prices of goods and services; second, deriving benefit for the consumer even, when the result of exemption will eliminate competition.

Article 4 of the Saudi Competition Law (2004) states that the CCP has the power to exempt any kind of anti-competitive agreements and practices—for example, ‘hard-core restrictions’, which are: price fixing, market sharing, and control of production.

Nevertheless, the CCP mentioned four prohibitions as *per se* prohibitions: price fixing, entry or exit barriers, predation prices, and bid-rigging.

The CCP has stated that the "*de minimis*" principle will be applied on practices and agreements if they have minor effect on competition. Nonetheless, the CCP has not set out its approach for deciding how it will apply this principle.

Recommendations

Assessing the provisions for control of anti-competitive agreements of the Saudi Competition Law (2004) leads to a number of recommendations in order to improve the control of anti-competitive agreements and practices. These recommendations would have significant impact and would provide an advanced regulation system for control of anti-competitive agreements.

Undertakings association is a very common method for all undertakings to meet and discuss competition issues in order to make an agreement that violates competition law, such as price fixing. In Saudi Arabia, the Council for Saudi Chambers of Commerce has a similar role and includes a number of committees, which, together, cover all economic sectors—for instance, car dealers and transport committees. However, the Saudi Competition Law (2004) does not prohibit the undertaking associations; the Competition Law (2004) should control and prohibit all decisions of any trade association.

Concerted practices are fundamental practices that provide clear indication of violation of competition law. The Saudi Competition Law should regulate these practices in order to cover all types of anti-competitive agreements.

The CCP does not issue an adequate guideline for assessing anti-competitive agreement and practices. Thus, the Saudi competition system should adopt a general 'economic context' to assess any agreement.

The Saudi Competition law does not state whether the violation agreement or practice will be void or not, which demonstrates lack of regulation of the law. The efficiency of any competition law is dependent on the power of the law to prevent violation and its impact. Therefore, the Competition Law should include a clause stipulating that any agreements, practices, and contracts that violate the law will be void.

The prohibition under the Competition Law shows ambiguity and overlaps between Articles 4 and 5. Because of this, Articles 4 and 5 should be amended by regulating the prohibitions in separate sections, as follows: Article 4 contains anti-competitive agreements (for instance, cartels followed by its exemptions), while Article 5 details dominant position rules (for example, those governing abuse of dominant position).

The CCP does not point out all types of anti-competitive agreements that limit competition. Hence, the CCP should issue in its guideline (the Rules Governing) two kinds of prohibitions: first, vertical agreements, such as fixing resale prices. Second, additional examples, such as joint purchasing or selling, sharing information, exchanging price information, exchanging non-price information, restricting advertising, and setting technical or design standards.

The prohibition ‘entry barrier’ is a profound problem in the Saudi market, especially to national investors. This situation should be changed by modification of the competition policy in order to open the markets for the competitors’. New competition policy should involve reviewing legal entry barriers in national laws and regulations that conflict with the Competition Law, such as the requirements of getting a license to establish company.

The Cartel arrangement is a serious prohibition. It includes price fixing and markets sharing; in many countries, such as the UK, cartel participation is considered a criminal offence. Accordingly, adopting this as a criminal offence into the Saudi Competition Law (2004) will be a significant factor in deterring the violation of anti-competitive agreements.

The oligopoly problem in the Saudi market requires immediate treatment by reducing the legal barrier to entry. Removing all barriers will allow new competitors’ companies to enter into the national market and increase the level of competition.

The Saudi Competition Law (2004) grants the CCP the competence for exemption of any agreement prohibited in Article4. Current exemption rules indicate a lack of guidelines in exemption regulation. Therefore, the CCP should enact detailed guidelines including rules for different kinds of exemptions, such as black and parallel exemptions.

The Saudi Competition Law (2004) allows the CCP to exempt any agreement that meets two conditions: developing the performance of companies and getting benefit for the consumer (even if an agreement leads to eliminate competition). The conditions for exemption of anti-competitive agreements should be amended by adding a new condition such that an agreement should not eliminate competition in any circumstances.

The Saudi exemptions system should not allow any exemptions from ‘hard-core restrictions’. Hard- ore restrictions aim to restrict and prevent competition constantly—for example, price fixing, market sharing, and control of productions.

The CCP adopted the ‘*de minimis*’ principle, which exempts restriction for any agreement that has a minor effect on competition. However, the CCP has not set out its approach to application of the ‘*de minimis*’ principle. The CCP should apply the ‘*de minimis*’ principle to any agreement where market shares of horizontal agreements (competitors in the same level) is under 10% and vertical agreements (competitors in the different level) less than 15%.

This chapter has investigated the control of anti-competitive agreements in the Saudi Competition Law (2004). Defects in the Law were identified and suggestions provided to improve the effectiveness of the Saudi Competition Law (2004).

The next chapter explores control of abuse of dominant position.

Chapter Five: Control of Abuse of Dominant Position

CHAPTER FIVE: CONTROL OF ABUSE OF DOMINANT POSITION

5.1 Introduction

The control of abuse of dominant position is considered to be the second most important element of competition law, after control of anti-competitive agreements. Competition law prohibits any company from abusing their dominant position and adversely affecting competition, especially in relation to consumers and small competitors in the market.

The control of abuse of dominant position plays a significant function in the market. Dominant position grants an undertaking additional power in the market against other competitors, power which may be aboused for example by refusing to deal with other firms[245]. All competition laws include rules that aim to prevent abuse of a dominant position. Regulation of abuse of dominant position can be found in Articles 4 and 5 of the Saudi Competition Law (2004).

This chapter aims to present an examination of the rules regarding abuse of dominant position in the Saudi Competition Law (2004) and its practice, including an investigation of the meaning of dominance and abuse thereof under the law, and an assessment of dominance in the relevant market. This chapter also aims to explore the first Saudi Competition Law in order to determine its good and bad points, which may lead to beneficial reforms of the Saudi law.

There is no doubt that the achievement of a dominant position is a significant advantage for any firm in the market. This position provides fundamental power, which may lead to a company abusing this position to reap extra profits based on unfair practices. Consequently, the Saudi Competition Law also considers the abuse of a dominant position to be important, and to this end contains rules in two Articles, 4 and 5, which shows that the law is focused more on this prohibition than other prohibitions.

In order to discuss how the Saudi Competition Law (2004) deals with abuse of dominant position, the following section is divided into three main subsections, examining: dominant position, abuse of dominant position, and exemption criteria.

[245] Dominant position by merger or acquisition will be discussed in Chapter Six (Control of Mergers).

5.2 Dominant Position

This section aims to identify the dominant position principle in the Saudi Competition Law (2004), which is considered the essential first step in determining whether a firm is abusing its dominant position. Accordingly, a definition of the concept of dominant position is necessary because it provides guidance on how to apply the rules in relation to evidence of abuse of this kind in competition law. This section examines the definition of dominance, the criteria for a position of this kind, and an assessment of dominance under the Saudi legal regime.

5.2.1 Definition of dominance

Article 2 of the Competition Law (2004) defines dominance as:

> A situation where a firm or a group of firms are able to influence the market prevailing price through controlling a certain percentage of the total supply of a commodity or service in the industry of its business. The Regulations shall specify this percentage according to criteria which include the market structure, the easiness of market entry by other firms, and any other criteria determined by the Council.

Article 1 of the Implementing Regulations of Competition Law (IRCL) describes dominance as:

> A situation where an entity or a group of entities are in a position to influence the prevailing price through controlling a specific percentage of the total supply of a specific commodity or service.

However, this definition does not state an amount for the controlling percentage, which is required by Article 2 above. Therefore, the definition of dominance in Article 1 of IRCL was amended on 9 September 2008 by Decision No. 25/2008 of the Council of Competition Protection (CCP) to the following:

> A situation when a firm or a group of firms in the market owned 40% at least from the cost of total sales during 12 months and/or a firm or a group of firms are able to influence the market prevailing price[246].

5.2.2 Criteria for dominant position

According to the definition of dominance in Article 1 (amended) of IRCL, the Saudi Competition Law applies two criteria to measure dominance: market share of at least 40

[246] Article 1 of the IRCL.

per cent and/or market power to influence the market price. The first criterion is based on the market share of the seller in the market. Accordingly, the market share criterion is linked with the market share of all firms to determine dominance. An example of this is when the firm has a particularly large share in the market compared with other competitors, meaning that the firm is in a dominant position. The Saudi Competition Law applies a market share criterion and sets the ownership of market share at a minimum of 40 per cent of the cost of total sales during a 12-month period. By contrast in EU case law, dominance is defined as economic power to prevent competition and act independently in the market[247].

The second criterion is the degree of market power as indicated by the ability of firms to control prices in the market; for instance, dominant position under this criterion is evident when the firm has the market power to influence the price of any goods or services.

5.2.3 Assessment of dominance

The CCP adopted rules called "Rules Governing Dominant Position" as a guideline only, which provide an assessment method for dominance. These rules briefly state five considerations: the relevant market, market share, existing and potential competitors, entry barriers, and date of competition[248]. The relevant market consists of two elements: the relevant product market and the relevant geographical market. Article 1 of the IRCL states that the relevant product market consists of:

> Any commodity or service or a combination thereof which may, in terms of price, characteristics and uses, substitute each other to meet a specific consumer need in a given geographical area of homogenous competition conditions.

The definition of a relevant product market states that three factors of goods or services should be interchangeable in the same relevant market: price, physical characteristics, and intended use.

The Saudi Competition Law and the IRCL do not define the relevant geographic market, but in Article 1 of the law, the phrase "…in a given geographical area of homogenous competition conditions" appears. The law states that two conditions for

[247] Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429.
[248] Section 2(1) of the Rules Governing Dominant position.

being in the relevant market: first, being in the same geographical market and second, having similar competition conditions.

As mentioned above, the first consideration of assessing dominance is the market share of a firm. The Saudi Competition Law applies a fixed market share of at least 40 per cent in the market. Therefore, any company owning a 40 per cent share will be considered to be in a dominant position without need for the other considerations below.

Another factor to consider is existing and potential competitors. ‘Existing competitors’ means firms already active in the market. An assessment of this factor aims to determine if consumers have the ability to switch to other firms or not. Generally, if the number of competitors in the market is limited, this means there is dominance by a firm or firms. On the other hand, it is assumed that if there are a large number of competitors there is no dominance. Potential competitors are firms that are able to enter the relevant market without barriers.

Entry barriers are a significant factor in the assessment of dominance. For example, if entrance to the market is easy, this means there is probably no dominance and, conversely, if there is difficulty or there are barriers to entry to the market, this indicates that there is probably dominance. The law also mentions that the assessment of dominance between competitors considers the last 12 months only.

5.3 Discussion of Dominant Position

1. Definition of dominance

The definition of dominance raises two issues. First, it sets a new word, ‘dominance’, instead of ‘monopoly’, which is used in the Shariah Law. Dominance is a significantly wide expression and it covers other terms, such as ‘oligopoly’[249], as well as monopoly. Second, the law does not prohibit holding dominance itself, but prevents abuse of the power of the dominant position, as with the UK Competition Act 1998.

Monopoly is considered crucial to the determination of unfair competition, especially in the Saudi market and other countries in the Middle East. Generally, monopolies can be divided into legal and natural monopolies. A legal monopoly occurs when the government monopolises special sectors by law, such as the oil sector in the Saudi

[249] Korah (2004) defined oligopoly as “a market with few sellers. In such a market suppliers are unlikely to compete in ways that can be quickly imitated”, in Korah, V., (2004), *An Introductory Guile to EC Competition Law and Practice*, 8th ed, Oxford: Hart Publishing.

market, and also monopolises the innovator of the patent or the trademark and its innovation, which grants the owner exclusive rights. A natural monopoly occurs when a particular company has monopoly of special goods or services because it has better quality or lower price than other similar goods or services.

The Shariah Law prohibits anyone from possessing a monopoly in order to increase the prices in the market. It allows Islamic States to monopolise particular kinds of goods or service for social objectives, and respects private rights as a legal monopoly, but stipulates that there must be no misuse of this right. It can also be argued that the Shariah Law encourages and promotes natural monopoly as a result of fair competition[250]. In fact, the policies and practices of the government in the market indicate a number of critical issues:

- ‘Public monopoly’: the government monopolises some goods or services, completely or partly, which leads to high prices and lower qualities. For instance, the government monopolised 100 per cent of *Saudi Arabia Airlines* in normal national civil aviation services.
- ‘Public and private monopoly’: with the *Saudi Electricity Company,* the government owned 70 per cent and 30 per cent was owned by the private sector, which monopolises the electricity sector.
- ‘Private monopoly’: the Commercial Agencies Law 1962[251] allows private companies to monopolise goods through what are called ‘exclusive agents’, for example, trading of cars and clothes.

Consequently, the Saudi market is either monopolised, such as in civil aviation, public transport, water, and electricity sectors, or oligopolised, as has occurred in mobile phone services (three operators), for instance. This shows that the government has failed to prohibit private monopolies in the market and it abuses the right of monopoly under the Shariah Law.

2. Criteria for dominant position

As mentioned above, there are two criteria for dominance in the Saudi Competition Law. The first is that the market share of a firm should be at least 40 per cent based on the cost of total sales during 12 months, and the second is that sufficient market power should be demonstrated, such that it grants a firm the ability to control prices in the

[250] See Chapter Three for competition regulation in the Shariah Law (the Saudi Competition Law (2004)).
[251] The Commercial Agencies Law (1962) was adopted by royal Decree No. M/11, dated 23 July 1962.

market. Hence, the definition of dominance includes either a market share of 40 per cent or market power, or both. However, there are two issues regarding the criteria for dominance that were pointed out through the interviews.

Some of the interviewees[252] believed that, generally, the percentage of market share necessary for dominance should be dependent upon the nature of the market, and the market power is different in each market in the country. For example, the percentage market share used to determine dominance in a neighbouring country from the region (the Egyptian Competition Law) is 25 per cent, because their law assumes that firms holding this percentage will be able to control prices in the Egyptian market. In the Saudi market, on the other hand, the law sets the figure at 40 per cent because this percentage is believed to enable a firm to have power over the price of goods or services. For this reason, some experts consider a starting market share of 40 per cent of dominance is suitable for the Saudi market. Other interviewees[253], however, felt that 40 per cent of market share for dominance was high, and that instead dominance should normally be signified by a 25–35 per cent market share.

One of the interviewees[254] raised a significant issue that is not mentioned in the law or in Rules Governing Dominant Position—namely, that the calculation of 40 per cent does not describe how to apply the 40 per cent to determine whether the firm is in a dominant position. For instance, in the case of bag production, the question arises as to the best way to determine whether a given firm has a 40 percent share of the market.

This raises the issue of "the relevant market", which was mentioned briefly above when assessing dominance and will be further discussed below.

It appears that the criteria used to determine dominance raise several matters. In relation to the first criterion—fixing a particular percentage (40%) for market share is not a practical method to define dominance, because dominance is changeable and it is different in each case. Market share can be an important presumption only for dominance with other factors, such as existing and potential competitors and entry barriers that apply in the EU and the UK Competition Law. Furthermore, in relation to the second criterion, linking dominance with the ability to control prices in the market only is not precise, because this criterion does not cover other abuses of a dominant position, such as refusing to deal with another competitor.

[252] The Secretary General and the Member of the CCP no 3 and private lawyers no 4 and 5.
[253] Private lawyers no 6 and 8.
[254] The Member of the CCP no 2.

In EU competition system, the Court of Justice of the European Union has defined dominance as:

> …a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained in the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of consumers[255].

The above definition contains references to the economic power of firms in relation to two aspects: prevention of competition in the market and independent action in the market.

Consequently, the criteria for determining dominance should be broad and include the market power of firms and contain all types of dominant behaviour in the market, such as predatory pricing or refusal to supply.

3. Assessment of dominance

The Rules Governing Dominant Position adopted by the CCP as a guideline do not seem to provide sufficient information, because they do not offer details or steps for assessing dominance. The CCP member interviewed emphasised this lack of rules in answering the question regarding the relevant market above.

The Court of Justice of the European Union has stated that any firm that has a market share above 50% is presumed, unless there are 'exceptional circumstances', to have dominance[256]. The General Court of the European Union (GCEU) declared that a market share between 70% and 80% in the relevant market is a clear indication of a dominant position[257]. The OFT considers that any undertaking with a market share of under 40 per cent is unlikely to be dominant in the market[258].

So far, there has been no dominance case in the Saudi Competition Law. Therefore, in the next section the research will try to suggest a system for assessing dominance based on the EU and the UK competition laws and OFT Guidelines.

4. Framework for assessing dominance

The EU Competition Law followed by the UK adopts two approaches to assessing dominance: first, identify the relevant market (in product and geographical terms) of the

[255] Case 27/76 *United Brands v Commission* [1978] ECR 207, [1978] 1 CMLR 429.
[256] Case C62/86 *AKZO Chemie BV v Commission* [1991] ECR I-3359.
[257] Case T-30/89, *Hilti v Commission* [1991] ECR II-1439, paragraph 92, confirmed by the European Court in case C-53/92 P *Hilti v Commission* [1994] ECR I-667.
[258] *Assessment of market power* (OFT Guideline 415), para 2.12.

goods or services and, second, determine if a firm has dominance in the relevant market. Assessing dominance is an economic test aimed to measure the power of a firm in the market in order to determine if it has a dominant position. Generally, this test is called the "*hypothetical monopolist test*", and applies in the major competition laws in the world, such as those of the EU and the UK[259]. The relevant market consists of two dimensions: the relevant product market and the relevant geographical market. Commodities or services can be in the same product market if they have three similar features: price, physical characteristics, and intended use. In order to determine the relevant product market, it is necessary to look at elasticity of both demand and supply in the market.

The concept of elasticity refers to the relationship between price and quantity of goods or services in the market. It is assumed that when the price increases there is a decrease in the quantity of goods and retention of the quantity. If the quantity of goods does not change much, it means that demand is inelastic, whereas if the quantity reduces, it means that demand is elastic because consumers are able to switch to other products[260]. For example, assuming that the price of one kilo of oranges costs 100 pence and that consumers in Preston consume 1,000 kilos weekly, then the price increases to 110 pence and the quantity of oranges bought in Preston decreases to 750 kilos. This result means that the demand is elastic because an increment 10% in the price led to a decrease of 25% in the quantity purchased. As an opposite scenario, when the price rises to 150 pence, the quantity of oranges bought decreases to 950 kilos. This indicates that the demand is inelastic because a price increase of 50% reduced the quantity purchased by only 5%[261].

As to the question regarding the extent of the relevant market, the answer depends upon the application of the *hypothetical monopolist test*, which is utilised in the EU and the UK. This test is mentioned briefly in the Saudi Competition Law, but a clear mechanism for application is not provided. The test aims to measure, as in our example, all kinds of bag production in the relevant market in order to determine if all sorts of bags are similar in respect to the three factors of interchangeability—namely, price, physical characteristics and intended use. The test also examines the elasticity of demand in relation to the substitution of bag products in the market, which indicates the

[259] The EU adopts the "*hypothetical monopolist test*" laid out in the 'Commission Notice on the definition of relevant market for the purposes of community competition law'.
[260] Al-Monif, M. (1997), *Economic Principle*, Riyadh: King Saud University.
[261] Hashem, A. (2005), *Introduction in Economic Science*, Egypt: Dar Al-Jamiat Al-Masriah, p. 117.

ability of consumers to switch to other bag products in the relevant product market when the price is increased.

Taking another example of elasticity of demand, this time from mobile phone services when *Saudi Telecom Company (STC)*, owning a 50 per cent market share, increased the price of its services, consumers may have transferred to other mobile companies, such as *Mobily* (owning a 40 per cent market share) or *Saudi Zain* (owning a 10 per cent market share). The reason behind this assumption is that the demand for mobile services is elastic because:

- there are three operator companies providing a similar service; and
- the prices of the services are close to each other, which means mobile services are considered to be in the same relevant product market.

Recently, *Mobily* announced that it had received more than 16,000 complaints from its customers, who requested to switch from *STC* to *Mobily* and who stated that *STC* was abusing its dominant position by delaying their doing so. *Mobily* has complained to the Communications and Information Technology Commission (CITC) and to date the case is still under investigation[262].

In contrast, *STC* still monopolises (100%) the landline services and there are no other operators in the relevant product market yet, which means demand for landlines is inelastic. The two services (mobile phone and landline services) are different in price, physical characteristics, and intended use, according to Article 1 of the IRCL.

In another example from the civil aviation sector, *Saudi Arabia Airlines (SAA)* monopolises (quasi-monopoly) the national services of civil aviation. The General Authority of Civil Aviation (GACA) permits two companies to operate in the Saudi market: *Nas Fly*, based in Riyadh City and *Sama Fly*, based in Dammam City. The civil aviation sector still does not really have any competition because:

- The GACA divided flight routes between *SAA* and the new operators, ten routes went to *Sama Fly*[263] and seven routes to *Nas Fly*[264], and these airlines compete for only six routes in the Saudi market.
- *SAA* maintains control of at least eight flight routes, which means it has a complete monopoly over these routes and consumers cannot switch to other

[262] *Mobily Company,* available at http://www.mobily.com.sa
[263] *Sama Fly* , available at http://www.flysama.com/Sama/English/default.htm
[264] *Nas fly, available* at http://www.flynas.com/eng/index.html

operators[265]. However, *SAA* has exemption from the application of competition law because it is still a public corporation and a wholly-owned state company[266].

- The services provided by *SAA* and the two new operators are different. *SAA* provides a normal service that includes first class, business class, and economy class. The new operators, on the other hand, provide cheaper prices for what are called "*commercial domestic flights*" and only provide one kind of service—namely, economy class. Commercial domestic flights services are not satisfactory for a number of consumers because the limitation of seats and the high incidence of cancellations or delays in departure[267]. Accordingly, the demand of the civil aviation sector is not inelastic because there is a difference between the kinds of services provided.

Supply substitution focuses on the supply side of products in the market and aims to determine whether merchants are able to switch to producing similar products for the same market. If the answer is yes, that means there is elasticity of supply substitution and that the original producer is not in a dominant position, because consumers are able to switch to other traders in the market.

The relevant geographic market indicates the same geographical market and similar competition circumstances. It also indicates one of three situations: local market, regional market, or international market. There are significant factors that need to be assessed in order to determine the relevant geographic market, such as the ability of buyers to transport goods from one area to another, lower or higher entry barriers, customs tariffs, and the cost of transportation. In the Saudi market, importation is considered to be a significant factor in assessing the relevant geographic market, because Saudi Arabia is a developing country, which means various kinds of goods are manufactured outside the country.

In its case law, the EU has defined dominance as the ability to prevent competition and operate independently in the market. It provides the economic power principle, which aims to affect the market and can be a positive criterion for dominance. Therefore, it is suggested that the criteria of dominance be modified as follows: first, cancel the market share condition (40 per cent) as a fixed condition, and second, amend market power condition and apply the principle of economic power as a general condition for

[265] *Saudi Arabia Airlines, available* at http://www.saudiairlines.com/portal/site/saudiairlines/
[266] See Chapter Four (Control of Anti-Competitive Agreements) for more details.
[267] Legal adviser of Saudi Arabia Airlines no.10.

dominance as in the EU case law. On the other hand, several factors should be taken into account in assessing dominance in the Saudi market, such as market share and legal barriers.

Market share is considered to be an important indicator for identifying the dominance of a firm in the market. Market share itself cannot provide absolute evidence; however, a certain level of marker share can raise a presumption of dominance, depending on other factors. In EU case law, market share is generally held to consist of three categories: large market share, medium market share, and small market share.

First, a clear indication for dominant position occurs when the firm has large market share between 70 and 100 per cent in the market. Second, a presumption for a dominant position is made if the company is owned and has a medium market share between 50 and 69 per cent in the market. Third, when an undertaking holds a small market share of less than 40 per cent it is unlikely to have a dominant position. Therefore, it is necessary to look at other factors, such as entry barriers and intellectual property rights to determine dominance.

The Saudi market has a number of legal barriers. The government grants concession to private companies for the exclusive right to operate in the market, which prohibits new competitors entering into the market, such as with *Saudi Public Transport Company* (SAPTCO) in the public transportation services sector. SAPTCO has monopolised public transportation services since 1979 and no other companies can provide public transportation services in the Saudi market.

Any company wishing to enter the Saudi market must have one of three kinds of license to enter: first, a high restriction license for Saudi companies establishing a company in particular sectors in the Saudi market, for example the iron sector. Second, a bid license, which allows a private company to enter into the Saudi market to work, whether a Saudi or a foreign company, such as *Mobily Company* and *Saudi Zain Company* in the Communications sector. Third, Foreign Investment Law permits foreign companies to operate in the Saudi market, but only in particular sectors and services, which means that there are entry barriers.

5.4 Abuse of Dominant Position

5.4.1 Definition of dominant position

The Saudi Competition Law does not define abuse of dominant position, but the Rules Governing Dominant Position define abuse as taking advantage of the position[268]. However, the law defines a number of types of abuse of dominant position.

In this section, the theory of abuse of dominant position in Saudi Competition Law will be studied and the kinds of abuse of dominant position practices will be described.

5.4.2 Kinds of abuse of dominant position practices

The Saudi Competition Law (2004) prevents any abuse of dominant position practices under Articles 4 and 5. The law also states several types of prohibition, as examples only, as in the following:

Article 4 states the prohibition practices and agreements for abuse of dominant position in the same way as for anti-competitive agreements, by providing examples in the form of a '*prohibition illustrative list'*. This list contains eight prohibitions as examples, which are: price fixing, limitation of production or illegal storing, affecting prices, preventing a firm from entering or existing in the market, refusal to supply, market sharing, bid-rigging, and freezing production, development, distribution, or marketing. These prohibitions were discussed in Chapter 4.

Article 5 mentions additional rules relating to dominant position. It forbids the dominant firm from undertaking any practices that aim to restrict freedom of competition between competitors in the market. Article 5 states four prohibitions as examples in a '*prohibition illustrative list*', which contains pricing and non-pricing practices, as follows:

1. Predatory pricing

This practice is known as '*predatory pricing'*. Article 5(1) prohibits any unfair practices by the firm in a dominant position that aim to abuse the power of that position in order to force other competitors, especially small companies, to exit the market by, for example, selling goods or services below cost. The firm in a dominant position intends to decrease the price of particular goods or services without making a profit since it is strong enough to work without income for a period of time. In contrast, other rivals,

[268] Section 1(b) of the Rules Governing Dominant Position.

especially small or new competitors, are generally unable to match this activity, which subsequently leads to their withdrawal from the market. The IRCL emphasises that most attempts to control prices in any way are prohibited, such as imposing an unrealistic price for goods in any way[269] or forcing other firms to sell at a loss[270].

2. Imposing restrictions on the supply of a commodity or service

Article 5(2) prevents any restriction on the supply of goods or services that aims to limit the quantity of goods or services in order to increase prices. The IRCL describes an example of such a prohibition as that which arranges a false shortage or abundance of goods or services[271].

3. Tie-in

This prohibition in competition law is called a '*tie-in'*. Article 5(3) forbids unfair conditions of selling or buying goods or services that aim to deal with a particular competitor in the market over others without acceptable reasons. The IRCL presents four examples for these prohibitions: first, fixing or imposing prices or conditions of resale goods[272]; second, discriminating on the prices of goods and services between customers in similar agreements[273]; and third, forcing customers to agree to not deal with other competitor firms[274]. Fourth, tying the sale of the goods to other goods/services or offering a service with other goods/services[275].

4. Refusal to supply

This kind of behaviour is identified as a '*refusal to supply*'. Article 5(4) prohibits a firm from refusing to deal with another firm where the aim is to prevent a new firm from entering the market. IRCL gives three examples under this prohibition:

- first, it prevents any practice that hinders another firm from entering the market[276];
- second, it forbids importing of add-on goods that lead to increasing prices forcing other rivals to exit the market; and

[269] Article 6(1)(c).
[270] Article 6(1)(b).
[271] Article 6(1)(d).
[272] Article 6(1)(a).
[273] Article 6(1)(f).
[274] Article 6(1)(g).
[275] Article 6(1)(j).
[276] Article 6(1)(b).

- third, it does not allow a firm to refuse to deal with a particular customer in normal commercial conditions without a legitimate reason[277].

The IRCL also provides other examples of prohibitions that attempt to monopolise any particular materials that are considered necessary for other competitors to perform their activities[278].

Article 6(2) of the IRCL presents other practices that all firms are prohibited from, whether the firms have a dominant position or not. Article 6(2) initially contained seven examples, but this has been amended by the CCP to contain four examples:

- any deliberate practice by a non-competing firm that leads to violation of fair competition;
- imposing lowest prices, directly or indirectly, for resale goods;
- imposing on another party or getting unjustified prices or conditions of sale or purchase that provides a competitive advantage or causes damage; and
- prohibiting resale of any goods under its market price (though this practice is only prohibited if the aim is the infringement on fair competition); highly perishable goods and permitted discounts are excepted[279].

5.5 Discussion of Abuse of Dominant position

1. Definition of abuse of dominant position

As noted earlier, abuse is not defined in the Saudi Competition Law; nevertheless, the Rules Governing Dominant Position defines abuse as a company taking advantage of their dominant position. This definition provides for a wide meaning; therefore, the application of this principle depends on the impact of the actual practice of abuse of dominant position. However, taking advantage as a criterion is difficult to determine in reality as there is occasionally overlap between fair and unfair practices and their results.

The meaning of abuse is not defined in the EU and the UK laws. However, in *Hoffmann-La Roche v. Commission*, the concept of abuse was stated as being:

> …an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market

[277] Article 6(1)(i).
[278] Article 6(1)(h).
[279] Article 6(2)(a, b, c and d).

> where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transaction of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition[280].

This concept of abuse refers to the objective concept and looks at the behaviour of the firm itself in the market in two ways: the individual practices of the firm abusing its dominant position and the impact of this behaviour on the structure of the market[281].

2. Theory of abuse of dominant position

The theory of abuse of dominant position is similar to what the Shariah Law calls the '*misuse of the right principle*'. This notion under the Shariah Law provides a great general rule which respects the private ownership and, on the other hand, to not exploit this right in excessive practices which causes damage to consumers and rivals. The Shariah Law does not prohibit dominant position but it prohibits a company who have a dominant position from abusing this power in order to affect fair competition in the market. This means that misuse of the private right of a company is a significant principle in Islamic economic theory which is intimately connected with the aim of competition law to prevent firms from using unfair practices in the market.

3. Conditions of abuse of dominant position

To apply abuse of dominant position rules in the law there are two conditions that must be satisfied: first, existing dominant position firm and second abuse of dominant position in the market. Abuse of dominant position occurs only when a firm is dominant. In the law, dominance occurs when a firm has a market share of at least 40 per cent from the cost of total sales during 12 months and/or market power to influence the prices.

The Competition Law does not define abuse of dominant position, but the Rules Governing Dominant Position state that abuse means taking advantage of a dominant position in the market which indicates broad meaning. Instead it states different kinds of practices as examples only, which are covered in the next section.

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[280] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461, [1979] 3 CMLR 211, para 91.
[281] Korah, V., (2004), *An Introductory Guile to EC Competition Law and Practice*, 8th ed., Oxford: Hart Publishing, p. 123.

4. Kinds of abuse of dominant position

First, all of the interviewees believe that Articles 4 and 5 of the Competition Law (2004) include all sorts of prohibition in relation to dominant position in the '*prohibitions illustrative list'*. Second, Article 4 provides rules that regulate two kinds of prohibition: anti-competitive agreements and the dominant position—eight examples are given for the latter. Article 5 also contains extra regulations regarding dominant position and describes four examples. The IRCL in Article 4 provides eight examples, instead, while Article 6(1) gives ten examples for prohibition. However, Article 6(2) of the IRCL mentions that any firm, whether dominant or not, is prohibited from practicing the additional four examples.

The current rules on dominant position show that the prohibitions lack consistency, which in turn causes ambiguity, affecting the understanding and implementation of competition law. Since Article 4 regulates two kinds of prohibitions: anti-competitive agreements and dominant position, and Article 5 covers dominant position only. Article 4 provides exemptions from the prohibitions, whereas Article 5 does not provide such exemptions. This problem could be resolved by the following:

First, the regulations in relation to anti-competitive agreements in Articles 4 and dominant position in Articles 4 and 5 must be divided into separate articles to become such that, for example, Article 4 regulates anti-competitive agreements with its exemptions and Article 5 covers dominant position only. Similarly, the UK Competition Act deals with anti-competitive agreements in its Chapter I Prohibition, and abuse of dominant position under its Chapter II Prohibition. Article 6(2) of the IRCL emphasises this inconsistency because it provides, in a separate section, rules for all firms, whether dominant or not, such as imposing minimum prices for the resale of goods[282].

Second, because of inconsistency between Articles 4 and 5, there are also overlaps between the prohibitions on dominant position in Articles 4 and 5—such as refusing to deal with another firm in Article 5(4) also being mentioned by Article 4(5) with the same meaning but worded differently. It would therefore be more practical if the law and IRCL provided two main practices in '*the prohibitions illustrative list*'. The first is pricing prohibitions that contain exploitative prices, pricing intended to eliminate competitors, and price dissemination. The second is non-pricing prohibitions, which include exclusive agreements, tie-agreements, and refusal to supply. This bears close

[282] Article 6(2)(b) of the IRCL.

similarity to the UK Competition Act 1998, which contains four examples of abuse of dominant position as a '*prohibitions illustrative list'*.

Moreover, the OFT provides several examples of practices prohibited under the Chapter II Prohibitions, such as excessive prices, price discrimination, discounts, margin squeeze, vertical restraints, and essential facilities[283].

5.6 Application in Legal Cases

Up to now, the Saudi judiciary has not ruled on any cases relating to abuse of dominant position; therefore, examples of such cases will be provided from countries in the region with a similar background (i.e., Egypt and Kuwait). These countries had several legal cases before enacting competition law, however, and analysis of these cases is significant for applications of competition rules under the Shariah Law in practice, as this is the main jurisprudential source in Saudi Arabia[284].

5.6.1 The Egyptian Insurance Company[285]

In *Egyptian Insurance Company v. Egyptian Transport Company*, the Court refused the claim that the Egyptian Transport Company (public company) had the same dominant position in relation to sea transport services between Cairo and Alexandria because other private companies in the market provided the same services[286]. Moreover, the Court found justification for not ruling that the defendant company had a monopolist position after determining the nature of the market. As a result of defining the market, the Court found that the sea transport services market is not exclusively the preserve of sea transport. In fact, it was found that there were other methods of transportation, such as air transport, which could be used, indicating that there was interchangeability in demand substitution. In *Ahmed Saeed Flugreisen*[287], the Court emphasised that all kinds of transportation in the market are considered as being in the same market[288].

5.6.2 The Al-Nasser Company for Vehicles Industrial[289]

In this case, the Court decided that the defendant company was not in a monopolist position because the vehicle was not an essential item for consumers. It mentioned that

[283] *Assessment of conduct* (OFT Guideline 414a).
[284] Monopoly under the Shariah Law see Chapter Three (the Saudi Competition Law (2004)).
[285] Appeal No.248 on 3 July 1969.
[286] *Ibid*.
[287] Case 66/86 [1989] ECR 803, [1990] 4 CMLR 102.
[288] Case 66/86 [1989] ECR 803, [1990] 4 CMLR 102.
[289] Appeals No.396 and 398 on 12 March 1974.

when an individual merchant provides goods or services, the merchant is not considered to have a monopoly unless the goods are necessary for consumers[290]. Actually, the judgment contained ambiguity and was based on invalid reasons because it followed the earlier concept in the Shariah Law, which considered monopolies only in relation to necessary goods or services for consumers[291]. Additionally, the decision did not examine the relevant product market before making any decision. In other words, it should be necessary to investigate first if there is any other product in the same market (demand substitution test) and this investigation did not occur.

5.6.3 The Mobile Phones Company[292]

In Kuwait, the Court did not recognise the *Mobile Phones Company* as having a monopolist position, despite the fact that the company is the only one operating in the market because the law establishing the company granted it a monopoly in relation to this service[293]. The judgment overlapped two kinds of monopoly: legal monopoly and actual monopoly. First, the legal monopoly arose based on the law of the country, which granted a particular company a monopoly to provide special goods or services and did not allow other companies to work in the same market. Second, an actual monopoly exists because the company monopolised goods or services because it has the power to control the service. However, the judgment did not mention if there were other products in the market to which consumers could switch.

Comments

The applications of the above cases demonstrate several findings. These cases operated under the Shariah Law, and not in competition law. The judgments of the Courts did not consider the differences between necessary and luxury goods and services. The prohibition monopoly under the Shariah Law has two notions: the old notion, which prohibits only necessary goods such as food and medicine, and the modern notion, extended the definition of necessary goods and services to include other essentials with less necessity, such as vehicles. The Shariah Law regulates competition under two main principles: prohibiting monopoly and causing damages to others. However, the decisions did not assess the practices of the companies in the market in order to

[290] *Ibid*.
[291] For more details on monopoly in the Shariah Law, see Chapter Three (the Saudi Competition Law (2004)).
[292] Appeal No.89-428 on 5 July 1989.
[293] *Ibid*.

determine whether they caused harm to others or if they misused their power against other consumers or potential competitors. As a result, the courts have failed to apply competition rules of the Shariah Law in the above cases.

The applications of the law in cases in the EU and the UK Competition Law provide comprehensive guidelines for assessing dominance in the market. This system contains three fundamental tests: first, identifying the relevant market of the product and geographic location, which involves substitution for the relevant product in the same region; second, assessing if the company has a dominant position by applying the economic power principle, which defines dominance in the market(this indicates the power of the company to operate independently in the market that aims to prevent fair competition); and third, examining whether or not a company has abused its dominant position. The practices demonstrate several prohibitions as examples, such as exploitative prices, pricing intended to eliminate competitors, price dissemination, exclusive agreements, tie-agreements, and refusal to supply.

5.7 Exemptions

The Saudi Competition Law does not state any exemption for a dominant position firm in Article 5, but exemption can be made by the CCP under Article 4 because it contains rules for dominant position as well.

5.8 Discussion of the Exemptions

Article 4 lists two exemptions from the prohibitions of anti-competitive agreement and abuse of dominant position: to improve the performance of firms and to realise a benefit for consumers. Article 5 contains other rules for dominant position that are not exemptions. The prohibition illustrative list relating to dominant position shows that Article 4 provides exemption for particular prohibitions, while at the same time similar examples are not exempted in Article 5. These prohibitions are:

- Selling under the cost price with the aim to force other competitors out of the market, which is called '*predation pricing*'. This example is also stated in the same words in Article 4(9) in the IRCL and in Article 5(1).
- Restricting the movement of goods and services, which is mentioned in Article 4(2) and Article 5(2).

- Imposing special conditions when dealing with other firms, which is known as '*tie-in*'. This prohibition is described in Article 4(5) and Article 5(3).
- Preventing a firm from entering or exiting the market appears in Article 4(4) and in Article 5(4).

All examples of prohibitions in the '*prohibitions illustrative list',* which are mentioned in Article 5, can be matched to similar examples of prohibitions in Article 4, therefore any dominant position firm can apply for exemption under Article 4 not Article 5 and exploit this inconsistency in the law. Consequently, the example prohibitions of dominant position and the exemptions that are in Articles 4 and 5 need to be reviewed and modified into separate Articles, as mentioned in Chapter Four (Control of Anti-competitive Agreements), because this problem is considered to be a critical issue and negatively affects the implementation of the Saudi Competition Law.

In the UK Competition regime, there are no provisions for anyone to provide exemptions under the Chapter II Prohibition of the UK Competition Act 1998. Such lack of flexibility can be considered a strong point in the Act since any abuse of dominance causes market damage and should always be prohibited without exemptions.

5.9 Conclusion

Control of abuse of dominant position is a fundamentally important element in competition law. It aims to ensure that dominant position is not abused by a firm or firms in order to make unlawful profits in the market. Consequently, the Saudi Competition Law (2004) gives due and essential attention to the regulation of dominant position.

The current section provides a critical assessment for the regulation of abuse of dominant position and is followed by recommendations to reform control of abuse of dominant position in the Saudi Competition Law.

The Saudi Competition law does not prevent dominant position itself, but prohibits abuse of dominance. In essence, abuse of dominance aims to restrict or hinder free competition, since firms can legally dominate goods or services according to their price or quality against other competitors in the market. The Competition Law also encourages firms to achieve dominance as a result of fair competition between rivals.

The Saudi Competition Law adopted two conditions to define dominance: at least 40 per cent of market share and/or market power to control prices in the market. The Rules

Governing Dominant Position briefly state five factors for assessing dominance: the relevant market, market share, exiting and potential competitors, entry barriers, and competition date.

The Saudi Competition Law (2004) does not describe the term of abuse; however the Rules Governing Dominant position define it as taking advantage. The phrase of abuse of dominant position is similar to general '*misuse of the right principle*' under the Shariah Law, which prevents causing damages to other. Article 5 of the Saudi Competition Law forbids any practices by dominating firms that can affect free competition generally in '*prohibition illustrative list'*, which includes two main practices: first, pricing prohibitions, such as predatory prices and fixing resale condition, and second, non-pricing prohibitions, such as tie-agreements and refusal to supply.

As mentioned in Chapter 4, the Saudi Competition Law in Article 4 provides the CCP with the power to grant exemptions from the prohibition if exemptions lead to improve the quality or the price and provide a benefit for the consumers. Article 5 of the Saudi Competition Law (2004) does not provide any exemption for abuse of dominant position. However, the lack of regulations of anti-competition agreement, abuse of dominant position, and their exemptions in Article 4 create ambiguity and misunderstanding of the exemption system under the Law.

Control of abuse of dominant position under the Saudi Competition Law (2004) involves a number of legal defects that create insufficient guidance as to whether in the regulation or in the implementation of abuse of dominant position rules, as follows.

Article 1 of the Saudi Competition Law (2004) defines dominance through two criteria: at least 40 per cent of market share and/or market power to control the market price. However, these conditions do not provide a valid explanation, which may affect the determination of abuse of dominant position.

As mention above, the CCP presents five indicators for assessing dominance, but without adequate guideline in assessing dominance in practice. Thus, lack of comprehensive instruction may lead the CCP to incorrect application of these indicators.

The Saudi Competition Law was enacted in June 2004, indicating a new economic policy for seeking free market principle. However, the government is still controlling different services in the Saudi market, such as national civil aviation services and the public transportation services sector. On the other hand, the Commercial Agencies Law (1962) grants private sector exclusive right in particular kinds of business—for example cars trading—which is a common form of monopoly in the Saudi market,. It allows the private sector to continue monopolising goods, which violates of the Competition Law (2004).

The meaning of abuse is not defined under the Saudi Competition Law; however, the Rules Governing Dominant Position set out the term of abuse as a 'taking advantage'. Taking advantage is a wide definition which does not indicate abuse practice of company.

The CCP guideline does not provide extra examples considered as abuse of dominant position; for instance, excessive prices, price discrimination, discounts, margin squeeze, vertical restraints, and essential facilities.

Article 5 of the Saudi Competition Law (2004) does not provide exemption for dominant position companies. However, Article 4 includes rules for anti-competitive agreements and dominant position and their exemption. Therefore, the exemption system indicates inconsistency, which may affect its enforcement.

Recommendations

This section provides significant recommendations that are likely to improve the efficiency of the control of abuse of dominant position in the Saudi Competition Law (2004).

The structure of the Saudi market indicates that there is a major problem: namely, the government's monopoly of some goods and services, which it has held for many years. Despite the Saudi Competition Law being enacted more than six years ago, the government still monopolises the entirety of several sectors, such as water, civil aviation, and internet services, which demonstrates a failure in competition policy. The government also has a large market share in other sectors—for instance, 70 per cent in the communications sector and 74 per cent in the electricity sector. The problem in the structure of the Saudi market can be solved by the adoption of a new competition policy in order to achieve the following:

- cancel the Commercial Agencies Law (1962), which conflicts with the aim of the Competition Law (2004) and gives private individuals and firms the legitimate right to monopolise goods in the Saudi market;

- reduce the market share held by the government in the Saudi market to a maximum of 49% of the capital of companies; and
- allow new firms to enter the market and reduce entry barriers, especially legal barriers, which are the main barriers in the Saudi market, such as the need to obtain a license to operate in the market or establish a factory or company.

Competitive markets show that there are large numbers of existing rivals in the market, which indicates that no particular firm is dominant. The large number of competitors is considered a significant factor when assessing dominance in the relevant market, which assesses whether consumers are able to switch to other products in the market or not.

As we have seen, Saudi Competition Law has adopted special criteria for assessing dominance: a market share of at least 40 per cent and/or market power through which a firm can influence prices in the market. Therefore, under this system, possessing a 40 per cent share automatically makes a company dominant.

First, setting a simple percentage (40%) for dominance does not provide a sufficient framework by which to assess dominant position. Additionally, as noted above, objectively measuring a percentage share can be extremely complex. Dominance in the market changes on a case by case basis, since a firm can often have a 40% market share and yet not be considered dominant. Market share can legitimately provide a presumption for dominance with other significant factors; however, a specific figure (40%) as a necessary condition should probably be cancelled.

Second, market power is an important factor to utilise in the assessment of dominance. The law has linked market power with the ability to influence price in the market only, which is not cover other practice of dominant company in the market—for instance, refusal to supply as a non-pricing prohibition.

The Court of Justice of the European Union defines dominance as economic power, which provides a practical definition for measuring dominance. Market power indicates the genuine condition of a dominant firm—that is to say, which firm(s) will be able to avoid competition and work independently in the relevant market. Consequently, it is suggested that market power only be adopted as a criterion for dominance in the Saudi Competition Law.

The CCP adopted a guideline—'Rules Governing Dominant Position'—based on five factors in assessing dominance in the market: the relevant market, market share, existing and potential competitors, entry barriers, and date of competition. This guideline does not provide a comprehensive system for assessing the relevant market; therefore, it is recommended that the CCP pursue a new guideline that contains further illustrations for how the CCP will determine the relevant market in the practice, similar to the UK Competition system.

The guideline of the CCP does not provide the framework needed to assess relevant market. The EU and the UK Competition regimes conduct a test to assess relevant market called the '*hypothetical monopolist test'*; it is recommended that the Saudi Competition Law applies the same approach to assess the relevant market. The hypothetical monopolist test analyses whether consumers are able to switch to other products in the relevant market in response to an increase of 5–10%. In terms of the price of a product, this means that a firm is not in a dominant position and goods or services are considered as being in the same relevant market.

The Court of Justice of the European Union's definition of abuse provides a practical measure to assess abuse of dominant position practices. The Court of Justice of the European Union applies an objective concept that focuses on the behaviour of firms only in order to determine whether a firm has abused its power and used any unfair practices with the aim of hindering competition in the market. It is proposed that the Saudi Competition Law employs this standard, as it offers a practical way to assess the abuse of dominant position practices.

The CCP should issue a comprehensive guideline that provides other kind of abuse of dominant position practices—for example excessive prices, price discrimination, discounts, margin squeeze, vertical restraints, and essential facilities.

The Saudi Competition Law includes in Article 4 regulations for three aspects: anti-competitive agreements, abuse of dominant position, and exemptions. Therefore, the following is recommended to review all the prohibitions in Article 4 and divide the three topics: anti-competitive agreements, abuse of dominant position and exemptions into separate sections—for example, set anti-competitive agreements with its exemptions in Article 4—, and abuse of dominant position in Article 5.

The Saudi Competition Law states exemptions for anti-competitive agreements and abuse of dominant position in Article 4. That seems to contradict Article 5, which does not state any exemption for dominant position. Therefore, any exemption for a dominant position should be cancelled. The exemption policy in anti-competitive agreements, for example, aims to allow exemption of particular agreements if expected to realise a benefit for the consumers. In the dominant position, exemption itself is prohibited because it is against the function of the competition law.

This chapter examined the control of abuse of dominant position in the Saudi Competition Law (2004). The next chapter will discuses issues related to the control of mergers in the Saudi Competition Law (2004).

Chapter Six: Control of Mergers

6.1 Introduction

Control of mergers is a significant matter in competition law. Mergers can give a firm an advantageous position in the market and are one possible legal means for a firm to gain dominant position[294]. Consequently, competition law prohibits a merger between firms if the result of the merger will lead to dominance in the market that will subsequently affect fair competition.

The aims of firms seeking a merger may include eliminating rivalry, increasing their market power, and gaining the ability to reduce production and increase prices[295].

The Saudi Competition Law (2004) includes essential provisions dedicated to the regulation control of mergers in order to ascertain to what degree Saudi law grants protection to fair competition. These rules are covered by Articles 6 and 7 of the Competition Law (2004).

This chapter aims to explore the control of mergers in the Saudi Competition Law (2004) and identify the impacts of mergers on competition. In addition, an assessment of merger controls under the Saudi Competition Law will be made and recommendations for reform will be proposed.

The chapter also investigates control of mergers as laid down in the Saudi Competition Law (2004) and covers several issues. First, it provides a history of the development of merger regulations in the Saudi laws. Second, it defines two terms: ‘merger’ and ‘economic concentration’. Third, it discusses the type of merger operations that lead to dominant position. Fourth, it explains the prior notice and time limit in assessing mergers. Fifth, it examines the approach of the Council of Competition Protection (CCP) for assessing mergers. Sixth, it explores the exceptions from assessment. Seventh, it describes the remedial action available under Competition Law. Lastly, it describes the application of the law in relation to legal cases regarding mergers in Saudi Arabia and other countries in the Middle East, such as Jordan.

[294] For more discussion see Chapter Five ‘Control of Abuse of Dominant Position’.
[295] Whish, R., (2003), *Competition Law*, 5th ed., London: Lexis Nexis Butterworths, p. 785.

6.2 History of Merger Regulations

Merger operations in the Saudi Arabia are regulated by two laws: the Companies Law (1965) and the Competition Law (2004), which are described in more detail below.

6.2.1 Merger regulations under Companies Law (1965)

The Companies Law was adopted by Royal Decree No. M/6 on 20 July 1965, and some articles have since been amended several times[296]. The Law contains, in Chapter Two, the requirements and the procedures for completing the merger process for "normal mergers", which are:

- First, the law allows any company to merge with another company even if the company is in the liquidation stage[297];
- Second, the law states that there are two kinds of merger: by one company or more merging with another existing company or by two companies or more combining in a new company under a new structure[298]; and
- Third, the decision to merge shall become operative after 90 days from its publication[299].

However, in relation to merger regulation, a new Companies Law bill is being studied and the draft contains amendments to merger regulations to complement Competition Law (2004), especially Article 9, which gives the Council of Competition Protection (CCP) the jurisdiction to approve merger cases[300].

Generally, in the Saudi market, a '*holding company*' is considered a significant, simple way to create dominant position. The holding company acquires other companies to enhance its position in the market. The Companies Law does not state any rules for holding companies; however, the Legal Department in the Ministry of Trade and Industry has indicated that in order to a establish a holding company in Saudi Arabia it is required that the holding company state in its articles of incorporation that one of the

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[296] For more details on the Saudi Companies Law see: Yahia, S., (1976), *Commercial Law in The Saudi*, Egypt: Al-Mktabah Al-Msriah Al-Hadethah; Al-Jaber, M., (1994), *The Saudi Commercial Law*, Egypt: Dar Al-Wataniah Al-Jadedah; Al-Koobar, Abed-Al-Hameed, R., and Bahnasi, S., (1998), *The Saudi Commercial Law*, Egypt: Dar Al-Nahdah Al-Arabia,.

[297] Article 213 of the Companies Law 1965.

[298] Article 214 of the Companies Law 1965.

[299] Article 215 of the Companies Law 1965. For more information on mergers in the Saudi Companies Law see: Al-Saedei, S., (2004) *The Effect Companies Mergers Within the Saudi Legal System*, Jeddah: Al-Maktabah Al-Asria.

[300] The Secretary General of the CCP.

main activities of the holding company is to participate in the acquisition of the capital of another company or several other companies[301].

6.2.2 Merger regulations under the Competition Law (2004)

A merger operation is considered to be a quick and lawful method for any firm to create a legally dominant position, but it is likely to negatively affect other competitors and consumers. Consequently, competition law focuses on merger operations to prohibit firms from abusing their power in the market.

Competition law aims to prevent two kinds of economic concentration:

- First, any merger operation that may lead to dominant position by means such as obtaining assets, property rights, usufructs, or shares, is called a "complete merger"[302]; and
- Second, any combination by companies of two or more managements into one joint management that may lead to dominant position in the market. For example, under the Saudi Companies Law, when Company A buys from 51 per cent to 99 per cent of the shares in Company B, this proportion of shares is seen in the Law as allowing Company A to control the management of Company B, and is known as a "partial merger"[303].

The law requires prior notification for all kinds of merger to be provided to the Council of Competition Protection (CCP) in writing at least 60 days before completion[304].

The following section investigates merger controls in the Saudi Competition Law, for instance terminology, merger criteria for resultant dominant position, and assessment of merger operations.

6.3 Concepts and Definitions

The Competition Law and the Implementing Regulation of Competition Law (IRCL) provide two basic definitions for 'merger' and 'economic concentration'.

A merger is defined in Article 1 of the Competition Law as "amalgamating a firm with another or more or the amalgamation of two or more firms into a new one". This

[301] Brief no 11/2197 issued on 26 June 1988.
[302] Article 6(1) of the Competition Law (2004).
[303] Article 6(2) of the Competition Law (2004).
[304] Article 6(1) and (2) of the Competition Law (2004).

definition includes the normal definition for all types of mergers. Article 1 of the IRCL defines economic concentration as:

> any act resulting in full or partial transfer of ownership rights or usufruct of an entity's properties, rights, stocks, shares or obligations to another entity that puts an entity or a group of entities in a position of domination of an entity or a group of entities, by way of merger, takeover, acquisition, or combining two or more managements into one joint management or any other means which leads to a state of Economic Concentration[305].

The Saudi regulator uses the term 'economic concentration' to distinguish between a normal merger and a merger that leads to a dominant position that affects fair competition.

6.4 Discussion of Concepts and Definitions

The legal concept of a merger in the Saudi Companies Law describes only the legal procedures for regulating normal merger operations—namely, the merging of one company or more with one other company or more. However, the theory of mergers in Competition Law has been significantly developed to include other kinds of mergers and actions that may affect fair competition but are not described in Companies Law. The Saudi Competition Law has subsequently succeeded in extending the principles in law to cover all unlawful practices in merger operations, as follows:

The IRCL of the law describes the various kinds of legal actions that might lead directly or indirectly to dominant position in the market. These actions are a transfer, whether wholly or partly, of the ownership; usufruct rights; rights or shares; or stocks or obligations from one company to another company.

The IRCL uses the term 'economic concentration', which is a broad term and covers all types of merger: acquisition or takeover or concentrative joint venture.

- 'Acquisition' means controlling a company by buying all or the majority of the target company's assets.
- 'Takeover' means controlling a company by buying its shares.
- 'Concentrative joint venture' means controlling the management of a company and in effect becoming one joint management[306].

[305] Article 1 of the IRCL.
[306] Slot, P. and Johnston, A., (2006), *A Introduction To Competition Law*, Oxford: Hart Publishing.

6.5 Merger Operation to Acquire Dominant Position

The law states that any dominant position as a result of a merger operation will be examined by the CCP for two kinds of activities:

- merger operations or ownership between companies[307]; and
- combination of two or more managements into one joint management[308].

Article 7(a) of the Implementing Regulation of Competition Law (IRCL) describes the dominant position situation as being where a company plans to acquire 40 per cent of the total supply of goods or services in the market, which is called 'economic concentration'.

6.6 Discussion of Merger Operation to Acquire Dominant Position

As can be seen from the above, the CCP applies only one criterion, which is known as the 'market share test', for any merger operation. The test will be satisfied if a company acquires 40 per cent of the total supply in the market. However, the test raises several legal issues. First, in Article 6, the law mentions that the reason for investigating a merger operation is because it may be expected to create dominant position in the market. Dabbah (2007) has confirmed the lack of regulation to control mergers[309]. However, dominant position is not prohibited in itself[310] and this criterion is not a comprehensive means through which to control merger operations. Therefore, it is recommended that this Article should be amended to adopt another criterion: the result of dominant position is expected to lead to a substantial lessening of competition (SLC), which can be found in the UK Enterprise Act 2002.

Second, the law states that 40 per cent of total supply in the market is a market share test for economic concentration. In fact, 30 per cent is a reasonable market share test for the CCP to start an investigation of a merger operation[311] and to decide if the result is likely to affect fair competition. The Tunisian Competition Law (1991) applies a similar test[312].

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[307] Article 6(1) of the Competition Law (2004).
[308] Article 6(2) of the Competition Law (2004).
[309] Dabbah, M., (2007), *Competition Law and Policy in the Middle East*, Cambridge: Cambridge University Press, p. 203.
[310] For prohibited practices see Chapter Five "Control of Abuse of Dominant Position".
[311] Private lawyers no 6 and 8.
[312] Article 7 (amended) of the Tunisian Competition Law (1991).

Third, the law applies only one test (market share test) for economic concentration. However, depending on only one test to assess merger operations is not effective, because one of the aims of assessing a merger is to determine the market power of the merger operation, which may occur in different ways, such as the share of supply or the value of turnover.

Therefore, it is suggested that the law adopts a second alternative test—the value of turnover test (set, for example, at 60 million Saudi Riyals (US $16 million)) as found in different competition laws such as those of the UK and Tunisia. The Tunisian Competition Law sets a figure of 20 million Dinars (US $13 million) for the value of turnover, which is similar to the Saudi economic background in region. However, the amount of the value of turnover test should be determined based on economic analysis of the ability of the given merging companies to change the structure of the market.

6.7 Prior Notice and Time Limit

Any company wishing to undertake either a merger operation or shared ownership between companies or a combination of two or more managements into one joint management is required to notify the CCP in writing at least 60 days prior to completion of same[313]. Article 7(b) of the IRCL provides that if the CCP does not notify the companies in writing of its decision to approve or refuse the merger of the companies within 90 days from the submission of their application, then this will be considered as implicit approval.

6.8 Assessment of Mergers

The CCP has stated that its general approach is to determine whether economic concentration might affect fair competition in the market. It provides, in brief, seven considerations in the Rules Governing Economic Concentration, as follows:

- Competition level in the market between actual and potential rivals;
- Barriers to entry into the market;
- Result of merger operation on the goods or services price;
- Legal barriers that may affect entry of new competitors;
- Current and past evidence of anti-competitive practices in the market;

[313] Article 6 of the Competition Law (2004).

- The expectation that economic concentration may increase the market power of the parties; and
- Other factors in the market, such as development and innovation[314].

However, the CCP has discretionary power in making its decision[315].

6.9 Discussion of Assessment of Merger

As stated above, the CCP mentions seven factors that are taken into account in the examination of merger operations; however, these do not mention the mechanism framework of the CCP in applying these considerations in practice. It is my view that the CCP should provide inclusive guidelines that show how the CCP will enforce the Saudi Competition Law in practice.

It is proposed that the CCP should apply the same approach laid out in the OFT guidelines in its explanation of the Enterprise Act 2002 as follows:

- First, divide the assessment of merger operations into three categories: horizontal, vertical, and conglomerate; and
- Second, apply three measures to determine market structure and concentration: market shares, concentration ratios (CRs), and Herfindahl-Hirschman Index (HHI).

6.10 Exemptions to the Assessment of Mergers

The Saudi Competition Law does not mention any exemptions in the assessment of merger operations. It can be inferred from the IRCL, however, that any merger operation which results in less than 40 per cent share of the total supply of goods or services in the market will be considered a merger of insufficient importance and will therefore be exempted from the application of Article 6.

6.11 Remedial Action

Section 5 of the Rules Governing Economic Concentration provides that the CCP may come to one of three decisions:

- Approval of the economic concentration;

[314] Rules Governing Economic Concentration, para 4(1).
[315] The Secretary General and the Members no 2 and 3 of the CCP.

- Refusal of the economic concentration with reasons; and
- Approval of the economic concentration with conditions.

In the UK competition system, if a merger has anti-competitive results, remedial action is taken, but this is dependent on the situation in each case. The CC[316] details a number of factors considered when deciding appropriate remedial action, such as the costs of remedy and proportionality, the effectiveness of remedies, and different types of remedy[317]. The CC considers three kinds of remedies:

- First, the returning remedy of the *status quo ante* market structure—for example, exclusion of the anticipated merger;
- Second, the increasing the competition remedy, through the merged firm, for instance, providing access to essential inputs or facilities; and
- Third, the excluding or limiting market power remedy being applied to the merged firm, such as imposing restraint on prices[318].

The CC also considers the need for any other remedial actions, such as making recommendations to persons or bodies (government) for the amendment of regulations or increasing of market transparency[319].

6.12 Applications of Rulings on Mergers

The following sections provide examples of the application of Competition Law regulations to legal cases relating to mergers in two countries in the Middle East: Saudi Arabia and Jordan[320].

6.12.1 Merger operations under the Saudi Arabia Competition Law

To date, there have been four mergers operations in the Saudi market, which are: *Afaq Al-Talim Company*, *Aminco Company*, and two mergers by *the Al-Azizia Panda United*[321].

[316] The Competition Commission is an independent body responsible for investigation of merger cases under the UK Enterprise Act 2002.
[317] *Merger references: Competition Commission Guidelines* (CC 2), para 4.1.
[318] *Ibid* , para 4.17.
[319] *Ibid*, para 4.18.
[320] More details about the Jordanian Competition Law see Dabbah, M., in Dabbah, M. and Hawk, B., (2009), *Anti-cartel Enforcement Worldwide*, vol. 2, Cambridge: Cambridge University Press.
[320] Case No. 2900/2008.
[321] The CCP website is available at http://www.ccp.org.sa, last visited on 25 May 2010.

1. In the merger operation between *Madars Al-Manar Al-Ahliah Company*, limited liability company (the merged company) and *Afaq Al-Talim Company*, joint-stock company (the merging company), both companies provide services in the education sector. The CCP approved the merger operation without any conditions in decision no. 54/2010 on 20 March 2010[322].

2. The *Aminco Company* merger involved four companies being merged into two companies: *Sultan Al-Adel Company* and *Al-Tadamoniah for Special Civil Security Company* into two other companies: *Al-Arabiah for Security Services Company* and *Al-Arabiah for Secure Transport Services Company*. All participating companies created a new company called '*Aminco Company*' and all operate in the security services sector. The merger operation was approved by the CCP in decision no. 53/2010 on 28 February 2010 and no conditions were imposed on this merger[323].

In general, mergers operations of *Afaq Al-Talim Company* and *Aminco Company* are considered a normal merger, which means the mergers did not indicate a significant effect in the level of competition in the two sectors in the market.

3. *Al-Azizia Panda United Company*

Al-Azizia Panda United Company was the first merger case judged under the Saudi Competition Law (2004). The merger operation acquired two separate companies: (1) *Al-Makazen Al-Kobra Company*, which was renamed *Al-Azizia Panda United Company I*, and (2) *Al-Saudi Geant Company*, which was renamed *Al-Azizia Panda United Company II*. On 26 August 2008, two major supermarket companies, *Al-Azizia Panda United Company* and *Al-Makazen Al-Kobra Company*, applied to the Council of Competition Protection (CCP) seeking approval of their merger. The CCP studied this merger and decided to approve the merger operation with one condition—namely, that the merged company should use the same price policy in all their markets in Saudi Arabia, even in areas where they had no other rivals[324].

On 28 July 2009, *Al-Azizia Panda United Company* applied to the CCP to buy 11 stores, which were the assets of the supermarket company, *Al-Saudi Geant Company*.

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[322] *Ibid*.
[323] *Ibid*.
[324] The Secretary General of the CCP and the CCP Decision no 38/2008 on 9 September 2008, available at http://www.ccp.org.sa.

The CCP decided to approve the application and gave the same condition as in the previous case (that the company should apply the same price policy in all Saudi markets, especially where no other competitors exist)[325].

A comprehensive analysis of whether the CCP applied the correct test and investigation follows.

Al-Azizia Panda United Company is owned by *the Savola Group*, which is a joint-stock holding company. *The Savola Group* was established in 1979 and its capital was at first 40 million Saudi Riyals ($10 million) and is currently 5 billion Saudi Riyals (US $1 billion). *The Savola Group* was initially a single company that supplied the edible oil industry in Saudi Arabia and which went on to succeed in developing its business to encompass other goods such as sugar, noodles/pasta, packaging, real estate, and franchising. In the 2008 financial year, *the Savola Group* had market shares of 62 per cent in the edible oils sector and 68 per cent in the sugar sector. It owned 79 stores (supermarkets and hypermarkets) in Saudi Arabia and Dubai, in the United Arab Emirates. *The Savola Group* is divided into four sectors:

- Savola Foods, covering edible oils, foods and sugar;
- Savola Retail (Panda and Hyper Panda);
- Real Estate sector; and
- Savola Plastics.

By 2009, the *Savola Group* had 16,000 employees and around 160,000 shareholders, one of whom is Prince *Alwaleed Al-Saud*, nephew of the King of Saudi Arabia and one of the world's wealthiest investors. In 2008, the turnover of the Group was more than 13 billion Saudi Riyals (US $3 billion) and net income was 202 million Saudi Riyals (US $53 million). The Group is ranked number 20 in the top companies in Saudi Arabia[326].

Al-Makazen Al-Kobra Company is owned by the Abdull-Qadeer Al-Muhideb Group, which is a limited liability holding company. It undertakes several activities in the market, such as commerce, industry, and foodstuffs. The Group owned 16 stores (supermarkets and hypermarkets) in Saudi Arabia and 38 stores outside the country. The turnover of the Group was more than one billion Saudi Riyals (US $266 million) in

[325] The CCP Decision no 48/2009 on 69 October 2009, available at http://www.ccp.org.sa.
[326] *The Savola Group*, available at http://www.savola.com.

2007. The chairman of the board of the Abdull-Qadeer Al-Muhideb Group is Sulaiman Al-Muhideb, who is a member of the CCP[327].

Al-Saudi Geant Company is owned by the Fawaz Abdulaziz Al-Hokair Group, which is a joint-stock holding company. The capital of the Group is 700 million Saudi Riyals (US $186 million) and it has 11 supermarkets and hypermarkets in the Saudi market. The revenue of Fawaz Abdulaziz Al-Hokair Group exceeded one billion Saudi Riyals (US $266 million) in 2007[328].

Merger operation analysis

Al-Azizia Panda United Company I: Assessment of any merger operation depends on the available information in order to determine whether a particular merger may be expected to negatively affect the level of competition in the market. Accessing the necessary information is not always easy; however, there are significant factors that can be of use when assessing such mergers. First, this kind of merger is called a 'takeover' because *Al-Azizia Panda United Company* (the merging company) bought all the assets and entire control of *Al-Makazen Al-Kobra Company* (the merged company). Second, this merger operation is a 'horizontal merger' because it occurred between two companies at the same level—namely, 'two retailers' in the market. Third, all parties announced that the total turnover of the company after merging was up to 5 billion Saudi Riyals (US $1 billion)[329]. Fourth, when the relevant product market approach is applied, it indicates that all parties were providing the same goods and services sector, namely 'retail in foodstuffs'. Fifth, application of the relevant geographical market method shows that both parties were working in the same geographical region (the Saudi market). Sixth, the law states that a 40 per cent market share signifies dominant position. *The Savola Group* has a dominant position because it has market shares of 62 per cent in the edible oils sector and 68 per cent in the sugar sector. Seventh, the merger operation is expected to result in a substantial lessening of competition. Finally, the shares of each party in *Al-Azizia Panda United Company I* after completing the merger operation are: 80 per cent to *Al-Azizia Panda United Company* and 20 per cent to *Abdull-Qadeer Al-Muhideb Group*.

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[327] The Saudi Stock Exchange, available at http://www.tadawul.com.sa, last accessed on 22 December 2009.
[328] The Saudi Stock Exchange, available at http://www.tadawul.com.sa, last accessed on 22 December 2009.
[329] *The Savola Group*, available at http://www.savola.com.

Al-Azizia Panda United Company II: This kind of merger is an 'acquisition' because *Al-Azizia Panda United Company* (the merging company) planned to buy 11 stores, assets of the supermarket company, *Al-Saudi Geant Company* (the merged company), which cost 440 million Saudi Riyals (US $117 million). Second, this merger operation occurred less than a year after the previous merger, and the combination of the two transactions is in fact a merger of three major companies; this process is called 'obtaining control by stages'. Third, the merger operation is also called a 'horizontal merger', which means that all parties are competitors in retail at the same level. Fourth, the result of the merger operation is extremely likely to lead to substantial lessening of competition. Fifth, other factors that have already been mentioned above in the case of *Al-Azizia Panda United Company I* come into play, such as the relevant market, domination by *The Savola Group* of some sectors and the turnover of *Al-Azizia Panda United Company*.

According to the above findings, in my opinion the CCP did not make the right —*Al-Azizia Panda United Company* should not have been allowed to complete its application for a merger for two main reasons:

The first of these is regarding the regulation of merger operations. The law imposes a pre-approval system for merger operations in the Saudi market, which requires that an anticipated merger company which has 40 per cent of goods or services (the share of supply test) in the market should seek approval from the CCP. So, the regulation of merger operations does not control all merger operations because it applies only one test. The law states that a merger operation will only be investigated if it leads to a dominant position. A merger that does not do so but nevertheless leads to a substantial lessening of competition cannot be investigated. This demonstrates a defect in the Saudi law as the mergers regulations do not apply the right criterion for assessing merger operations. These types of operation should adopt two criteria for investigating a merger case: the market share test at 30 per cent *or* the turnover test at 60 million Saudi Riyals (US $16 million).

In general, these criteria control all mergers operations by identifying the power of mergers companies on the basis of the market share or the revenue of a company, which as with the UK law, may lead to an affect in the level of competition.

The second issue relates to the approach of the CCP. This merger operation was expected to increase the monopoly in the food sector generally and raise the prices of foodstuffs:

- All the merged companies (three companies) have large market power in the market;
- Applying the definition of a market indicates that the merged companies are competing in the same product (supermarkets) and geographical area (the Saudi market);
- The merger of these companies is called a 'horizontal merger', which is prohibited by Article 5 in the Competition Law, because the merged companies have more than 40 per cent in the market share test, which is required in the law. Mergers operations create absolute dominant position in the relevant market and may prevent fair competition in the market, which means the decision of the CCP for approving these mergers was still wrong.

The CCP also does not provide a framework for its assessment of mergers operation as guidelines. Nor did the CCP give explanations or justifications for its decisions, which contravenes the principle of transparency, underpinning laws of fair trade.

6.12.2 Merger operations under the Jordanian Competition Law

A Competition Law in Jordan was enacted in 2004 and the Competition Authority created by that law has approved three merger operations, which are described below.

1. *International Henkel Company for Manufacturing Chemical Cleaning*

In January 2007, *International Henkel Company for Manufacturing Chemical Cleaning*, an international company, applied to acquire shares of the *Masane Al-Monadfat Al-Keemywah Al-Arabiah Al-Msahamah Al-Mhdodah Company*, a Jordanian company. Both companies were in the industrial cleaning sector.

The Competition Department in the Ministry of Industry and Trade studied the market shares for both companies in the market. Article 9(b) in Competition Law No. 33 Year 2004 applies a prior approval system to the merger operation if the total shares of the participating companies comprise more than 40 per cent of the whole transactions in the market.

The Department announced that the Competition Authority would start an investigation in this case and approved the merger operation based on the following issues:

- First, the companies are working in production and marketing and provide many kinds of chemical cleaning, meaning that the chemical cleaning sector is considered to be the relevant product market.
- Second, both companies are working in the same market, which is considered to be a relevant geographic market.
- Third, the market shares of the two companies in the market did not exceed 40 per cent of total transactions, which means that the merger operation between the two companies is unlikely to lead to a dominant position, according to Article 9(b) of the Competition Law[330].

2. *Al-Ahlia Company for Computers*

In December 2007, six companies applied to the Competition Department for consent to merge and transfer all rights and obligations of the companies to one company, which would be called *Al-Ahlia Company for Computers*. These companies traded computers and programs and were named as follows: *Al-Ahlia Company for Computers*, *Ideal Software Company*, *Ideal Technologies Company*, *Ideal Systems Company*, *Al-Lotus Company for Management Solutions,* and *Dana Company for Computer Systems*.

The Competition Department stated that the Competition Authority examined the relevant market for each operation according to three dimensions: product dimension, including all goods that can be passable alternatives for computers and programs; geographic dimension, covering all areas which had products (in other words, the relevant product market and its consumers in the country); and market machinery, containing all the relevant parties in the market (supply and demand):

- The demand side contains all parties wishing to buy computers and programs.
- The supply side includes all national companies which produce programs and sell computers.

[330] The Ministry of Industry and Trade in Jordan, available at http://www.mit.gov.jo

The Department approved the merger operation because the total market shares of all companies did not exceed 40 per cent, and therefore there was no requirement for ministerial approval, according to Article 9(b)[331].

3. *Hijazi & Gosheh Company*

The Competition Department looked into the merger operations between *Al-Mara'i Company for Food Industries, Al-Itihad Farm,* and *the Australian Middle East Trading Company* within the *Hijazi & Gosheh Company*.

The Department studied this application and found that the *Hijazi & Gosheh Company* (the merging company) wholly owned both companies, which had the same partners with the same shareholdings; the *Hijazi & Gosheh Company* owned 41.7 per cent of the market share of the total business in the market; and the *Hijazi & Gosheh Company* had the ability to control the market, which would affect competition. The Competition Department decided to approve the merger with three conditions:

- The company must not increase or reduce the prices of its products from meats. Should there be any change in the prices, the company is required to provide valid justification for this change;
- The company must apply the non-discrimination principle and equality in dealings between meat traders; and
- The company must not restrict or prevent any other company from entering the market[332].

Two other companies applied to the Competition Department seeking advice as to the opinion of the Competition Authority before submitting their applications for merger. The advice given on these two different cases is outlined below.

1. *Al-Hikma Company for Pharmaceuticals*

In November 2007, *Al-Hikma Company for Pharmaceuticals* applied to acquire *Al-Arabia Company for Pharmaceuticals.* Both companies were in the medical sector. The Competition Department launched an investigation and decided that the application for merger should be approved because: market shares of both companies did not exceed 30 per cent in the relevant market, "the medical pharmaceuticals sector"; this merger would

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[331] The Ministry of Industry and Trade in Jordan, available at http://www.mit.gov.jo

[332] Annual Report (2007) of the Competition Authority, available at the Ministry of Industry and Trade in Jordan, available at http://www.mit.gov.jo

not achieve or support dominant position in the market; and the merger operation would not have a negative impact on competition or in the national market. Consequently, there was no requirement to obtain ministerial approval[333].

2. *Autogrill SPA*

Autogrill SPA, an Italian company, purchased a large number of shares of Alpha Airport Group, so *Autogrill SPA* sought approval from the Competition Department. The Department investigated the merger and found that: the market shares of the relevant companies did not exceed 40 per cent in total in both markets (The airline catering market and restaurants market), and the merger operation would not affect existing or potential competitors in the market. Accordingly, the Competition Department determined that *Autogrill SPA* was not required to obtain ministerial approval, pursuant to Article 9(b)[334].

Merger analysis

Assessment of merger operations in the Middle East shows that a number of competition laws in the region have adopted only one test for controlling merger operations, such as the 40 per cent share of supply test in Saudi Arabia[335] and Jordan[336] (30 per cent in Syria)[337]. The Egyptian Competition Law applies the turnover test only for merger operations which are fixed at 100 million Egyptian Pounds (US $17 million)[338]. Dabbah (2010) states that the majority of the developing countries do not adopt systems for merger control under competition law[339].

The Tunisian Competition Law seems to succeed in enacting a satisfactory criterion that consists of a 30 per cent of the share supply test or the turnover test, which is set at 20 million Tunisian Diners (US $13 million)[340].

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[333] The Ministry of Industry and Trade in Jordan, available at http://www.mit.gov.jo
[334] Annual report 2007 of the Ministry of Industry and Trade in Jordan, available at http://www.mit.gov.jo
[335] Article 7(a) of the Implementing Regulation of the Competition Law (2004) (IRCL).
[336] Article 9(b) of the Competition Law (2004), available at http://www.mit.gov.jo
[337] Article 9(b) of the Competition and Antimonopoly Law 2008, available at http://www.competition.gov.sy/
[338] Article 19 (amended) of the Protection of Competition and the Prohibition of Monopolistic Practices Law 2005, available at http://www.eca.org.eg
[339] Dabbah, M., *Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing Effective Competition Law regime*, Queen May University of London, Legal Studies Research Paper No. 53/2010, p. 35, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1598869
[340] Article 7 (amended) of the Competition and Prices Law 1991, available at http://www.infocommerce.gov.tn; Dabbah, M., (2007), *Competition Law and Policy in the Middle East*, Cambridge: Cambridge University Press, p. 156.

The assessment approach of the above cases suggests that the relevant investigating bodies failed to provide comprehensive assessments for the above merger operations due to the following factors:

First, the Competition Council or Authority in all the cases above concentrated only on the share of supply test, which is set at 40 per cent in the Saudi Arabian and Jordanian competition laws. Both laws provide that any merger operation which results in a 40 per cent share of the total transactions in the market requires approval from the Competition Authority or the Ministry. In addition, the Jordanian Competition Law, in Article 9(b), requires the Minister's approval for a merger operation that is expected to adversely affect fair competition. As a consequence of this, the Competition Council or Authority deals with this condition as part of its "formal condition" only, not as a genuine assessment of the merger operation and its result in the market, which indicates a lack in the law in assessing merger operation.

Second, applying one test to determine whether a company has a 40 per cent share of supply as a condition for a merger operation is not an adequate criterion on its own. A solitary test does not control for all the different kinds of merger operation. Other competition laws apply two conditions, which are the share of supply test or the turnover test, as in the UK and Tunisia[341].

Third, all the above cases of merger operations demonstrate that there is an absence of a criterion or guideline for assessment of the outcome in the market as a whole, because the Councils or Authorities in these countries do not issue detailed guidelines on how they assess merger operations in practice. The absence of guidelines leads to the insufficient assessment of merger operations.

6.13 Conclusion

Control of mergers is an important element in competition law, aiming to prevent mergers that affect fair competition or enhance dominant position in the market. The Saudi Law (2004) regulates merger operations in Articles 6 and 7 of the Competition Law (2004).

[341] Dabbah, M., in Dabbah, M. and Lasok, K., (2005), *Merger Control Worldwide*, 1st ed., vol. no.1, Cambridge: Cambridge University Press.

The Saudi Competition Law (2004) sets out one condition only to define a merger operation, which is economic concentration. It contains 40 per cent in the share of supply test, which covers goods or services in the Saudi markets.

The Saudi Competition Law (2004) provides two kinds of action in merger operations: complete mergers such as transfer of the ownership of shareholding and assets; and partial mergers, which establish one joint venture between two or more companies as a result of the merger operation.

The Saudi Competition Law (2004) states that the CCP will examine a merger operation if it may be expected to create a dominant position in the market.

The Saudi Competition Law (2004) requires written notification (pre-approval system) to the CCP at least 60 days prior to completion of same for any merger operation or shared ownership between companies or a combination of two or more managements into one joint management.

The CCP's approach for determining the economic concentration contains seven general indicators in the Rules Governing Economic Concentration: the level of competition between the competitors (actual and potential), the entry barriers, the consequence of merger operation on the price of goods or services, legal barriers, the past violation of unfair competitive practices, the impact of economic concentration which may create the market power, and other aspects such as innovation.

The Saudi Competition Law (2004) does not provide any exceptions for merger operations.

The Saudi Competition Law (2004) adopts remedial action for merger operations. It contains three kinds of remedies: approval, refusal, or imposition of conditions, for approval of the merger operation.

The Saudi Competition Law has one body (known as the Council of Competition Protection (CCP)) that is involved in monitoring all practices such as anti-competitive agreements, mergers, abuse of dominant position, and enforcing of competition rules.

Investigation control of mergers operations under the Saudi Competition Law (2004) reveals a number of deficiencies in the law, which prevents effective implementation.

The Saudi Competition Law (2004) adopts one criterion only for assessing economic concentration, which is set at 40 per cent of the share of supply of the goods or services in the market. Accordingly, the share of supply test does not control all kinds of mergers in the Saudi market.

The CCP under the Saudi Competition Law (2004) investigates a merger operation if it establishes a dominant position only. This approach indicates lack of regulation for merger operations.

The CCP's guideline does not issue inclusive guidelines for its approach in order to assess mergers operations in the Saudi Competition Law (2004), which emphasised lack of capacity and expertise in competition field among employees of the CCP.

The Saudi Competition Law (2004) does not provide any exemption for merger operations. Thus, merger operations that are expected to benefit consumers will not be approved.

The Saudi Competition Law (2004) provides three types of remedial action in merger operations: approval, refusal, or imposition of conditions, for approval of the merger operation. So, the CCP has a limited power, which may affect its role in control of merger operations.

Recommendations

This section aims to provide important recommendations to develop the efficiency of the control of mergers under the Saudi Competition Law (2004).

The definition of a merger is of principal importance in adopting effective merger regulations. The Saudi Competition Law (2004) should amend its current definition because it does not control for all merger situations in the market. Instead, the law should apply comprehensive criteria as follows:

- reduce the share of the supply test from 40 per cent to 30 per cent;
- adopt the turnover test (set at 60 million Saudi Riyals annually, which is equal US $16 million) as a second alternative measure of a merger; and
- modify Article 6 to include the investigation of a merger operation if the result of the merger is expected to lead to competitive constraints or significant lessening of competition (SLC) in the market.

In merger assessment, the CCP should provide satisfactory guidelines indicating its approach in applying the law in practice, such as applying the supply share test to measure the result of the merger in the market or any other condition. The purpose of this is to present a clear analysis in the assessment of mergers.

Regarding exemptions, the Saudi Competition Law does not mention any; it should contain an exemption for the cases that will be of benefit to consumers, because the explicit aim of competition law is to protect the consumer against unlawful practices. This is completely in keeping with the main principle of the Shariah Law and Saudi Competition Law.

The current Competition Law offers basic remedial action, such as approval of the economic concentration, refusal, or approval with condition(s). The law should give the CCP the power to apply the necessary remedial action on a case-by-case basis, such as through applying a condition like requiring access to essential inputs or facilities, or by removing exclusive distribution agreements.

This chapter investigated issues related to the control of mergers in the Saudi Competition Law (2004). It also presented suggestions to enhance the efficiency of the Saudi Competition law.

Chapter Seven will explore the enforcement under the Saudi Competition Law (2004).

Chapter Seven: Enforcement

CHAPTER SEVEN: ENFORCEMENT

7.1 Introduction

Enforcement of competition law is a very critical matter in the competition system. For competition law around the world to be effective, the legal framework should be comprehensively well written to ensure it contains all necessary prohibitions of practices, such as anti-competitive agreements and abuse of dominant position. It must also be enforced by the imposition of sanctions against violators to deter future violations, which requires a high level of supervision of the firms in the market and their activities. Therefore, enforcement plays a fundamental role in ensuring a competitive market and protecting the market from unfair practices.

The aim of this chapter is to examine enforcement of the Saudi Competition Law (2004). It provides critical assessment of the enforcement system, which involves analysis of violations cases in anti-competitive agreements and practice and merger operations. The findings are expected to provide recommendations to improve the enforcement of the Saudi Competition Law (2004).

The chapter is structured as follows. The first part looks at the Saudi system of competition institutions involved in enforcing competition law: the Council of Competition Protection (CCP) and the Board of Grievances. The second part deals with the procedures under the Saudi Competition Law (2004), such as undertaking investigations of violators. The third part examines the penalties system in the Saudi Competition Law, which is applied against anyone who violates the law. The fourth part looks at private enforcement, which provides for anyone who has been harmed to claim damages. The final part discusses two significant sectors in the Saudi market—the communications sector and the civil aviation sector—as case studies.

7.2 Institutions

The Saudi Competition system contains two institutions: first, the Saudi legislature established a new body in its legal system for the first time, called the Council of Competition Protection (CCP). The main function of the Council is to enforce the provisions of competition law and prevent any kind of illegal practice in the market that may affect fair competition. Second, the Board of Grievances has role to hear appeals against the CCP’s decisions as an administrative judicial body.

7.2.1 The Council of Competition Protection

The Council of Competition Protection (CCP) was established by virtue of Article 8(1) of the Competition Law (2004) as an independent council. However, the CCP is located within the Ministry of Commerce and Industry[342].

The institution of the CCP contains several levels of positions, such as members of the Council of Competition Protection, the General Secretariat, and the Legal Committee.

Article 8(2) states that the CCP shall be created by Royal Order to consist of: the Minister of Commerce and Industry (Chairman), a representative of the Ministry of Commerce and Industry (Member), a representative of the Ministry of Finance (Member), a representative of the Ministry of Economy and Planning (member), a representative of the General Investment Authority (Member), and four other members selected by the Minister of Commerce and Industry on the basis of their expertise. Therefore, Royal Order No A/292 of 9 October 2005 was issued and the CCP formed, to consist of a chairman and eight members. There are five official members: the Minister of Commerce and Industry as chairman, and four official members, one each from the Ministry of Commerce and Industry, the Ministry of Finance, the Ministry of Economy and Planning, and the General Investment Authority. The CCP also has four private members: a private lawyer as deputy chairman[343] and three businessmen from the industry, finance, and commerce sectors.

Article 8(3) states that the membership period of the CCP is four years, with the possibility of renewing for one more year only. Despite this fact, any party whose membership has expired is able to continue in his position until another new member is appointed.

Article 8(4) explains that the CCP shall be led by the chairman or the deputy chairman when the chairman is absent[344]. Attendance of members of the CCP must be at least two-thirds in order for a quorum to exist, and decisions of the CCP must be made by a majority vote. In cases where the votes are equal, the vote of the chairman of the meeting will be considered binding. Article 10 of the Implementing Regulations of Competition Law (IRCL) states that the CCP shall have periodic meetings at least once every three months or more if necessary.

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[342] Article 8(1) of the Competition Law (2004).
[343] Appointed by the Minister according to Article 9(b) of the IRCL.
[344] Article 12 of the IRCL.

Article 8(5) prohibits members of the CCP from revealing any kind of information obtained by way of their membership.

Article 8(6) prevents any member of the CCP from attending or participating in the deliberation of any case in which he has an interest in or relationship with, or in any case involving a relative or blood relationship or where he represents any of the parties.

Article 10 provides that the CCP shall have a General Secretariat headed by a Secretary General of the Fifteenth Grade. Article 11(1) of the IRCL mentions three roles of the Secretary General: first, arranging the agenda of the CCP; second, updating members of the CCP regarding dates of meetings; and third, enforcing the decisions the CCP. Article 11(3) of the IRCL provides that in order for the General Secretariat to achieve its tasks, it shall consist of legal and economic experts.

Article 15(1) establishes a legal committee called the Committee for Settlement of Violations of Competition Law[345] under the CCP chaired by the Minister. It contains five members, at least one of whom must be a legal adviser. The role of the committee is to review and make decisions in cases where there are violations of the law by imposing a monetary penalty only. The Minister is also required to appoint prosecutors to litigate in the cases that come before the Legal Committee and the Board of Grievances[346].

The Committee is run by the chairman or his deputy[347]. In order for committee decisions to be valid they must meet two conditions: a) a quorum of four members with at least one of them being the chairman and/or deputy chairman; and b) decisions must be the result of a majority vote of members attending the committee meeting. However, when there is an equal number of votes, the chairman's vote is likely to be considered binding[348]. The Committee is required to notify the parties involved at least 15 days in advance and the notification must cover two issues: a) statement of the violation and b) ordering the violator to attend the hearing[349]. It has the right to carry out the necessary investigations, whether by one or all members, such as inspections of the place of the violation. However, the results of the inspection must be submitted to the Committee[350]. The law states that the Committee shall reach a decision immediately. In cases where a

345 Article 17(1) of the IRCL.
346 Article 17(2) of the IRCL.
347 Article 18(1) of the IRCL.
348 Article 18(2) of the IRCL.
349 Article 18(3) of the IRCL.
350 Article 19 of the IRCL.

review of a violation needs further investigation, the Committee shall fix another appointment[351]. If the Committee finds that there is a violation that warrants a sentence of imprisonment, the Committee shall not rule on it and instead return the case to the Ministry with justifications for its recommendation and its referral of the case to the Board of Grievances[352]. When the Committee takes a decision against any party, it is required to provide them with a copy of that decision. Any party has the right to complain about the Committee's decision before the Board of Grievances, but no more than 60 days from the notification date of the decision[353]. The chairman of the CCP is required to approve the decision of the Legal Committee. However, the approval decision can only become a final decision in two ways,: the period allowed for a complaint to be lodged before the Board of Grievances passes without a complaint being submitted, or the Board of Grievances releases a final judgment in cases where the party has submitted a complaint[354].

The CCP is required to appoint employees who have judicial investigative powers for enforcing the law[355]. The judicial investigation officers have several functions. They examine and investigate all complaints, they represent the prosecution before the Legal Committee and the Board of Grievances[356], and they observe all documents such as files and records of the relevant company and get any copies if needed. In this matter, the company must provide all information and not conceal any documents regarding the complaint for any reason[357], they can enter the suspect company to review all documents[358]; and they can conduct an immediate investigation against the suspected violator if necessary[359].

However, in all cases, the judicial investigation officers are required to present their identification to the manager of the relevant company before starting their investigation[360]; and must also keep all the information which they obtain confidential and protect the information from illegal use[361].

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351 Article 20(1) of the IRCL.
352 Article 20(2) of the IRCL.
353 Article 21 of the IRCL.
354 Article 22 of the IRCL.
355 Article 11(1) of the Saudi Competition Law (2004).
356 Article 11(2)(a) of the Saudi Competition Law (2004).
357 Article 11(2)(b) of the Saudi Competition Law (2004).
358 Article 14(a) of the IRCL.
359 Article 14(b) of the IRCL.
360 Article 15 of the IRCL.
361 Article 14(b) of the IRCL.

Article 9 of the law states that the CCP has different functions in implementing competition law:

> …First, approving all kinds of mergers such acquisition or joint management which create dominant position in the market as a result of merger;
> Second, making decisions regarding the beginning of legal procedures against a suspected violator of the law such as starting an investigation and collecting the evidence;
> Third, ordering criminal case proceedings;
> Fourth, establishing institutions of the CCP and adopting the relevant regulations of the CCP, for instance financial and administrative regulations;
> Fifth, offering recommendations for developing competition law and suggesting modifications of other laws which affect competition law;
> Sixth, adopting the Implementing Regulation of the Competition Law; and
> Seventh, presenting to the Council of the Ministers an annual report which contains the activities of the CCP and future plans[362].

However, Article 16 of the law mentions that the CCP has other functions when violation of the law is confirmed, which are:

- First, ordering the violator of the law to change his position in the market and remove the violation within a period of time according to the IRCL;
- Second, ordering the violator to conduct any action to remove the violation, results such as disposal of some of the assets, shares, or proprietary rights; and
- Third, imposing a daily fine against the violator of not less than 1,000 Saudi Riyals and not more than 10,000 Saudi Riyals[363].

Article 23 of the IRCL states that the CCP shall adopt rules governing the guidelines for enforcing competition law. Consequently, on 9 September 2008 the CCP adopted the Rules Governing the Implementing Regulation of the Competition Law as follows:

1. Rules Governing Exemptions and Exceptions;
2. Rules Governing Dominant Position;
3. Rules Governing Economic Concentration;
4. Rules Governing the Work of the Judicial Investigation Officers; and
5. Rules Governing the Committee for Settlement of Violations of Competition Law[364].

[362] Article 9 of the Saudi Competition Law (2004).
[363] Article 16 of the Saudi Competition Law (2004).
[364] Future details below for guidelines numbers 4 and 5.

7.2.2. Discussion of the Council of Competition Protection

The CCP under the Saudi competition regime deals with competition cases as an administrative body. The institution approach provides that three stages. First, the CCP will conduct an investigation, and if the result indicates violation of the law the violator will be refer to a special legal committee. Second, the Legal Committee, if finding violation will issue a decision with the possibility to appeal the decision before the administrative judiciary. Finally, the Board of Grievances has the competence to review the decision of the Legal Committee and make a final decision[365].

1. The independence of the CCP

As stated earlier, the CCP is located in the Ministry of Commerce and Industry, according to Article 8, as an independent council. Nevertheless, there are several factors and indicators showing that the CCP is not a fully independent body.

The CCP is established under the Ministry of Commerce and Industry and chaired by the Minister of Commerce and Industry: from observing their work, it appears delays were caused throughout the establishment of all divisional institutions under the CCP and the implementation of regulations, namely:

1. The establishment of the CCP was delayed one year and four months;

2. The introduction of the IRCL was deferred for more than two years and six months. However, the IRCL is referred to by the Rules Governing a number of articles;

3. Governing Rules were delayed for two years from adopting the IRCL; and

4. The Legal Committee was created on 12 March 2007.

The Minister of Commerce and Industry also has the right to appoint half the members (four private members), and the CCP consists of a Chairman and eight members. The majority of the CCP members are selected from or by the Ministry of Commerce and Industry: two members from the Ministry of Commerce and Industry and four members by the Ministry of Commerce and Industry. Thus, the Ministry of Commerce and Industry has a controlling influence over policy and enforcement of the law.

The majority of the interviewees believe that the CCP is not an independent body[366], and the Secretary General of the CCP has confirmed this by saying: "…the CCP is not

[365] More discussion in section 7.4 below.
[366] The Member no 2 of the CCP and private lawyers no 6, 7 and 8.

independent whether administrative or financial, because it is located at the Ministry of Commerce and Industry"[367].

Because of these factors, I suggest that the CCP should seek to attain actual independence. The government should grant the CCP actual independence, as with the OFT in the UK competition system. This requires giving the CCP adequate power to enforce the law starting from carrying out investigations to making decisions against the violators of the law.

The CCP should be linked directly to the Prime Minister, like other authorities in the region, such as the Egyptian Competition Authority[368]. In the Saudi system, councils are either attached to ministries (as is the case for the CCP at present), or they are attached to the head of government, which provides the highest level of independence—for example, the Supreme Judiciary Council and the Board of Grievances.

In his recently examination of competition authorities in developing countries, Dabbah (2010) points out that the lack of independence hinders the effective power of those competition authorities to conduct investigations or make decisions in competition cases[369].

2. Members of the CCP

As stated above, the CCP consists of a Chairman and eight members. The members of the CCP are chosen in two ways. First, the Chairman and four members come from different Ministries and a government Authority: a Chairman and a member from the Ministry of Commerce and Industry, and a member each from the Ministry of Finance, the Ministry of Economy and Planning, and the General Investment Authority. Second, there are four private members with specific expertise: a lawyer and three businessmen.

Consequently, the criteria for selecting the members of the CCP may indicate two critical problems. First, incapacity to perform, as not all members have sufficient knowledge and experience in the field of competition law and the application of law in practice, which leads to inefficiency in the CCP's implementation of the law. Second, conflicts of interest, as half of the members are from the private sector. Bari (2009)

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[367] The Secretary General of the CCP.

[368] Articles 2 and 11 of the Egyptian Protection of Competition and the Prohibition of Monopolistic Practices Law 2005.

[369] Dabbah, M., *Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing Effective Competition Law regime*, London: Queen May University of London, Legal Studies Research Paper No. 53/2010, p. 18, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1598869, last accessed on 25 May 2010.

criticises the selection of members from the private sector, as competition law prohibits unfair practices from traders in the market[370] and the *Savola group* merger case highlighted in Section 6.12.1 in Chapter Six (Control of Mergers) is pertinent to this issue because one of the members of the CCP was a partner in this company. Article 8(6) provides that any member may not participate in any case in which he has an interest or relation by blood or marriage[371]. However, all members of the CCP should be appointed according to their qualifications and experience, particularly in the fields of law and economics.

There are two significant matters which should be raised regarding the members of the CCP because they are indicative of serious problems: membership of the CCP and meetings of the CCP. The members of the CCP have four years' membership with the possibility of a further four-year extension. The current members of the CCP started their memberships from 9 October 2005 and this period expired on 26 August 2009 (now some months ago). No decision has been issued yet, however, regarding renewal of the terms of present members or appointing new members to the CCP.

The meetings of the CCP members are required to take place at least once every three months or more if necessary, though this level of irregularity means that the members of the CCP are ineffectively operating on a part-time basis[372]. Certainly, part-time members cannot be expected to fulfill their duties for various reasons, because all members are busy with their jobs, which are completely different than the practice and monitoring of competition law. On the other hand, the law does not explain the meaning of "in the necessary case" as a reason for meeting. Therefore, effective enforcement needs full-time members in order to supervise market activities and apply the competition rules on a daily basis.

3. The General Secretariat

Article 10 mentions that the CCP shall establish a General Secretariat led by a Secretary General of the Fifteenth Grade. According to the IRCL, the Secretary General's responsibilities involve preparing the agenda of the CCP, informing the members of the CCP of the dates of the meetings, and implementing the decisions of the CCP.

The current Secretary General was an Assistant Deputy Minister for Industrial Affairs and transferred to the CCP after its establishment; hence, the Secretary General does not

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[370] A member of *Shura* claims to prohibit monopoly. Hamzh, S., (2009, April 8), *Al-Madinah newspaper*.
[371] Article 8(6) of the Competition Law.
[372] The Secretary General of the CCP and private lawyers no 7 and 8.

have qualifications or experience in the area of competition law, which is a similar criticism to that raised above about the appointment of the members of the CCP.

Moreover, the Law grants the Secretary General a high level position in the public services grade to provide the office with sufficient power to enforce the law. On the other hand, the IRCL states that the Secretary General has three basic functions, which do not provide that office with satisfactory power to implement the law. There are also overlaps and ambiguities between the functions of the Secretary General and the CCP[373].

4. The Legal Committee

Article 15(1) provides that the CCP shall form a Legal Committee to investigate cases that have violated competition law. This committee includes five members, at least one of whom must be a legal adviser. The main jurisdiction of the Committee is to decide whether the respondent is guilty of a violation and the penalty must be a fine. It is arguable that the Minister of Commerce and Industry should appoint prosecutors to litigate in the cases before the Legal Committee and the Board of Grievances.

Basically, the Legal Committee has a significant responsibility to make determinations in competition law cases. However, the situation of the Legal Committee in the law and its implementations highlights several deficient legal issues, as follows.

1. Lack of neutrality

All three institutions—the Legal Committee, the CCP, and the prosecutors—are established under the Minister of Commerce and Industry, especially in the case of the CCP, which means that the above bodies are working as one party against the alleged violators.

2. Lack of capacity

As mentioned above in the case of CCP members and the Secretary General, members of the Legal Committee also lack fundamental knowledge of competition law, which could lead to inconsistent and unfair decisions in competition cases[374]. This is exacerbated by the fact that all the members of the Legal Committee only work part time.

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[373] See below for more discussion on the functions of the CCP.
[374] The Secretary General of the CCP.

3. Absence of framework for enforcement of competition law

The CCP has not issued sufficient guidelines for enforcing the law, and so the Legal Committee does not have rules for assessing the CCP decisions in practice. This lack of information can also lead to unfair and inconsistent judgments; the CCP should lay down guideline rules for applying the law that contain all kinds of prohibitions in competition law, such as anti-competitive agreements, abuse of dominant position, merger, and enforcement[375], and which are comparable to the OFT and the CC guidelines.

4. Role of the Legal Committee

There are also conflicts between the Legal Committee and the CCP in each jurisdiction. These conflicts will be discusses later in this chapter.

5. Penalties

The competition law provides for two types of penalties for violations of the law: a fine and/or imprisonment[376]. However, the Legal Committee only has competence to administer a fine; if the Legal Committee believes (in its discretionary power), after reviewing the case, that the violation deserves imprisonment, then they must refer the case to the Board of Grievances.

Indeed, the law does not state the criteria for punishment of a violation by imprisonment. All the individuals interviewed by the author, however, stated that in their opinion the punishment of imprisonment should be applicable to the staff of the CCP, including its members and the General Secretariat[377].

6. Appeal

In October 2007, the government enacted by Royal Decree No M/78, a new legal system which contains two regulatory bodies: the Judiciary and the Board of Grievances. The Judiciary regulation established commercial courts for the first time. However, the law grants the Board of Grievances judicial competence to hear appeals against a Legal Committee decision as an administrative decision.

Hence, I recommend that an independent Legal Committee be created with legal competence for all cases under competition law as a court of first instance. Respondents

[375] More details regarding the rules are given below.
[376] More details regarding the penalty are given below.
[377] The Secretary General and the Members the CCP no 2 and 3 and private lawyers no 4, 5, 6, 7 and 8.

would be able to appeal against this committee's decisions before the Appeal Commercial Courts, and in all cases this legal committee should meet all the requirements for effectively enforcing the law, such as having qualified employees and legal neutrality. The Legal Committee should have a role similar to that of the CAT in the UK competition system.

5. Functions of the CCP

The CCP has several powers, as stated in Article 9. It has the right to approve merger cases, decide whether to commence legal proceedings against suspected violators, make a decision to establish criminal case proceedings, create institutions of the CCP, suggest any amendments to competition law, enact the Implementing Regulation of the Competition Law, and submit an annual report to the Council of Ministers. Article 16 states additional powers in cases where the violation has been confirmed. These include removing the violation within a period of time, ordering the violator to sell some of its assets, shares, or proprietary rights, and imposing a daily fine against the violator of not less than 1,000 Saudi Riyals (US $267) and not more than 10,000 Saudi Riyals (US $2,667).

The CCP competence illustrates that there are certain ambiguities and areas of overlap in its jurisdiction with other jurisdictions—namely, those of the Secretary General and the CCP Legal Committee. First of all, the CCP authority has the most important function in enforcing the law. However, the competition law provides the Secretary General with a limited role, which is summarised as the implementing of the CCP's decisions. However, Article 9(2) of the Competition Law states that the CCP has the power to make a decision to initiate inquiry, investigation, and collection of evidence procedures against violators of the law. Consequently, this basic responsibility is granted to the CCP only.

There are two common interpretations of this article:

- First, the law states that this task is literally and exclusively that of the CCP, which means the Secretary General should seek permission before conducting any inquiry or investigation[378];
- Second, the Secretary General has the right to carry out any unofficial inquiry or investigation. If it is found that there is any suspicion of violation of the law, the

[378] The Secretary General and the Member of the CCP no 3 and private lawyers no 4, 5, 6, 7 and 8.

Secretary General must obtain an Order from the CCP to start an official inquiry or investigation[379].

The Competition Law created the Legal Committee whose aim it is to determine if there has been any violation after a case has been referred to it by the CCP. In contrast, Article 16 provides the CCP with additional judicial power that conflicts with the function of the Legal Committee, such as the power to order the sale of assets, shares, or proprietary rights of the violator, and to impose a fine on the violator of between 1,000 and 10,000 Saudi Riyals. The meaning of Article 16 can be explained in two main ways:

First, the function of the CCP in Article 16 is in conflict with the role of the Legal Committee[380];

Second, Article 16 refers to the CCP, which means the Legal Committee because the Legal Committee is established under the CCP; therefore, there is no conflict between the two bodies[381].

6. Appeal against CCP's decisions

The law grants a respondent the right to appeal only against the Legal Committee's decision before the Board of Grievances. Article 17 provides the right of general appeal to anyone who has been subject to a decision made by the CCP[382]. However, this Article refers to an appeal against the decision of the Legal Committee (legal decision) only, which is located in the CCP. However, the law does not mention any regulations for appealing against the CCP's decisions if the CCP refuses a merger application and if the CCP approves a merger application and another competitor opposes the decision. In violations of the Competition Law, the law does not mention the CCP finding no violation, the complainant not accepting the CCP decision, or the CCP granting a particular company exclusion from applying the prohibitions in Article 4(8) of the law.

For these reasons, and taking into the account previous recommendations, I propose that the functions of the three institutions—the CCP, the Secretary General and the Legal Committee—be redistributed according to the UK competition system, as follows:

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[379] The Member of the CCP no 2.
[380] The Secretary General of the CCP and private lawyers no 5 and 8.
[381] The Members of the CCP no 2 and 3 and private lawyers no. 4, 6 and 7.
[382] Article 17 of the Competition Law (2004).

- The CCP should contain two institutions: the Members of the CCP and the Executive Director (the Secretary General). The Members of the CCP should focus on making decisions in all competition cases that violate the Competition Law and on approving merger operations. They should also focus on formulating general policies in relation to competition law, such as the establishment of institutions within the CCP, providing recommendations to improve competition law, adopting and amending the Implementing Regulation of the Competition Law, and the publishing of an annual report.
- The Secretary General should be called 'the Executive Director' and be provided with sufficient power to conduct inquiries and investigations, to collect evidence, and to start legal proceedings against suspected violators of the law. The Executive Director should be a Member of the CCP.
- The Legal Committee should have a judicial role in all matters relating to competition cases, to include looking into all cases of violation of competition law and any appeals against decisions of the CCP. Moreover, the decisions of the Legal Committee should be open to review in the Commercial Appeal Courts.

7. Evaluation of the enforcement of the CCP

In order to evaluate the performance to date of the CCP in relation to enforcement, it is necessary to investigate two areas: regulations and cases.

The Saudi Competition Law was enacted on 22 June 2004. Article 20 states that the CCP shall adopt the Implementing Regulation of the Competition Law within 90 days from publication of the Law in the Official Gazette. Article 21 states that the Competition Law will come into effect after 180 days from the date of publication in the Official Gazette, though the establishment of the CCP and its authority shall come into effect from the date of publication in the Official Gazette. The Competition Law was published in the Official Gazette on 8 July 2004.

It is clear that the CCP did not comply with the time limit set down in the Law for completing the creation of the institutions and implementing the relevant regulations and guidelines, as discussed below:

The CCP was established on 9 October 2005 and the first meeting of the CCP was on 4 March 2006. The IRCL was enacted on 16 December 2006, and on 9 September 2008 four articles (1, 4, 6 and 23) of the IRCL were amended. However, the IRCL granted the Rules Governing explanation for several articles, Governing Rules were passed on 9 September 2008, and the Legal Committee was formed on 12 March 2007.

Therefore, the CCP took two years and eight months to implement the regulations of the Law and to establish other institutions in the CCP, instead of 90 days for adopting the IRCL and 180 days for enforcing in the Law, which results in a dependent council, whether administratively or financially, as discussed above.

As for the cases, the Competition Law was adopted six years ago, and during this time several violations of the Saudi Competition Law have occurred in the Saudi market. These include price fixing, storing of prohibited goods, and merger operations that created dominant positions and may have led to abuse of this position. All these cases were raised by individual consumers who were directly affected by illegal practices. The CCP has a responsibility under law to conduct investigations into these violations in order to enforce the law by making decisions that contain directions to end the violations and impose fines of up to 5 million Saudi Riyals. However, in all cases, the CCP did not make any decisions and did not enforce the law effectively.

The violations cases were in relation to anti-competitive agreements. The violations contained two kinds: three cases of prices fixing that violated Article 4(1) and storing of iron case which breached Article 4(2) of the Competition Law. These cases were mentioned in Section 4.4 in Chapter Four (Control of Anti-competitive Agreements).

1. *Cement companies*

In April 2007, all cement companies in the market agreed between themselves to increase and fix the price of cement (in essence, they took part in a cartel). The normal price of a cement bag was 13 Riyals and the cement companies added an extra one Riyal to make the price 14 Riyals. However, the cement prices rose four times in this year alone. The new prices caused damage to consumers and many of them complained to the Minister of Commerce and Industry (Chairman of the CCP). The Minister of Commerce and Industry found that there was no justification for the price increments and accused the cement companies of colluding to increase the prices. On 25 May 2007, the Minister of Commerce and Industry issued a decision to stop the increments and return the price to its previous level[383].

Section 2 of the Rules Governing Exemptions and Exceptions provides that the CCP will apply *per se* prohibition in price fixing agreements. In other words, the CCP is required to enforce the law by making a decision regarding the violations of the law because these violations have a harmful effect on consumers or on market prices as a whole. Cartel agreements are considered a criminal offence under the UK Enterprise Act 2002.

In this case, it can be seen that there is a clear absence of the CCP role in enforcing competition law. In spite of this, the Minister of Commerce and Industry found this practice unfair, because making a price-fixing agreement is prohibited in Article 4(1). The Minister did not apply the Competition Law and he directly dealt with the price fixing conducted by the cement companies who had violated Competition Law in his role as the Minister of Commerce and Industry, not as the Chairman of the CCP.

A similar case occurred in Egypt, which in this case indicated effective enforcement of the competition law. The Criminal Court found in the case, *Prosecution vs. nine cement companies*[384], that nine companies had acted as a cartel in making agreements and undertaking practices to fix the price of cement. The Criminal Court imposed total fines of 200 million Egyptian Pounds (US $354 million)[385].

2. *Dairy companies*

In January 2008, the main dairy companies increased the prices of dairy products and milk 20 per cent at the same time as each other, which is prohibited Article 4(1). So, the Minister of Commerce and Industry asked the managers of these companies for a meeting. The Minister asked the companies to go back to their earlier prices, but the companies refused this request and they mentioned that the reason for the increment was because the prices of other production components, such as fertiliser, fodder, and transportation had risen.[386] Consequently, the CCP investigated this case and decided that there was no violation of Competition Law, because the dominant position company (*Al Maraeei*) was the first to increase its prices, which is called '*price*

[383] The Minister of Commerce and Industry accused the cement companies of colluding. Al-Marshedi, O., Al-Wahbi, M, (2007, November 25), *Al-Watan newspapers*.
[384] Case No 2900/2008.
[385] More information, see section 4.9 in Chapter Four (Control of Anti-Competitive Agreements).
[386] The Saudi Ministry of Commerce and Industry calls emergency meeting to address the high milk prices. Al-Ziani, M., (2008, January 12), *Asharq Al-Awsat newspaper*.

leadership', and other companies had followed *Al Maraeei Company* by increasing their prices[387].

Examination of this case suggests that:

First, as stated in relation to the previous case, competition law was not applied;

Second, the CCP did not mention what framework it was using to assess this case; however, there was a lack of guidelines and expertise, which will have affected how competition law and its regulations should have been applied;

Third, the facts of the price increments indicated agreement or quasi-agreement between the main companies: they occurred on the same day (3 January 2008) and all companies' increments were the same (20 per cent), which is indicative of collusion;

Fourth, the principle of '*price leadership*' may be considered as another kind of abuse of dominant position since it encourages other companies in the market to increase their prices as well; and

Fifth, the justification for the CCP decision is not correct because the principle of '*price leadership*' is not a valid reason for not applying the law; therefore, the responsibility of the CCP is to determine whether this increment of prices is justified, especially when the relevant company (*Al Maraeei*) has a dominant position, as stated in the decision.

3. *Car sales sector*

In April 2009, a member of the *Shura* Council (parliament) stated that exclusive car agencies had had a meeting in a chamber of commerce in Jeddah City and that they had arranged to fix the prices in the car sales sector[388]. However, the prices of cars decreased across the world because of the international financial crisis. The agreement is, nevertheless, considered a kind of illegal practice because it violates Article 4(1) of the Competition Law (2004). In the UK Competition Act 1998 this practice is called 'decisions by association of undertakings', which are prohibited in Section 2(1) of the Chapter I prohibition (discussed in Chapter 4).

4. *Storing of iron*

In July 2008, the Ministry of Commerce and Industry (Chairman of the CCP) received a notice regarding existing storing of iron. The Ministry of Commerce and Industry started, for the first time, a huge investigation into a famous investor in the Saudi iron

[387] The Secretary General of the CCP.

[388] A member of *Shura* claims to prohibit monopoly. Hamzh, S., (2009, April 8), *Al-Madinah newspaper*.

market. The inspection teams found, in a special place outside Riyadh City, massive quantities of iron, which were estimated to total 100,000 tonnes. The investor was planning to store iron until the prices increased, then selling them and making illegal profits[389]. The storing of essential goods such as iron is prohibited by Article 4(2) of the Competition Law (2004).

To this day, the CCP has not released any statement about such a violation, and which reveals other aspects of the CCP, which are: secrecy and ambiguity in enforcing the law. The CCP should be transparent about the aims of their mission and publish achievements, such as decisions and guidelines, to interested parties in this field, such as judges, lawyers, and competitors in the market.

5. *Merger operations*

As mentioned previously, the CCP has approved four mergers operations in the Saudi market, which are: *Afaq Al-Talim Company*, *Aminco Company*, and two mergers by *the Al-Azizia Panda United*[390]. *The Al-Azizia Panda United* was a significant merger, because it involved two merger operations. However, the decisions of the CCP in the case of *Al-Azizia Panda United Company* demonstrate the insufficiency of the approval system since the aim of the merged company was to control the market, and it has a dominant position in different sectors, such as sugar (more than 68 per cent) (as discussed in Section 6.12.1 in Chapter Six) .

Enforcement analysis

The results of this assessment of the CCP regarding past implementation of policy and decisions shows that there is inefficiency in this Council, which can obviously be seen to be due to the following fundamental reasons:

- Lack of independence of the CCP, whether administrative or financial;
- Incapacity of members of the CCP, such as the CCP members, the Secretary General and the Legal Committee, who are involved in enforcing competition law; and
- Inefficiency of the CCP in fulfilling its duty, particularly in issuing regulations and preventing violations of the law in the above cases.

[389] Involvement of a famous investor in the storage of iron. Al-Bdrani, B., (2007, July 27), *Al-Riyadh newspaper*.
[390] The CCP website is available at http://www.ccp.org.sa, last visited on 25 May 2010.

Al-Bader (2009)[391] and Bari (2009)[392] support this assessment of the CCP in the practice of its duties.

There are other reasons referred to in the draft of the Competition Law that lead to ineffective enforcement—which were discussed in Chapter 3 (The Saudi Competition Law (2004))—such as:

- Exception of public companies that provide goods or services from application of competition law, such as *Saudi Arabia Airlines* in the civil aviation sector (see below);
- Conflicts between Competition Law and other laws, such as the Communications Law, in enforcing the provisions of Competition Law; and
- Interventions of the government in the market through obtaining a high proportion of shares of more than 70 per cent—for instance, in Saudi Telecommunications Company (STC).

7.2.3 The Board of Grievances

Competition law states that the Board of Grievances is competent to hear appeals against decisions made by the CCP[393]. However, on 1 October 2007, the Saudi government reformed its legal systems by enacting new regulations in the Judiciary and Board of Grievances laws[394]. The new legal systems created commercial courts, for the first time, whether courts of first instance or court of appeal.

The government established the Board of Grievances as an administrative judicial body. The background to the development of the Board of Grievances in Saudi Arabia can be divided into four distinct stages:

Initially, the Board of Grievances was established in 1954 and was then called the 'Department of Grievances' and located in the Council of the Ministers[395]. Then, in 1955, the Board of Grievances was established as an independent administrative judicial body[396]. The current regulation of the Board of Grievances was issued in 1982 when the Board of Grievances became an independent administrative judicial commission

[391] Protecting competition and preventing monopoly or protecting honesty and anti-corruption. Al-Bader, A., (2009, August 18), *Al-Aqtisadiah newspaper*.
[392] A member of *Shura* claims to prohibit monopoly. Hamzh, S., (2009, April 8), *Al-Madinah newspaper*.
[393] Article 17 of the Competition Law (2004).
[394] The Royal Decree No. M/78 on 1 October 2007.
[395] Al-Durreb, S., (1999), *The Judicial Regulation in The Kingdom of Saudi Arabia According to Shariah Law and Judicial Authority*, Riyadh: Imam Mohammad Bin Saud Islamic University Press.
[396] Article 1 of the Board of Grievances Law 1955.

responsible directly to the King[397]. The government extended the power of the Board of Grievances to cover additional jurisdictions such as penal, disciplinary, and commercial[398].

A new regulation of the Board of Grievances was adopted in 2007 to create a new system for administrative courts. The Board of Grievances Court contains: the Supreme Administrative Judicial Court, the Administrative Appeal Courts, and the Administrative Court[399]. There is a three-year transitional period to complete the new system for the Board of Grievances, starting from the date of amendment and application of Shariah litigation law, criminal procedures, and litigation regulation of the Board of Grievances[400].

7.2.4 Discussion of the Board of Grievances

This section aims to assess the Board of Grievances as the appeal court in competition cases, taking into account the new legal systems that may lead to better application particularly in the Competition Law.

The Board of Grievances Law 1982 has some key legal problems. It was established as an administrative judicial body and its main jurisdiction was to look into cases the government was involved in. However, the Board of Grievances has been granted jurisdiction over penal, disciplinary, and commercial matters, which has affected its role. The multiple jurisdictions of the Board of Grievances do not make it a specialist court, which is especially needed in a new field such as competition law.

The varied functions of the Board of Grievances has led to a massive number of cases being heard by them, which has affected the expertise of judges, especially as regards commercial cases, and has delayed the completion of cases. Furthermore, the appeal system in the Board of Grievances Law (1982) did not provide satisfactory justice, because there is no pleading or attendance in these courts. It allows parties who have had a judgment issued against them to submit only a written protest to the first instance courts, which will then be referred to the appeal courts.

[397] Article 1 of the Board of Grievances Law 1982.

[398] Al-Durreb, S., (1999), *The Judicial Regulation in The Kingdom of Saudi Arabia According to Shariah Law and Judicial Authority*, Riyadh: Imam Mohammad Bin Saud Islamic University Press.

[399] For more details see the Saudi legal system in Chapter Three (the Saudi Competition Law (2004)).

[400] Article 1 of the implementation mechanism of the Board of Grievances. For more information about Saudi legal system see Chapter Three (the Saudi Competition Law (2004)).

The Board of Grievances Law 2007 is a very significant regulation. It offers a comprehensive legal system for the administrative judicial body, as:

- it stresses that the main jurisdiction of the Board of Grievances is an administrative judicial one;
- it creates a substantial appeal system which consists of two levels: courts of first instance and appeal courts; and
- the Board of Grievances becomes a special judicial body.

The jurisdiction of competition cases, which is defined as falling under the commercial field of law, also suffers from some legal problems. Article 9 of the Law of the Judiciary established specialist commercial courts to look into commercial cases, such as competition cases. However, because a decision of the Legal Committee is an administrative decision, the Competition Law grants the Board of Grievances the authority to hear appeals against the Legal Committee's decisions according to Article 15(3) of the Competition Law. This means that there is a conflict with the aims of the new system.

Accordingly, this inconsistency between laws emphasises the need to adopt the earlier suggestion of establishing an independent legal committee for all matters falling under competition law, and its decisions should be appealed in the Appeal Commercial Courts. The judiciary in Saudi Arabia itself is suffering from a variety of problems, particularly a lack of judges; the statistics state that there are four judges for every 100,000 people[401], and a shortage of specialist judges in the courts in terms of qualifications and expertise in the area of competition law.

7.3 Procedures

The CCP has the power to conduct several procedures under competition law, starting from an investigation of a suspected firm and ending with referral of a case to the Legal Committee.

[401] Four judges for every 100,000 people – why? Al-Shbrawi, A., (2006, August 3), *Okaz newspaper*.

7.3.1 Initiating an investigation

There are two ways to start an investigation under the auspices of the CCP: investigation as a result of a complaint and investigation by the CCP without complaint[402].

1. Investigation as a result of a complaint

The complainant has to submit a complaint in writing to the CCP. The complaint should contain the necessary information to allow the CCP to undertake an initial evaluation.

Additionally, the General Secretariat examines the complaint and submits the results of its study to the CCP, including recommendations, within 30 days from receiving the complaint. Accordingly, the CCP may make one of two decisions:

- Order the start of legal proceedings against the suspected violators such as through inquiry, research, and collection of evidence, in case of suspicion.

- Order that the complaint be left on file, if there is no case of suspicion.

However, if 90 days has passed from submitting the complaint to the CCP without the complainant receiving any notification, this means that the CCP has decided to leave the complaint on file[403].

2. Investigation by the CCP without complaint

The CCP may decide to start an investigation if it believes that a particular firm has violated competition law based on evidence. The CCP has to make a decision about whether to open a legal, official investigation into the suspected violator, which includes inquiry, research, and collection of evidence[404].

7.3.2 Post investigation

If it is determined by the CCP that a firm is suspected of being in violation after a preliminary investigation and it decides to start investigation proceedings, the CCP is required to notify the relevant firm of its decision[405]. Then, if the CCP considers that a suspected firm has violated competition law, the CCP must refer the case to the Legal Committee, according to Article 15 of the Law.

[402] Article 2 of the Rules Governing the Work of the Judicial Investigation Officers.
[403] Article 2(1) of the Rules Governing the Work of the Judicial Investigation Officers.
[404] Article 2(2) of the Rules Governing the Work of the Judicial Investigation Officers.
[405] Article 3(1) of the Rules Governing the Work of the Judicial Investigation Officers.

7.4 Discussion of Procedures

Basically, the procedures for enforcement of competition law consist of different stages, as follows:

7.4.1 Unofficial investigation stage

The Secretary General starts an unofficial investigation consisting of inquiry, research, and collection of evidence as a result of a complaint or on its own initiative. The results of the investigation are then submitted to the CCP; and then the CCP may make a decision to commence with an official investigation and legal proceedings if there is suspicion of violation of the competition law. Optionally, the CCP may decide to leave the complaint on file if there is no suspicion of violation.

7.4.2 Official investigation stage

In cases where the CCP decides to start legal proceedings against the violator, the Secretary General is required to begin an official investigation and submit the results of the investigation to the CCP. The CCP is expected to refer the violator to the Legal Committee if it agrees with the results and evidence for violation of the competition law. As before, the CCP can also leave the complaint on file if it does not agree with the outcome of the investigation.

7.4.3 The Legal Committee stage

Should the CCP decide to refer the violator to the Legal Committee, the Legal Committee is likely to decide on a penalty whether there is violation or not. Moreover, if the violation is made by a member of staff of the CCP, it should refer the matter directly to the Board of Grievances[406]. Following this, the decision of the Legal Committee should be approved by the CCP.

7.4.4 The Board of Grievances stage

If the decision of the Legal Committee is approved by the CCP, this decision can be appealed before the Board of Grievances, which consists of two levels: court of first instance and appeal court.

However, the procedures for implementing competition law show that in cases of violation of competition law, it takes many steps and a long time for a decision of the

[406] See more on penalties below.

Legal Committee to be final and enforced. The CCP also controls all the procedures, such as starting an investigation and approving the Legal Committee's decision. In spite of this, the members of the CCP are part time and most of them have little knowledge about competition law and its enforcement.

In fact, the procedures under competition law should be less time consuming and less complicated. Therefore, I recommend three stages only for the procedures:

- First, the Secretary General should have the authority to start an investigation at any time.
- Second, if the Secretary General finds any kind of violation it should be referred directly to an independent Legal Committee.
- Third, the respondent should have the right to appeal against the decision of the Legal Committee before the Appeal Commercial Courts, and not before the Administrative Court (the Board of Grievances).

7.5 Penalties

Competition Law provides for a punishment by fine of up to 5 million Saudi Riyals (US $1.3 million) for violation of the law. This fine can be doubled in cases of repetition and if it is decided that the violation shall be punished at the expense of the violator[407]. On the other hand, the law provides two kinds of punishment for the employees of the CCP—namely, a fine not exceeding 5 million Saudi Riyals and/or imprisonment for a period not exceeding two years if anyone has benefited from their position[408]. However, the Legal Committee has the discretion to determine each case according to the type of violation[409].

7.6 Discussion of Penalties

The penalty system in competition law provides for two sorts of penalty, as follows:

7.6.1 Violations of the Competition Law (2004)

The law states that a fine should not exceed 5 million Saudi Riyals for violation of competition law—for instance, operating a cartel and abusing of dominant position. However, the following remarks on the penalty system can be made:

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[407] Article 12 of the Competition Law (2004).
[408] Article 13 of Competition Law (2004).
[409] Article 14 of Competition Law (2004).

First, the penalty system does not make violations of this law, such as cartel arrangements, criminal offences;

Second, the Legal Committee has competence in all cases that concern the violation of competition law only;

Third, the amount of the fine is considered the highest punishment in the Saudi legal system. The penalty system shows that the legislature wishes to apply a new policy that will prevent monopolies and unfair practices in the Saudi market.

Fourth, the penalty system is fixed at a maximum amount (5 million Saudi Riyals). On the other hand, this provides the Legal Committee with wide discretionary power to apply a fine starting from one Riyal to 5 million Saudi Riyals. However, the profits of firms gained through one violation may exceed the amount of the fixed fine in the law.

7.6.2 Employees of the CCP

The competition law provides for two sentences for CCP members, the General Secretary, the Legal Committee, and the judicial investigation officers if they violate the confidentiality of their duties and derive benefit from information gained through their positions. The punishment may consist of a fine not exceeding 5 million Saudi Riyals, or imprisonment of up to two years, or both. The penalty system for employees of the CCP demonstrates that the Board of Grievances is in charge initially of determining whether there has been a violation by an employee of the CCP. It can also be argued that the penalty system criminalises violations by employees of the CCP to prohibit any abuse of power or corruption because they are responsible for enforcing competition law.

Evidence seems to suggest that the penalty system of the competition law should be improved because it contains a fixed maximum penalty and adopts a flexible system for punishing violations. Therefore, I propose that there be a fine of up to 10 per cent of the turnover of the firm for a violation of competition law, and that operating a cartel be considered a criminal offence that may result in punishment of up to five years imprisonment, similarly to the UK competition law.

7.7 Private Enforcement

The regulation of private enforcement in competition law is stated in Article 18 only. Article 18 grants anyone who suffered harm the right to ask the competent court for compensation, which is called 'private enforcement'. Thus, the regulation states that, as a result of any illegal practices that cause damage to any person, whether natural or corporate, compensation can be sought before the relevant court. In the Saudi legal system, compensation may be claimed before the General Court (Civil Court) by any person and before the Commercial Court by any company.

7.8 Discussion of Private Enforcement

Private enforcement is very significant in competition law; however, a number of criticisms can be leveled against its current implementation in Saudi Arabian law. Perhaps the most important of these is that the law does not mention if the plaintiff should obtain evidence from the CCP before starting compensation cases. There are two conflicting interpretations: some state that a complainant is required to provide evidence of harm issued from the CCP before claiming compensation in front of a court[410] and others say that this is not a condition[411]. Additionally, the law does not mention any details about the type or level of compensation. However, a compensation case in the competition law refers to the principle of the Shariah Law. The Shariah Law adopts a compensation system called 'financial compensation' in *the Holy Qur'an* and *the Sunnah*. The *Holy Qur'an* emphasises the lawfulness of financial compensation: "*Then whoever transgresses the prohibition against you, you transgress likewise against him. And fear Allah, and know that Allah is with Al-Muttaqun*"[412]. The explanation of this verse stresses the legitimate seeking of financial compensation when others have caused damage[413]. The Prophet Muhammad stated a general principle for compensation when he said: "*You should neither harm yourself nor cause harm to others*"[414].

The theory of compensation in the Shariah Law provides that the estimation of financial compensation must be equivalent only to the actual damage caused. For example, if firm A caused damage to firm B, which caused the loss of one million Saudi Riyals, then the financial compensation must be the same amount (one million only); this is known as material damage compensation[415].

[410] The Secretary General and the Member 3 of the CCP and private lawyers no 5 and 7.
[411] The Member no 2 of the CCP and private lawyers no 4, 6 and 8.
[412] Khan, M. and Al-Hilali, M., (1996), *Interpretation of the Meaning of Noble Qur'an,* Riyadh: Darussalam, Surah Al-Baqarah, verse 194.
[413] Al-Zohaili, W., (2003), *The Theory of Liability*, Beirut: Dar-Al-Fider, pp. 16–17.
[414] As-Sanani, M., (1996), *Bulugh Al-Maram Attainment of the Objective according to Evidence of the Ordinances,* Riyadh: Darussalam, p. 324.
[415] Bosaq, M., (1999), *The Compensation for the Damage*, Riyadh: Dar-Asbiliah, p. 170; Moafi, A., (1997), *The Damage in the Shariah Law*, Al-Koobar: Dar-Abin Afan, pp. 1039–1050.

Dabbah (2007) confirms the criticism of private enforcement in the Saudi Competition Law (2004), stating that:

> It is worth noting that the Act provides for a small window for private enforcement actions to be brought before the courts for compensation in situations where a natural or legal person sustains harm in a situation prohibited under the Act[416].

7.9 The Gulf Cooperation Council

On 25 May 1981, six countries—the United Arab Emirates, the Kingdom of Bahrain, the Kingdom of Saudi Arabia, the Sultanate of Oman, the State of Qatar and the State of Kuwait—signed a treaty to establish 'the Gulf Cooperation Council (GCC)[417]. The GCC is located in Riyadh, Saudi Arabia[418]. The Treaty aims to enhance coordination and integration between Member States in order to achieve unity between them in all areas, such as economic and financial affairs; commerce, customs and communications; and education and culture[419]. The institutions of the GCC consist of three bodies: the Supreme Council, the Ministerial Council, and the Secretariat General[420].

In December 2001, the GCC adopted a significant agreement to establish a common market and monetary union between Member States (now two countries—the Sultanate of Oman and the United Arab Emirates—are excluded), which is similar to the experience of the EU. In order to achieve this goal, the GCC adopted a number of unified laws such as civil, criminal, and legal practice, and the GCC mentioned that competition law is now being reviewed and will be enacted in the future. The draft of the unified competition law contains 31 Articles and regulation of practices or activities in the market between companies that may affect fair competition. For instance, it prohibits abuse of dominant position[421].

In fact, it is a difficult to assess the draft of the unified competition law because it is not enacted yet. On the other hand, adoption of a unified competition law faces three fundamental challenges that may restrict its efficiency. These challenges are as follows:

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[416] Dabbah, M., (2007), *Competition Law and Policy in the Middle East*, Cambridge: Cambridge University Press, , p. 205.
[417] Article 1 of the GCC Treaty, the GCC website, available at http://www.gccsg.org/index.php
[418] Article 2 of the GCC Treaty.
[419] Article 4 of the GCC Treaty.
[420] Article 6 of the GCC Treaty.
[421] Kuwait New Agency website available at http://www.kuna.net.kw/NewsAgenciesPublicSite/ArticleDetails.aspx?Language=ar&id=2052241

First, the GCC has two policies for enacting unified laws: first, guideline laws such as the civil procedures law in 2001 and the advocacy law in 2001. Second, compulsory laws—for example, anti-dumping and countervailing measures law in 2003 and the trade mark law in 2006. However, the Secretariat General of the GCC does not mention that the competition law will be a guideline (optional) law or a compulsory law, because there are two conflicting opinions in this regard[422].

Second, some Member States of the GCC, such as the United Arab Emirates, have not yet passed competition law in their legal systems. However, a unified competition law will encourage these Member States to adopt this law.

Third, the enforcement of unified law is expected to apply competition law in the national level of the Member States only. So, competition law will be implemented under the national competition authority, because the law does not create GCC competition authority to extend application of the law by the national competition authority of all Member States. Moreover, the GCC does not adopt the GCC courts, such as the first instance and appeal courts, which create appeal and judicial review system for unified laws. Accordingly, the effectiveness of the GCC unified competition law is dependent on the national competition authority of the Member States, which plays a significant role in enforcing the law.

7.10 Case Studies

The Saudi government has so far applied a new policy to liberalise the communications, civil aviation, and electricity sectors, with the aim to promote the participation of the private sector in these national markets.

This section focuses on two of these significant sectors in the Saudi market—communications and civil aviation—and uses them as case studies to determine the level of competition in those sectors.

7.10.1 The communications sector

The government has enacted two regulations for the communications sector: The Communications Law by Royal Decree No M/12 issued on 3 June 2001 and the Saudi

[422] A guideline law stated by the Secretary General of the CCP and a compulsory law provided by Gulf trade ministers admit three new laws for consumer protection and the fight against commercial fraud. Al-Bdrani, B., (2010, November 4), *Al-Riyadh newspapers*.

Communication Commission Regulation by Cabinet Decision No 74, issued on 27 May 2001.

The Communications Law 2001 aims to regulate the communication services in the Saudi markets to encourage and develop the communication services sector[423]. The Communications Law was adopted in 2001, which means it precedes the Competition Law of 2004. However, Chapter Six contains some competition rules that prohibit anti-competitive agreements between operators if it will lead to a dominant position, or prevent, limit, or distort competition[424]. Moreover, the law forbids a dominant position firm from abusing its dominance in the market[425], which is fixed at 40 per cent[426], and it also requires that approval be sought before any merger takes place between operators[427].

The Saudi Communication Commission Regulation established an independent commission named 'The Saudi Telecommunication Commission'[428]. The Commission was given administrative and financial independence and linked with the Minister of Communications and Information Technology. The name of the Commission was then amended to the 'Communications and Information Technology Commission' (CITC)[429].

The CITC consists of the Minister of the Communications and Information Technology (Chairman), the Commission Governor (Deputy Chairman), a representative of the Ministry of Communications and Information Technology (Member), a representative of the Ministry of Finance (Member), a representative of the Ministry of Commerce and Industry (Member), a representative of King Abdul Aziz City for Science and Technology (Member), and three members of the private sector nominated by the Minister[430].

The CITC established a Governor (selected by Royal Decree) as an executive of the CITC. The Governor has several roles, such as preparing CITC meetings and implementing their decisions[431].

[423] Article 3 of the Communications Law 2001.
[424] Article 24 of the Communications Law 2001.
[425] Article 26 of the Communications Law 2001.
[426] Article 1 of the Communications Law 2001.
[427] Article 25 of the Communications Law 2001.
[428] Article 2 of the Saudi Telecommunication Commission Regulation 2001.
[429] By the Ministries Cabinet Decision No 133 on 20 July 2003.
[430] Article 4 of the Saudi Communication Commission Regulation 2001.
[431] Article 8 of the Saudi Communication Commission Regulation 2001.

The Communications Law created a Legal Committee containing five members, one of whom must be a legal adviser. The task of the Legal Committee is to review evidence and decide whether a violation of the law has occurred. The Legal Committee's decision may be appealed before the Board of Grievances[432].

The main role of the CITC is to provide advanced services in the communications sector. These might include services such as granting permission for new operators to enter the market and encouraging investment in communications services[433].

An evaluation of competition in the communications sector shows that, at present, there are three companies operating and providing mobile phone services in the Saudi market: *Saudi Telecom Company (STC)*, *Mobily*, and *Saudi Zain*. Recently, *Etihad Atheeb Telecom Company* has been granted a license to operate fixed line services only.

1. *The Saudi Telecom Company* (*STC*)

The *STC* was established by Royal Decree No M/ 35, dated 21April 1998, as a Joint Stock Company with capital of 20 billion Saudi Riyals (US $5.3 billion). The company was the first operator in the sector and provides a variety of telecommunications services, including telephone services (landline and mobile) and Internet services. The Saudi government owns 70 per cent of the capital and other shares are owned by the private sector. The Chairman of the *STC* is the Governor of the Saudi Arabian Monetary Agency (the Central Bank)[434]. The *STC* has 50 per cent of the market share in mobile services[435].

2. *Mobily*

Etihad Etisalat Company (*Mobily*) was created by Royal Decree no M/40 on 18 August 2004 as a Joint Stock Company. *Mobily* is the second mobile operator in the Kingdom of Saudi Arabia, its capital is 7 billion Saudi Riyals (US $1.9 billion), and it is owned wholly by the private sector. *Mobily* offers two kinds of services: mobile phone and Internet services. *Mobily* has 40 per cent of the market share in mobile services[436].

3. *Saudi Zain*

Saudi Zain was established on 12 March 2008 as a Joint Stock Company and capital of the company is 14 billion Saudi Riyals (US $3.8 billion). *Saudi Zain* is the third

[432] Article 38 of the Communications Law 2001.
[433] Article 3(1, 6) of the Saudi Communication Commission Regulation 2001.
[434] The Saudi *Stock Exchange,* available at http://www.tadawul.com.sa
[435] Private lawyer no 4 and member of *Mobily Company* no 9.
[436] Private lawyer no 4 and member of *Mobily Company* no 9.

operator in the Saudi market and it provides a mobile telecommunications service only. The Chairman of *Saudi Zain* is a member of the Saudi royal family and *Saudi Zain* has a 10 per cent share of the market in mobile services[437].

4. *Etihad Atheeb Telecom*

Etihad Atheeb Telecom Company was established on 25 February 2009 as a Joint Stock Company and the capital of the company is one billion Saudi Riyals (US $267 million). The company is the second largest operator that provides fixed telephone line services in the Saudi market. *Saudi Zain* is headed by an influential family in Saudi Arabia[438].

The competition in the communications sector (fixed lines, Internet, and mobile phone services) indicates that the government is still in the first stages of liberalising and creating a competitive market. However, there are a number of critical legal problems which arise from this. First, the overlap causes conflicts in the jurisdiction between the Competition Law (2004) and the Communications Law 2001. These conflicts can be summarised in the following points:

- Anti-competitive agreements are prohibited in Article 4 of competition law and in Article 24 of communications law;
- Abuse of dominant position is forbidden in Article 5 of competition law and in Article 26 of communications law;
- Mergers require approval, as stated in Article 6 of competition law and in Article 25 of the communications law; and
- The CCP and the CITC have the same responsibility, which is enforcing the competition rules;

The second problem is the lack of neutrality in the application of competition law. Companies in which the government has a high market share (of more than 70 per cent) are unlikely to have the competition rules applied against them. Since the government transfer is in most cases less than 49 per cent, this allows the government to control the company. These companies that provide goods and services include the *STC* and the *Electricity Company*. In addition, the new governmental projects for fixed telephony

[437] *Ibid*.
[438] *Ibid*.

services and Internet services have been granted directly to the *STC*, because the government is one of the main partners in this company[439].

The *STC* monopolises Internet services, and other operators do not have a license and work as providers only, which gives the *STC* extra power against other providers in the market[440]. Furthermore, *Mobily* applied to the CITC to compete in the fixed telephony services, but the CITC barred *Mobily* from this part of the sector without valid justification. The reason may be because the CITC does not want *Mobily* to be a real competitor against the *STC*[441].

The third problem is the inefficiency and unfair practices of the CITC. The CITC solves disputes between operators amicably, which means the CITC does not do its duty in enforcing the competition rules according to law[442]. *Mobily* has complained to the CITC against the *STC*, which delayed transfer of more than 16,000 *STC* customers to *Mobily*. The CITC did not take action in this regard. *Mobily* offered its customers free receipt of international calls. However, the CITC ordered *Mobily* to stop this offer without reasonable justifications being given. On the other hand, the CITC approved the offer of the *STC,* which included free calls for all its customers in Saudi Arabia.

Taking all the above elements into account, the absence of neutrality and inefficiency of the CITC shows that there is a misunderstanding of competition law culture in relation to operator companies, such as *Mobily*, and consumers in the communications sector, because the CITC does not implement the law and does not penalize the violator company[443].

Consequently, comprehensive improvements are required in the communications sector. The following recommendations are offered as potential solutions:

First, remove the jurisdictional conflicts between the Competition Law (2004) and the Communications Law 2001—particularly as regards Articles 24, 25 and 26 of the former—and invest the CCP with the sole power to enforce competition law as an independent Council.

Second, have the CITC focus on competition policy, including only responsibility for privatisation of the communications sector.

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[439] Private lawyer no 4 and member of *Mobily Company* no 9.
[440] Member of *Mobily Company* no 9.
[441] *Ibid*.
[442] *Ibid.*
[443] *Ibid.*

Third, have the CITC apply an equal privatisation policy to all operators in the market. For instance, stop the *STC* from monopolising Internet services or preventing any other operators from providing any kinds of competing services in the communications sector. Competition cases in the UK communications sector provide evidence of concurrence between the OFT and the Office of Telecommunications in enforcing competition rules in this sector. However, the UK mechanism does not provide an example of best practice for the Saudi Arabian context because it creates conflicts between the competition authorities and makes procedures more complex.

7.10.2 The civil aviation sector

The government adopted two regulations for the civil aviation sector: the Civil Aviation Law by Royal Decree No M/44 issued on 23 August 2005 and the Regulation of General Authority of Civil Aviation by the Ministries Cabinet Decision No 33 on 22 March 2005.

The Civil Aviation Law was approved in 2005, though the law did not contain any rules regarding competition, which means the CCP has general authority to apply the Competition Law (2004) in the civil aviation sector.

The Regulation (in 2005) established an independent Commission called the 'General Authority of Civil Aviation' (GACA)[444]. The members of the GACA consist of the Minister of Defence (Chairman), the assistant Minister of Defence (Deputy Chairman), the Secretary General of the General Commission for Tourism and Antiquities (Member), the Director of the General Authority of Civil Aviation (Member), a representative of the Ministry of Transport (Member), a representative of the Ministry of Finance (Member), a representative of the Ministry of Economy and Planning (Member), and three members from the private sector chosen by the Minister[445]. The GACA has a Director who has a range of tasks, such as implementing the GACA's decisions[446].

The main function of the GACA is to regulate, develop, and implement general policies for the civil aviation sector, such as granting licenses for national and foreign operators and determining the fees for these licenses[447]. At the time of writing, there are three operators in the civil aviation sector, the largest and most important of which is *Saudi*

[444] Article 2(1) of the Regulation of General Authority of Civil Aviation.
[445] Article 5 of the Regulation of General Authority of Civil Aviation.
[446] Article 8 of the Regulation of General Authority of Civil Aviation.
[447] Article 16(6 and 10) of the Regulation of General Authority of Civil Aviation.

Arabia Airlines, and two other operators, *Sama Fly* and *Nas Fly,* which have managed to access the Saudi market:

1. *Saudi Arabia Airlines*

Saudi Arabia Airlines (*SAA*) is a state-owned company that was launched in 1945. It covers five service areas: catering, cargo, technical affairs, ground services, and airlines. However, the government privatised the first four services, and airlines services are now also undergoing this process[448]. *SAA* provides national and international services, and has controlled the national service for more than six decades[449].

2. *Sama Fly*

Sama Fly was established in 2005 as a limited liability company and its capital is 500 million Saudi Riyals (US $133 million). *Sama Fly* has been permitted a license by the GACA to operate as a national carrier and is based in Dammam City. The chairman of the company is from a powerful Saudi family[450].

3. *Nas Fly*

Nas Fly was established in 2007 as a holding company and its capital is more than 2 billion Saudi Riyals (US $533 million) after being permitted a license by the GACA to operate as a national carrier and it is based in Riyadh City[451].

However, the two operators (*Sama Fly* and *Nas Fly*) only provide special services called ‘commercial domestic flights’, which are generally cheaper than the *SAA* price.

This level of competition in the civil aviation sector demonstrates limited competition in the market. The main reason for this is because the GACA delayed implementing the privatisation policy in this sector. *SAA* is still a public corporation and a wholly-owned state company. According to Article 3 of the Competition Law, *SAA* has exemption from the application of competition law. The GACA policy transferred the civil aviation services from the public sector (*SAA*) to the private sector by dividing the flight routes between *SAA* and the other two operators: 10 routes went to *Sama Fly* and seven routes to *Nas Fly,* which means that competition between operators occurs on six routes only in the Saudi market. However, *SAA* has a complete monopoly of least eight flight

448 Legal adviser of *Saudi Arabia Airlines* no 10.
449 *Saudi Arabian airlines* available at www.saudiairlines.com
450 *Sama Fly,* available at www.flysama.com
451 *Nas Fly,* available at www.flynas.com

routes[452]. The GACA issued licenses for the two private operators to provide commercial domestic flights services only, which are different from the normal civil aviation services. Consumers are not satisfied with these commercial domestic flights services because they are of a low standard—for instance, they have small seats and there are frequent cancellations or delays in departure times[453]. In other words, the GACA did not encourage or enhance the position of private operators so they could not become strong rivals to the public operator (*SAA*) in the civil aviation sector.

There is a strong case for the civil aviation sector being in extreme need of development in terms of competition. The following proposals might address some of these issues:

- First, transfer at least 51 per cent of the market shares of *SAA* to the private sector so that competition law will apply to *SAA*.
- Second, enhance the authority of the CCP in areas of supervision over and enforcement in the civil aviation sector.
- Third, have the GACA grant licenses to operators, which will both allow and encourage them to provide satisfactory and developing services to consumers in order to create a competitive market in the civil aviation sector.

7.11 Conclusion

The aim of the enacted competition law is to enforce competition rules in the commercial market to create a competitive market and prevent unfair agreements or practices. In order to achieve this, Saudi Arabia has established a special governmental authority, which is called the Council of Competition Protection (CCP) and located in the Ministry of Commerce and Industry. The main responsibility of the CCP is to enforce the provisions of the Saudi Competition Law (2004).

The institution of the Saudi Competition system created a CCP that includes three bodies: the members of the Council of Competition Protection, the General Secretariat, and the Legal Committee.

The Council of Competition Protection contains nine members. There are five official members: the Minister of Commerce and Industry, the Ministry of Commerce and Industry, the Ministry of Finance, the Ministry of Economy and Planning, the General Investment Authority. Four private members were selected by the Minister of

[452] Legal adviser of *Saudi Arabia Airlines* no 10.
[453] *Ibid*.

Commerce and Industry from different backgrounds, which are law, finance, commerce, and industry sectors.

The Saudi Competition Law (2004) states several functions of the CCP. It encloses mergers approval, issuing decisions for taking legal procedures against suspected violators, starting criminal case proceedings, creating enforcement body under the CCP and enacting the Implementing Regulation of the Competition Law (2004).

The CCP has issued five guidelines which indicate its approach for enforcing the Saudi Competition Law (2004): Rules Governing Exemptions and Exceptions, Rules Governing Dominant Position, Rules Governing Economic Concentration, Rules Governing the Work of the Judicial Investigation Officers, and Rules Governing the Committee for Settlement of Violations of Competition Law.

If there any violation of competition law, the Saudi Competition Law (2004) grants the CCP the power to conduct investigation with suspects such as inquiry, research, and collection of evidence whether initiating or post investigation. However, the investigations procedures have four steps: unofficial and official investigation of the CCP, the Legal Committee, and the Board of Grievances.

The Saudi Competition Law (2004) sets out two kinds of punishment. First, there is a general fine up to 5 million Saudi Riyals (US $1.3 million) for violation of the law. Second, there can be a fine not exceeding 5 million Saudi Riyals and/or imprisonment for a period not exceeding two years for the employees of the CCP if anyone has benefited from their position.

The Saudi Competition Law (2004) grants anyone who suffered harm the right to claim the competent court for compensation, which is called private enforcement.

Examining the enforcement system under the Saudi Competition Law (2004) reveals insufficient regulations.

The Saudi Competition Law (2004) does not provide regulations for the powers of institutions under the CCP, which creates overlaps in duty between members of the CCP and the Secretary General on the one side and members of the CCP and the Legal Committee on the other side. Additionally, the CCP is a dependent council which is located in the Ministry of Commerce and Industry, headed by the Minister, and half of the CCP Members are appointed from the private sector, which causes conflicts of interest. Furthermore, the institutions of the CCP (members of the CCP, the Secretary

General, and the Legal Committee) have two negative points that clearly affect efficiency: employees are part-time and they lack expertise in the field of competition law.

The Saudi Competition Law (2004) does not present adequate power to the CCP to accept commitments, meaning that there are conflicts between the function of the Members of the CCP and the Legal Committee in relation to imposing daily fines against anyone who violates the Competition Law.

The Saudi Competition Law (2004) does sets out any rules for 'interim measures' in the cases where there is a suspicion of violation of the Competition Law and the CCP has not completed its investigation.

The Saudi Competition Law (2004) states two sorts of punishment: first, a fixed fine of up to 5 million Saudi Riyals for violation of the law; and second, a fine of up to 5 million Saudi Riyals and/or imprisonment of up to two years for employees of the CCP if they abuse their job to obtain benefit. However, the penalty system does not deter the violators of the Saudi Competition Law.

The Saudi Competition Law (2004) does not adopt a 'leniency programme'. Such programmes provide that any firm involved in illegal cartel arrangements may obtain immunity from or a reduction in fines if these agreements or practices are reported by that firm. A leniency programme aims to encourage the violators to provide information to the Competition Authority regarding violations such as anti-competitive agreements.

The Saudi Competition system contains a conflict between the CCP under the Saudi Competition Law (2004) and other councils such as the CITC under the Communications Law 2001, and this problem has yet to be resolved.

Recommendations

In order to enhance the efficiency of the Saudi Competition Law (2004), I recommend redefining the jurisdiction of the CCP institutions. The CCP should be an independent body and needs to be linked directly to the Prime Minister, which would give the CCP the power to enforce the Competition Law effectively. The functions of the CCP Members should be to:

- Make decisions in all violations of competition cases;
- Approve merger operations;

- Establish the role of the institutions within the CCP;
- Provide recommendations to improve competition law;
- Adopt and amend the Implementing Regulation of the Competition Law;
- Publish an annual report; and
- Issue sufficient guidelines that show the framework of CCP enforcement and which cover all aspects of competition law.

I also suggest establishing four departments in the CCP to cover all areas of competition: anti-competitive agreements, abuse of dominant position, merger operations, and enforcement. Each department would provide more concentrated expertise in particular areas of competition law; therefore, this mechanism leads to increasing the enforcement efficiency of the competition Law.

I recommend renaming the Secretary General as Executive Director and providing him with the necessary power to conduct inquiries and investigations, to collect evidence, and to start legal proceedings against suspected violators of the law. The Executive Director should be a Member of the CCP, thus giving the Executive Director sufficient power for successful enforcement.

It is essential to establish an independent Legal Committee to review legal cases as a court of first instance. The decisions of the Legal Committee should be reviewed in the Appeal Commercial Courts. Consequently, fair tribunal for all parties in the Saudi market should be provided.

The institutions should be provided with adequate power to enforce competition law. Full-time employees who have expertise in the competition field should be appointed.

The Saudi Competition Law (2004) mentions three measures that the CCP may take if they find that the law has been violated. However, it is unclear whether it is the CCP or the Legal Committee who has the power to issue such decisions. Therefore, the CCP should be granted two kinds of power:

- First, to accept commitments or to end prohibited practices by issuing directions if it finds that there has been a violation of competition law, but not imposing fines because this is a role for the Legal Committee exclusively; and
- Second, provide the CCP with the power to take interim measures when the CCP has not completed its investigations, in order to stop unfair practices.

The law needs to be adjusted such the cartel is criminalized, as it is a common violation worldwide and in the Saudi market particularly. The law should provide a sentence of imprisonment for the cartel arrangement violators of up to five years. The fixed fine sanction in Saudi Competition Law (2004) should be amended by adopting a new sanction that fines a company up to 10 per cent of its turnover if it is found to be in violation of the Competition Law (2004). Subsequently, the new penalty system is expected to deter competition violation.

The leniency programme in the Saudi Competition Law (2004) needs to be integrated. This will encourage parties to report their violations in order to obtain exemption or reduction in fines. The cartel agreement is a secret practice and such a law may help to bring cartels to light.

The Saudi competition system should grant the CCP the general power to enforce competition rules and take into account the importance of the concurrency between the CCP and other authorities when the violation occurred in the other authorities, such as the CTIC.

7.11.1 Conclusions in relation to case studies

1. The communications sector

The communication sector provides three main services: mobile phone services, land line services, and Internet services. However, the level of competition in the communications sector indicates that only the mobile phone services part of the sector has been improving, especially in last three years, because there are three operators in the market. Meanwhile, other services (land line services and Internet services) are still dominated by the *STC*.

2. The civil aviation sector

The civil aviation sector has a poor level of competition for two main reasons: first, *Saudi Arabian Airlines* has exemption from application of competition law because it is entirely owned by the government. Second, as explained previously, the civil aviation policy does not currently encourage fair competition because the authority in the civil aviation sector divides the routes of flights between three operators, which means that it has transferred the services from a public monopoly to a private monopoly.

The previous chapters explored the enforcement system under the Saudi Competition Law (2004) as well as two case studies and recommendations.

The final chapter of this study presents the final conclusion and suggestions.

Chapter Eight: Conclusion

CHAPTER EIGHT: CONCLUSION

8.1 Introduction

Competition law is a very important step for any country that wishes to change the market from a monopoly to a competitive market. It regulates market activities and protects both consumers and small competitors in the market.

Competition theory has emerged in different economies and cultures. In Western countries, competition law or antitrust law was born in the US through the Sherman Act 1890, which was the first modern piece of legislation in this field. It was developed under capitalist economic theory, which applies the free market principle in the market. In contrast, in the countries of the Middle East, the regulations regarding the notions of competition were founded in the Shariah Law, a divine law which generally adopts the market price as the '*fair price*', as is the case in Saudi Arabia.

The Shariah Law sets out general and flexible rules for regulating competition in the market. It prohibits two mains practices: monopoly such as legal monopoly in private sector and prevents causing damage to consumers and small competitors. The Shariah Law also has a general principle called '*misuse of the right*' which is similar to abuse of the dominant position rule in the competition law. Moreover, it creates the *Hosbah* role for enforcing the competition rules of the Shariah Law. Although Saudi Arabia is an Islamic State, the Shariah Law has no actual influence on the Saudi Competition Law (2004).

Since 2001, the GCC is applying a common market and monetary union between Member States. It enacted a number of unified laws which regulate different kinds of areas such as commercial, civil, and criminal. Under the GCC regulations there is no reference to competition law, but the draft of the unified competition law is under process and it contains 31 Articles which regulate three aspects: anti-competitive agreements, abuse of dominant position and mergers.

The Saudi government enacted the first Competition Law in the Kingdom in June 2004, indicating its intention to transform economic policy in an attempt to establish free market principles. This significant stage of development requires an in-depth investigation to identify the weak points of the Competition Law (2004), points that may affect its efficiency and its ability to fulfill its duties and purpose. Such an investigation can determine whether the weaknesses are in the law itself or in aspects of its enforcement.

This research aimed to investigate the Saudi Competition Law (2004) and its rules and regulations. It looked into the following research questions:

1. Does the Saudi Competition Law guarantee protection for fair competition?

That is,

- Does the formal law in theory require fair competition?
- How well has it been implemented in practice?

2. What are the defects, if any, in the Saudi Competition Law and its enforcement?

3. What reforms are needed, if any, to improve the Saudi Competition Law, and how can such reforms be achieved?

This chapter presents the study's final conclusions, recommendations, and suggestions for further research.

8.2 Saudi Competition Law and protection for fair competition

Article 1 of the Saudi Competition Law (2004) states that there are two aims under the law: to encourage and protect fair competition and to prohibit monopolistic practices, which means that the law generally succeeds in adopting the theoretical framework of this type of law. However, there are some issues which may hinder this function of the Saudi Competition Law, such as the exception of public and wholly-owned state companies from the law in Article 3, and jurisdictional conflict between the Competition Law and other laws, which are explained in more detail below.

8.3 Conflict between Competition Law and government policy

In Saudi Arabia, there is evidence of a huge conflict between the Competition Law and currently implemented government policy. Competition law aims to encourage fair practices between competitors and prohibits any activities which lead to damage to consumers and rivals in the market. Meanwhile, Saudi Arabian government policy regarding the market contains many obstacles which hinder the Competition Law from achieving its goals (discussed in Sections 3.5.4 - 3.5.6), as follows:

1. Exceptions

The Competition Law provides exceptions from application of the law for public and wholly-owned state companies, such as *Saudi Arabian Airlines* (*SAA*) in the civil aviation sector, which operate commercially in the market. Such exceptions are evidence of the monopolistic practices of the government in the market, which violates the general principles of competition law.

2. Government role in the market

The government plays a significant role in commercial activities. It owns a high proportion of market shares of more than 70 per cent in the main companies in the market, such as those in the communications and electricity sectors, which may lead to lack of neutrality and insufficient implementation of the law, especially against government-owned companies.

3. Privatisation policy

In accordance with its privatisation policy, the government only transfers a maximum of 49 per cent of the shares of public companies to the private sector in order to keep control of companies, such as the *Saudi Telecom Company* (*STC*).

4. Jurisdictional conflicts

The Saudi Competition Law prohibits different kinds of agreements and practices, which are: anti-competitive agreements such as price fixing; and abuse of dominant position such as setting predatory prices. It has also established a special authority for enforcing the law, known as the Council of Competition Protection (CCP). However, other laws, such as the Communications Law (2001), provide similar regulations. This law has also created an authority—the Communications and Information Technology Commission (CITC)—with similar functions to those of the CCP. This creates a conflict between the authorities in terms of who will be responsible for enforcing the competition rules.

5. Barriers to entry

The Competition Law includes entry barriers in the prohibitions in Article 4(4). Entry barriers are considered one of the main problems in the Saudi market. Government policy has, however, established legal entry barriers by enacting laws and regulations that restrict or prevent both national and foreign competitors from entering the various Saudi markets.

8.4 Critical Assessment of Competition Law

Examination of the Saudi Competition Law (2004) has revealed a number of problems which can be divided into four main categories, as follows:

1. Anti-competitive agreements

As discussed earlier in Chapter Four, this involves ten problems in relation to anti-competitive agreements:

1. The Saudi Competition Law (2004) does regulate the associations of undertakings. In the Saudi market, the official trade union is called 'the Council for Saudi Chambers of Commerce and Industry'. Thus, the regulation of anti-competitive agreements under the Saudi Competition Law (2004) does not extend its rules for agreement under the Council for Saudi Chambers of Commerce and Industry.

2. The Competition Law (2004) does not provide any regulations for concerted practice. Concerted practice is a significant kind of illegal behaviour which falls under anti-competitive agreements.

3. The Saudi authority (CCP) has not set out its approach and criteria for assessing anti-competitive agreements. This absence of guidelines emphasises the insufficiency of the policy for enforcing the competition rules.

4. The Saudi Competition Law (2004) does not include rules providing for voidness of the impact of anti-competitive agreements or practices. This means that companies may still benefit from the results of unfair agreements and practices, which leads to inadequate enforcement.

5. The Competition Law (2004) contains overlap and ambiguity between the prohibitions in Article 4 'anti-competitive agreements', 'dominant position' and its exemptions to the prohibitions in Article 5 'dominant position', which may lead to inefficiency in enforcing the law.

6. The CCP under the Saudi Competition Law (2004) has not set out detailed guidelines for all anti-competitive agreements, such as joint purchasing or selling and exchanging price information.

7. The Saudi Competition Law (2004) does not provide that a cartel agreement shall be a criminal offence. The cartel arrangement is a common violation in the Saudi market and the majority of violation cases involve price fixing by cartels.

8. The exemption system under the Saudi Competition Law (2004) provides that the CCP has the power to exempt any agreement, even if it is expected to eliminate competition.

9. The exemption mechanism provides exemption for what are called ‘hard-core restrictions’ (market sharing and control productions).

10. The CCP applies a ‘*de minimis*’ principle on minor agreements. However, the CCP has not set out its approach to applying this criterion.

2. Abuse of dominant position

Chapter Five investigated the Competition Law regulation of abuse of dominant position and demonstrated five core problems with this principle:

1. The Competition Law (2004) defines dominance in two fixed conditions: market share of no less than 40 per cent and/or market power that aims to affect prices in the market. However, this criterion is not a satisfactory definition for dominance.

2. The CCP’s approach to assess dominance refers to five factors. On the other hand, the CCP has not set out the steps for applying these rules.

3. The Competition Law (2004) states that abuse of dominant position means taking advantage from the practices of dominance in the market. However, the phrase ‘taking advantage’ is broad and unclear in meaning.

4. The CCP has not set out other prohibited practices under the abuse of dominant position, which are: excessive prices, price discrimination, discounts, margin squeeze, vertical restraints, and essential facilities.

5. The Competition Law (2004) provides that exemptions may be made for some abuses of dominant position. However, there is no justification for allowing a dominant company to abuse its position; this is inconsistent with the function of competition law.

3. Merger operations

Chapter Six explored rules regarding regulation of merger operations and found five areas of concern:

1. The Competition Law (2004) sets one condition for economic concentration as the criterion for a merger operation investigation (i.e., that the firm has 40 per cent of the share of supply). However, the share of supply test does not cover all merger operations, which may affect the level of competition in the market.

2. The Competition Law (2004) states that a merger will only be prohibited if it leads to the creation of a dominant position. However, a dominant position itself is not prohibited in the Competition Law.

3. The Saudi Competition Law (2004) gives the CCP discretionary power to approve or refuse mergers operations. However, the CCP's has not set out its system for assessing merger practices.

4. There are no exemptions under the Saudi Competition Law (2004). However, the law should allow merger operations that are expected to benefit consumers and not lead to substantial lessening of competition.

5. The Saudi Competition Law (2004) does not provide adequate power to the CCP for remedial action in merger operations.

4. Enforcement

Chapter Seven examined enforcement and showed the following results:

1. The Saudi Competition Law (2004) established a special authority called the CCP to enforce the law. The CCP includes three bodies: the CCP members, the Secretary General, and the Legal Committee. This organisational structure raises several issues, such as the independence of the CCP, because it is located in the Ministry of Commerce and Industry and there are overlaps between their jurisdictions. Moreover, the CCP members and the Secretary General are unqualified, and their expertise in competition law is limited. Added to this is the fact that the members of the CCP are part-time employees who cannot devote all their efforts to the enforcement of the law, which can obviously create problems.

2. The Competition Law (2004) does not provide rules regarding a number of procedures, such as commitments, interim measures, and a leniency programme.

3. The Competition Law (2004) provides a fixed penalties system that contains two types of punishment: a fine of up to five million Saudi Riyals for violation of the law and a fine of up to five million Saudi Riyals and/or imprisonment of up to two years for employees of the CCP.

5. Violation cases

The Competition Law (2004) does not require the CCP to provide frameworks or guidelines for how it will enforce the law. Instead, the law gives the CCP unlimited discretionary power to enforce the law without a clear implementation system.

The Saudi Competition Law (2004) was adopted six years ago in June 2004, and the Saudi market has witnessed several violations of the law during this time that have gone unpunished. The most notable violations concern the storing of iron, which is prevented in Article 4(2) and price fixing by cartels in the cement, dairy, and car sales sectors during 2007 and 2009, which are prohibited in Article 4(1) (as discussed in Section 4.4). Furthermore, the CCP has approved two large merger operations that created position of absolute dominance, specifically, in foods, oils and sugar, which may lead to abusive practices (as discussed in Section 6.12.1). This shows that the CCP has thus far failed to enforce the law in many cases, whether in prohibiting anti-competitive agreements such as price fixing, preventing abuse of dominant position practices, or in assessing merger operations.

6. Absence of competition culture

The operation of the Competition Law (2004) illustrates the lack of competition culture in Saudi Arabia among consumers and affected companies. The consumers have not made written complaints to the CCP in several cases where there have been violations of the Competition Law (2004) such price fixing. The reason for this is that the consumers assume that it is the government's role to take action against the violators in the Saudi markets. The affected companies prefer not to take legal actions against large companies especially if the government has the majority of its shares, such as with the *STC*. Taking all this into the account, there is insufficient enforcement of the competition rules by the CCP and other authorities such as the CITC.

8.5 Recommendations

This section provides recommendations for reform of the Saudi Competition Law (2004). The recommendations are based on a critical assessment of the Saudi Competition Law (2004) and comparison with the UK Competition Act 1998 and the UK Enterprise Act 2002. The recommendations fall into five categories related to competition law and policy, as follows:

1. Competition policy

1. The application of the Saudi Competition Law (2004) should be extended to public and wholly-owned state companies by repealing Article 3 of the Competition Law (2004). Consequently, the provisions of the Competition Law (2004) would apply to all commercial companies that provide goods or services in the market.

2. The government's privatisation policy should be revised to include transfer of majority shareholdings in public companies. According to the Saudi Companies Law (1965), anyone who owns at least 51 per cent of a company's shares runs that company. Accordingly, the government should transfer at least a 51 per cent share in public companies to the private sector. The impact of new privatisation policy is discussed in terms of the government's role below.

3. The government's role in the market should be lessened by reducing its large shareholdings in the market, as mentioned above. A lesser role would enable the government to supervise the market more effectively and would therefore have a better chance of enhancing the enforcement system since there would no longer be a conflict of interest;

4. The competition system contains jurisdictional conflicts between the Competition Law (2004) and other laws such as the Communications Law 2001. However, this conflict can be resolved by granting the CCP the general competence to look at all competition cases in all sectors, taking into account the importance of the concurrency between the CCP and other authorities, such as exchange of information, to enforce competition law in those authorities' own sectors.

5. The Saudi market has high entry barriers, allowing the continuation of monopolies in the market and protecting powerful companies from fair competition, which tends to lead to increased prices. Consequently, the government should reduce the legal barriers to entry and open the market to companies, which will enhance the level of competition.

2. Anti-competitive agreements

1. Association undertakings are official trade bodies which may provide a great opportunity for the companies to meet and make agreement, such as price fixing, to violate the competition law. So, the Saudi Competition Law (2004) should regulate this practice, which would make the control of anti-competitive agreements more efficient.

2. Concerted practices are an important type of anti-competitive practice. The Competition Law should provide regulations in relation to concerted practices in order to address this gap in the law and prohibit all anti-competitive practices.

3. The Competition Law (2004) should explicitly state that any 'anti-competitive agreements' in violation of Article 4 will be void, which means that the law would then prohibit companies benefiting from the results of agreements or practices violation.

4. There are overlaps in the regulation of the prohibitions under the Competition Law (2004) between Article 4 and Article 5. Article 4 provides three kinds of prohibitions: anti-competitive agreements, abuse of dominant position, and exemptions. In turn, Article 5 contains rules concerning abuse of dominant position. The prohibitions of the Competition Law should be rewritten so that all the different prohibitions in the separate sections are set out very clearly, which will lead to a more effective competition enforcement system.

5. The cartel is a very serious violation falling under the category of anti-competitive agreements. Cartels of competitors in the market make secret agreements, such as price fixing or market sharing, which violate competition law. Hence, making the cartel a criminal offence in the Competition Law (2004) would be a significant improvement in the law and would deter violation of the law.

6. Exemption regulation is a significant part in the anti-competitive agreements. For this reason, the exemptions under the Saudi anti-competitive agreements should contain two aspects: do not exempt any agreement that is likely to eliminate competition and hard-core restrictions—i.e., price fixing, market sharing and limiting production.

7. The CCP should adopt inclusive guidelines addressing three main issues: providing an assessment system for anti-competitive agreements, providing more examples for practices which are prohibited, and its defining and its approach for applying the *de minimis* principle.

3. Abuse of dominant position

1. The definition of the term 'dominance' should be clarified to make it an objective definition that indicates the economic power of a company in the market. The economic condition demonstrates the ability of a company to prevent competition and independent operation in the market. However, it must also be borne in mind that a market share in the relevant market is only one indication of dominance.

2. The definition of the term 'abuse' should be clarified to make it an objective definition, which can be used to assess the practices of the dominant company. The definition of 'abuse' should include all kinds of unfair practices undertaken by the dominant firm, such as excessive prices, price discrimination, predation, and refusal to supply.

3. Abuse of dominant position should never be exempted from the prohibitions in Article 4. The Competition Law (2004) aims to prohibit illegal practices, and abuse of dominant position is one of these illegal practices.

4. Merger operations

1. The economic concentration condition must be amended by decreasing the share of the supply test from 40 per cent to 30 per cent. The turnover test should be adopted as an alternative test and should be set at 60 million Saudi Riyals (US $16 million). Generally, the figure of 60 million Saudi Riyals for the turnover test is similar to that of two countries in the region: Tunisia (20 million Tunisian Dinar) and Egypt (100 million Egyptian Pounds), given that both countries share a similar economic background to that of Saudi Arabia.

2. The Competition Law (2004) provides that the effect of a merger operation will lead to it being prohibited only if it leads to the creation of dominant position. This must be modified so that a merger operation should be prohibited if it causes substantial lessening of competition (SLC).

3. The law should grant the CCP the authority to enforce remedial actions, such as returning to the previous situation, increasing the level of competition with the merged company, and limiting the market power of the merged company.

4. The Competition Law (2004) should provide an exemption for merger cases that will be of benefit to consumers.

5. Enforcement

1. The CCP should become an independent body that can enforce the Competition Law (2004) and make decisions on cases brought against violators.

2. The Legal Committee should become an independent tribunal that can review competition law cases.

3. The Secretary General of the CCP should be renamed the Executive Director of the CCP and granted complete power—for instance, in the conducting of investigations. The Executive Director should be a member of the CCP.

4. The CCP members, the Executive Director, and the Legal Committee should have qualifications and expertise in competition law.

5. The members of the CCP should be full-time employees.

6. The Competition Law (2004) should also grant the CCP adequate powers to accept commitments to end the violation and to take interim measures if the CCP has not completed its investigations.

7. The penalties system should be amended to consider the formation and operation of cartels as a criminal offence since it is one of the major violations in the Saudi market. The sentence of imprisonment for violators might be adopted to a maximum of up to five years. The fine sanction in the Competition Law (2004) should be amended from 5 million Saudi Riyals to a fine of up to 10 per cent of the turnover of the violating company.

8. A leniency programme should be adopted into the Saudi Competition Law (2004). The leniency programme would provide the opportunity for cooperation between the CCP and violating parties, encouraging the latter to report their violations in order to obtain exemption or reduction in fines.

9. The Competition Law (2004) should require the CCP to publish detailed guidelines that explain the method used by the CCP in enforcing competition law. The guidelines should include all competition law issues such as market definition, anti-competitive agreements, merger operations, abuses of dominant position, and enforcement.

8.6 Suggestions for Further Research

This study is, to the best of the author's knowledge, the first to address Competition Law in the Kingdom of Saudi Arabia. It has investigated all aspects of the Saudi Competition Law and policy: control of anti-competitive agreements, control of abuse of dominant position, control of mergers, and enforcement. Further research can be conducted to examine each aspect separately and in more detail.

Legal cases provide a fundamental resource for any legal research. As stated earlier, there are a limited number of Saudi legal cases to date in the field of competition law, which is one of the limitations of the present study.

Studying cases under the Saudi competition system in the future will result in the provision of further essential assessments of the implementation of the Competition Law (2004) through analysis of decisions and judgments made by the judiciary body. These future assessments will no doubt lead to further suggestions for reform of the Saudi Competition Law (2004) and its enforcement.

Researchers might also be interested in comparing the Saudi Competition Law (2004) with other competition (and related) laws that have been established in various countries around the globe. The focus here might be on laws that have grown out of a similar context, such as the Competition and Prices Law in Tunisia, or those which have developed in a different environment, such as antitrust laws of the United States.

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APPENDIX A: THE SAUDI COMPEITION LAW (2004)

APPENDIX B: IMPLEMENTING REGULATION OF COMPETITION LAW

APPENDIX C: INTERVIEWS SCHEDULE

Competition Law

Royal Decree No. M/25
4 *Jumada I* 1425 / 22 June 2004

Article One:

This Law aims to protect and promote fair competition and combat monopolistic practices that affect lawful competition.

Article Two:

Whenever they occur in this Law, the following terms shall have the meanings expressed next to them unless the context indicates otherwise:

Firm: Factory, establishment or company owned by natural or corporate person(s), and all groupings practising commercial, agricultural, industrial or service activities, or selling and purchasing commodities or services.

Market: Place or means where a group of current and prospective buyers and venders meet during a specific period of time.

Domination: A situation where a firm or a group of firms are able to influence the market prevailing price through controlling a certain percentage of the total supply of a commodity or service in the industry of its business. The Regulations shall specify this percentage according to criteria which include the market structure, the easiness of market entry by other firms, and any other criteria determined by the Council.

Merger: Merging a firm with one or more firms or the merger of two or more firms into a new one.

Council: Council of Competition Protection.

Ministry: Ministry of Commerce and Industry.

Minister: Minister of Commerce and Industry.

Regulations: Implementing Regulations of this Law.

Article Three:

Provisions of this Law shall apply to all firms working in Saudi markets except public establishments and wholly-owned state companies.

Article Four:

Practices, agreements or contracts among current or potential competing firms, whether the contracts are written or verbal, expressed or implied shall be prohibited, if the objective of such practices, agreements or contracts, or consequent impact thereof is the restriction of commerce or violation of competition among firms. A firm or firms enjoying a dominant position shall also be banned from carrying out any practice which restricts competition among firms, in accordance with the conditions and rules specified in the Regulations, especially the following:

1. Controlling prices of commodities and services intended for sale by increasing, decreasing, fixing their prices or in any other manner detrimental to lawful competition.

2. Restricting freedom of flow of commodities and services to markets or removing them, wholly or partially, therefrom by hiding, unlawfully storing, or refraining from dealing in them.

3. Contriving a sudden abundance of commodities and services which results in an unrealistic price affecting other dealers in the market.

4. Preventing any firm from exercising its right to enter or move out of the market at any time or hampering the same.

5. Depriving, wholly or partially, certain firm or firms of commodities and services available in the market.

6. Dividing or allocating markets for selling or purchasing commodities and services pursuant to any of the following criteria:
   (a) Geographical regions
   (b) Distribution centers
   (c) Type of clients
   (d) Seasons and time periods.

7. Influencing the normal price of sale, purchase, or supply quotations of commodities and services whether in government or non-government bids or auctions.

8. Freezing or restricting manufacturing, development, distribution or marketing processes and all other aspects of investment, or restricting the same.

The Council may choose not to apply provisions of this Article to practices and agreements in violation of competition which are believed to improve the performance of firms and realize a benefit for the consumer exceeding the effects of restricting freedom of competition, as specified by the conditions and rules in the Regulations.

Article Five:

A firm enjoying a dominant position shall be banned from any practice restricting competition, as specified by the Regulations, including:

1. selling a commodity or service at a price below cost, with the intention of forcing competitors out of the market.

2. imposing restrictions on the supply of a commodity or service, with the intention of creating an artificial shortage in its availability in order to raise prices.

3. imposing certain conditions on selling and purchasing transactions or on dealing with another firm, in a manner that puts it in a weak competitive position compared to other competing firms.

4. refusing to deal with another firm without justification in order to restrict its entry into the market.

Article Six:

1. Firms involved in merger operations or firms desiring to acquire assets, proprietary rights, usufructs or shares, which causes them to be in a dominating position, shall notify the Council in writing at least sixty days prior to completion of the same.

2. Competing firms desiring to combine two or more managements into one joint management shall, if that results in a dominant position, notify the Council in writing at least sixty days prior to completion of the same.

3. The Regulations shall specify the times of such notification, its form and content, information and documents required, procedures to be followed in submitting it as well as the due fees for the inspection thereof.

4. The Council may review all necessary information prior to issuing a decision of approval or rejection of the notification submitted thereto, in accordance with paragraphs (1) and (2) above, giving justification in each case.

Article Seven:

The firm referred to in Article Six of this Law may complete the procedures of merger, acquisition or combining two or more managements into one joint management in the following cases:

1. Upon notification in writing of the approval by the Council.

2. Upon expiration of sixty days from the date of notification without being notified by the Council in writing of its objection to the deal or that it is under study and review.

3. Upon expiration of ninety days from the date of notification with the deal being under study and review, without being notified by the Council in writing of its approval or rejection.

Article Eight:

1. An independent council named "Council of Competition Protection" shall be established. It shall be located in the Ministry of Commerce and Industry.

2. A Royal Order shall be issued for the formation of the Council as follows:

• The Minister of Commerce and Industry	chairman
• A representative of the Ministry of Commerce and Industry	member
• A representative of the Ministry of Finance	member
• A representative of the Ministry of Economy & Planning	member
• A representative of the General Investment Authority	member

- Four members of expertise and competence selected on their merits and nominated by the Minister.

3. The term of membership in the Council shall be four years renewable for one term. The Council member shall remain in his post upon expiration of his term until a successor is appointed.

4. The Council shall convene headed by the chairman or whomever he deputizes of the members and with the attendance of two thirds of the members. Council's decisions shall be taken by majority vote. In case of equal votes, the chairman shall have the casting vote.

5. Council members may not disclose any information they obtain as a result of their membership in the Council.

6. A Council member may not participate in the deliberation of any case or subject in which he has an interest or with which he has a connection, or if he is related by blood or marriage to any of the parties involved, or if he has represented any of the parties concerned.

Article Nine:

Subject to what is stipulated in other laws, the Council shall have jurisdiction over the following tasks:

1. Approving cases of merger, acquisition, or combining two managements or more into one joint management resulting in a dominant position in the market.

2. Ordering the undertaking of proceedings of inquiry, search and collection of evidence pertaining to complaints and practices in violation

of provisions of this Law, and ordering the investigation and prosecution thereof.

3. Approving the initiation of criminal case procedures against violators of provisions of this Law.

4. Forming the Council's bodies and issuing the financial and administrative regulations, in coordination with the Ministry of Finance and the Ministry of Civil Service.

5. Proposing relevant draft laws that affect competition in light of the variables occurring in the market, and proposing necessary amendments to provisions of this Law.

6. Issuing the Implementing Regulations of this Law.

7. Preparing an annual report of the Council's activities and future plans, to be submitted to the Council of Ministers by the chairman of the Council.

Article Ten:

The Council shall have a general secretariat presided over by a secretary general of the Fifteenth Grade. The Council shall be provided with all necessary facilities and specialized experts.

Article Eleven:

1. The Council shall issue a decision designating the employees who shall have the judicial recording capacity in implementing the provisions of this Law.

2. Subject to provisions of other laws, the employees having the capacity of judicial recording may:

   (a) Review and investigate submitted complaints which are based on actual evidence in accordance with the provisions of this Law, and initiate prosecution while considering violations of provisions of this Law before the committee referred to in Article Fifteen and before the Board of Grievances

   (b) Review all records, files and documents of the firm concerned, which are relevant to the complaints in question and obtain copies thereof. The firm subject of the complaint may not conceal any information on the pretext of confidentiality or for any other reason.

3. The Minister may issue a decision assigning some of the Ministry's staff to perform the Council's technical, financial, and administrative functions.

4. The Council may, when needed, seek the assistance of experts and qualified persons from outside the Ministry.

5. Council Members and staff shall maintain the confidentiality of the information and records they obtain from firms in the process of collecting evidence or investigations, and they may not turn over the same to any other party except with the approval of the Council.

Article Twelve:

Without prejudice to any harsher punishment under another law, each violation of the provisions of this Law shall be subject to a fine not exceeding five million riyals, to be multiplied in case of repetition. Judgment shall be published at the expense of the violator.

Article Thirteen:

Anyone disclosing a secret related to his job, according to provisions of paragraph (5) of Article Eleven of this Law, or directly or indirectly benefiting shall be subject to a fine not exceeding five million riyals or imprisonment for a period not exceeding two years or both.

Article Fourteen:

Punishments referred to in Articles Twelve and Thirteen shall be determined on a case by case basis according to the violation committed and the gravity thereof.

Article Fifteen:

1. The Council shall form a committee of five members one of whom at least shall be a legal counselor. A decision to this effect shall be issued by the Minister. Said committee shall have jurisdiction to review and decide violations subject to fines.

2. The committee shall issue its decisions according to the rules and procedures specified by the Implementing Regulations.

3. Anyone may file a grievance against the committee's decisions with the Board of Grievances within sixty days from the date of notification of the decision.

4. If the committee, upon reviewing the violation, decides that the violation calls for the punishment of imprisonment, it shall refer the case to the Board of Grievances for *ab initio* adjudication.

Article Sixteen:

Without prejudice to provisions of Article Twelve of this Law, the Council may issue a decision to take one or more of the following measures, if a violation of one of the provisions of this Law has been established:

1. Instructing the violator to rectify his status and end the violation within a period of time specified by the Regulations.

2. Instructing the violator to dispose of some of the assets, shares or proprietary rights, or to undertake any other action to remove the violation's effects.

3. Compelling the violator to pay a daily fine of not less than one thousand riyals and not exceeding ten thousand riyals, until the violation is removed.

Article Seventeen:

Anyone against whom the Council has issued a decision may file a grievance against the decision in accordance with the Law of the Board of Grievances and its regulations.

Article Eighteen:

Any natural or corporate person harmed by practices prohibited under the provisions of this Law may apply for compensation before the competent judicial body.

Article Nineteen:

All firms subject to this Law shall rectify their status so as to conform to the provisions hereof, within one year from the date of publication of this Law,

Article Twenty:

The Council shall issue the Implementing Regulations of this Law within ninety days from its publication, and they shall come into effect simultaneously with this Law.

Article Twenty One:

This Law shall be published in the Official Gazette, and shall take effect after one hundred and eighty days from the date of its publication, with the exception of the provisions related to the formation of the Council and its powers which shall be effective from the date of publication of this Law.

APPENDIX B: IMPLEMENTING REGULATION OF COMPETITION LAW

Implementing Regulation of Competition Law

Based on Article twenty of the competition law which was issued by the Royal Decree No. (M/25) dated 4/5/1425, the council of Competition Protection issued the Implementing Regulations of the law by its Resolution No. (13/2006) dated 25/11/1427 AH Equivalent to 16/12/2006 AD; and it has been amended by Resolution No. (25/2008) dated 9/9/1429 AH Equivalent to 9/9/2008 AD.*

The following articles are the Regulations of the system:-

Article (1)

Wherever they occur in these Regulations, the following terms shall have the meanings expressed next to them unless the context requires otherwise:

Law: Competition Law.

Entity: Factory, establishment or company owned by a natural or corporate person(s), all groupings practising commercial, agricultural, industrial or any service activities, or selling and purchasing goods or services .

Market: Place or means where a group of current and prospective vendors and buyers meet during a specific period of time.

Domination: A situation when a firm or a group of firms in the market owned 40% at least from the cost of total sales during 12 months and/or a firm or a group of firms are able to influence the market prevailing price.

Merger: Merging an entity with one or more entities, or the merger of two or more entities into a new one.

Council: Competition Protection Council.

Ministry: Ministry of Commerce and Industry.

Minister / Chairman of the Council: Minister of Commerce and Industry / Chairman of Competition Protection Council.

Regulations: Provisions of these Implementing Regulations.

Committee: Committee for Settlement of Violations of Competition Law.

Commodity / Commodities: any commodity or service or a combination thereof which may, in terms of price, characteristics and uses, substitute each other to meet a specific consumer need in a given geographical area of homogenous competition conditions.

Economic Concentration : any act resulting in full or partial transfer of ownership rights or usufruct of an "entity's" properties, rights, stocks, shares or obligations to another "entity" that puts an "entity" or a group of "entities" in a position of "domination" of an entity or a group of "entities", by way of merger, takeover, acquisition, or combining two or more managements into one joint management or any other means which leads to a state of "Economic Concentration".

Article (2)

The "Law" and "Regulations" aim at:

1. Protecting and promoting fair competition through reasserting market principles and goods traded therein, as well as free and transparent pricing.
2. Combating monopoly or practices affecting fair competition by commission, omission causing an act violating fair competition.

Article (3)

a. The provisions of "the Law" and "the Regulations" shall apply to all entities operating in the Saudi markets and various activities thereof. They shall also apply to any activity taking place abroad that leads to consequences contrary to fair competition within the Kingdom.
b. The following shall be exempted from the provisions of Paragraph (a) above
   1. Any company or establishment fully owned by the state.
   2. Any "commodity" whose price is fixed pursuant to a resolution by the Council of Ministers or a provisional decision by "the Minister" in response to extraordinary circumstances, an emergency or a natural disaster.

Article (4)
Any practices, alliances or agreements, explicit or implicit, between competing or potentially competing entities which violate, restrict or prevent competition shall be prohibited, particularly those whose subject matter or purpose is as follows:

1. Fixing prices, service charges or terms of sale, and the like.
2. Setting a limit for production of goods or the rendering of services.
3. Dividing markets on the basis of geographical areas, sale or purchase quantities, customers or any other basis adversely affecting competition.
4. Discriminating among clients in prices, facilities and services.
5. Taking measures to hinder the entry of an "entity" into "the market" or forcing it out of the market.
6. Complicity in tenders. Submission of declared joint bids shall not be considered complicity, provided that the purpose thereof is not to violate competition in any way.
7. Setting different prices on a certain commodity according to where it is sold.
8. Selling at less than the cost price in order to force competitors out of "the market".

Article (5)

1. "The Council" may exempt from the application of the provisions of Article(4) above to practices and agreements violating competition which lead to improvement in performance of "entities" and benefit customers to an extent greater than the effects of restriction of free competition, if the relevant "entity" or entities submit the request for exemption in writing along with supporting justifications.

2. "The Council" shall review the request and issue a decision of approval or refusal, giving the reasons thereof.
3. "The Council" may specify in its decision both the exemption term and conditions. It may thereafter shorten or extend such term.
4. "The Council" may, pursuant to a reasoned decision, cancel the exemption at any time.
5. "The Council" shall issue its decisions with respect to exemption request approval, refusal, determining its term or cancellation thereof in accordance with “rules governing exemptions” referred to in Article (23) hereunder.

Article (6)

1. "Any entity" of a dominant position in the market is prohibited from exploiting such a position to violate, limit or prevent competition, including the following:
    a. Fixing or imposing prices or terms on resale of goods.
    b. Committing any act that leads to hindering "the entry" of another "entity" into "the market", forcing it out or exposing it to losses, including selling at a loss.
    c. Imposing unrealistic price for a "commodity" through the dominant entity’s hindering, limiting or refusing the sale or purchase of a "commodity" in any other manner.
    d. Contriving a false shortage or abundance of a "commodity".
    e. Importing add-ons to a "commodity" at prices that force other competitors out of "the market".
    f. Discriminating among clients in similar contracts with respect to "commodity" prices, service charges or terms of sale and purchase thereof.
    g. Compelling a client or agreeing therewith to refrain from dealing with a competing "entity".
    h. Seeking to monopolize certain materials necessary for another competing "entity" to practice its activity.
    i. Refusing to deal, without valid reason, with a specific client under normal commercial terms.
    j. Making the sale of a "commodity" or offer of a service contingent on the purchase of another "commodity" or a specific quantity thereof or the request of another service.
2. An "entity", dominant or not, may not perform the following**:**
    a. Any deliberate act or practice carried out by a non-competing "entity" leading to violation of fair competition.
    b. Imposing minimum prices for the resale of a "commodity" whether directly or indirectly.
    c. Imposing on another party or obtaining therefrom unjustified special prices or terms of sale or purchase in a manner that gives it a competitive advantage or inflicts damage thereon.

d. An "entity" shall be prohibited from reselling a "commodity" in its purchase condition at a price lower than its real purchase price plus actual expenses, if any, if the intention is to violate fair competition. Said prohibition shall not include highly perishable goods and licensed discounts.

Article (7)

a. Any "entity" intending to realize "Economic Concentration" in order to dominate 40% (forty percent) of "a commodity's" total supply in the market shall submit a written application with the following attachments:
    1. Memorandum of Association or Articles of Association of related entities.
    2. A draft contract or agreement of "Economic Concentration".
    3. A list of the main goods dealt in by "entities" involved in the process of "Economic Concentration", branches of such "entities", quantity and sales of a commodity as well as a statement of its share in the domestic "market".
    4. A report on the consequences of the process of Economic Concentration, particularly its positive effects on the "market".
    5. Financial statements for the last two fiscal years of the "entities" involved in the process of "Economic Concentration" as well as their branches.
    6. A list of partners in each "entity" and the percentage of their share or interest therein.
    7. Any "entity" intending to realize "Economic Concentration" shall enclose with its application a statement of any obligations or suggestions it deems necessary to minimize the potential negative effects of the process of "Economic Concentration" on the "market".
    8. If a representative submits the application, he shall provide his full particulars. A copy of his power-of-attorney shall be enclosed and verified against the original
    9. Payment of one thousand riyals for review of the application.
    10. Signing and sealing the application by the principal or the representative.
    11. Submitting the application to the "Council" sixty days prior to the specified effectiveness date of the "Economic Concentration".
    12. The "Council" may require any additional information or documents.
    13. The "Council" shall announce through one or more media channels, at the expense of the applicant, an abstract of the "Economic Concentration" application, and invite all persons with interest to give their opinions thereon within a period not exceeding fifteen days from the announcement date.

b. The "entity" applying for "Economic Concentration" may complete the concentration procedures, if notified of the "Council's" approval in writing, or if not notified of refusal in writing after the elapse of sixty days from the application date, or that the application is under review. In all cases, the elapse of ninety days from the application submission date without the "Council" notifying the "entity" in writing of approval or refusal shall be considered an implicit approval thereto.

Article (8)
"The Council" shall be located at the Ministry of Commerce and Industry.
Article (9)

a. The Council shall consist of a Chairman and eight members as follows:

The Minister of Commerce and Industry	Chairman
A representative of the Ministry of Commerce and Industry	Member
A representative of the Ministry of Finance	Member
A representative of the Ministry of Economy & Planning	Member
A representative of the General Investment Authority	Member

Four members of expertise and competence selected for their merits and nominated by the "Minister".

b. Four experienced and competent members to be nominated by the "Minister".

Article (10)
The "Council" shall periodically convene at least once every three months or when necessary.

Article (11)

1. "The Council" shall have a secretariat chaired by a secretary general of Grade Fifteen. The Secretary General shall prepare the Council's agenda, notify "the Council" members of the meetings dates and implement the Council's decisions.
2. "The Council" shall independently determine the powers and authorities of the Secretary General.
3. The Secretariat shall include legal and economic experts, specialists and secretaries to perform the tasks assigned to them.

Article (12)
The Chairman of "the Council" shall chair the meetings. In his absence, the meetings shall be chaired by the deputy chairman.
Article (13)

a. The officers referred to in Article (11) of the Law shall jointly or severally record all breaches of the provisions of the Law and its Implementing Regulations.
b. A suspected entity may not, under the pretext of confidentiality, withhold any information for any reason whenever the judicial investigation officers require such information. The judicial investigation officers and others who obtain such information shall maintain the confidentiality thereof and protect the same against unlawful use.

Article (14)

Any of the officers referred to in the previous Article may perform the following in order to carry out the task assigned to him:

a. Access entities suspected of violating the provisions of this Law and review all documents.
b. Immediately investigate the violator, if deems appropriate, after confronting the violator with the violation attributed to him. In all cases, the violator shall be allowed to present his remarks in writing and sign them. The same shall be attached with the investigation report, after recording the violator's name, nationality, capacity, home and business addresses. All documents shall be referred to the "Committee".

Article (15)

The judicial investigation officers shall carry identification documents, and produce them to the person in charge of "the entity" under investigation, prior to initiating the investigation.

Article (16)

A violator shall rectify his status and end the violation immediately upon notification thereof. Ending the violation shall not exempt the violator of the punishments for such violation under the provisions of the Law.

Article (17)

1. The "Council" shall form a committee called the "Committee for Settlement of Violations of Competition Law". Said committee shall consist of a Chairman and four members, including at least one legal counselor. The Minister shall issue a decision naming the Committee Chairman and the other four members. The Committee may be dissolved and reformed as per the same procedures followed in formation thereof.
2. One or more prosecutors shall be appointed, pursuant to a decision by the "Minister", to plead before the "Committee", and litigate before the Board of Grievances.

Article (18)

1. The "Committee’s" Chairman or his deputy shall administer the "Committee's" work and divide it between him and the members
2. A "Committee" meeting shall not be valid unless attended by four committee members, including the Chairman or his deputy. The Committee decisions shall be issued by majority votes of members present. In case of a tie, the Chairman shall have the deciding vote.
3. The parties concerned shall be notified of the date of the session specified to decide upon the violation at least fifteen days in advance. The notification shall include a statement of the violation, a summons for the violator to present his statements and relevant information.

Article (19)

"The Committee" may complete investigations it deems necessary and conduct required inspections of the place of the violation. In such a case, "the Committee" may, as a whole, perform the inspection or delegate one or more of its members for such a task, provided that they submit to "the Committee" a report on the findings of the inspection.

Article (20)

1. The "Committee" shall promptly decide on violations referred thereto. However, if more than one session is required to review the violation, the parties concerned who fail to attend a session shall be notified of the date of the next session.
2. If the "Committee" deems that the violation is punishable by imprisonment, it shall refrain from reviewing it and shall return the same to the "Minister", with a reasoned recommendation. The violation shall be brought before the Board of Grievances by the prosecutors for review.

Article (21)

The parties concerned shall be served with a copy of the decision issued against them. The decision shall state their rights to file a grievance against "the Committee's" decisions with the Board of Grievances, within a period not exceeding sixty days from the date of notifying the convicted party of the punishment decision in accordance with Article (15) of the Law.

Article (22)

"The Chairman of the Council" shall approve the decision passed by "the Committee". However, the decision issued by "the Committee" on the violation and approved by "the Minister" shall not be considered final until the period for filing a grievance with the Board of Grievances expires without filing a grievance, or after a final decision has been rendered to this effect by the Board of Grievances, if submitted.

Article (23)

"The Council" shall issue the governing rules necessary for the implementation of the provisions of these "Regulations", including:

1. Rules Governing Exceptions and Exemptions.
2. Rules Governing Dominant status.
3. Rules Governing Economic Concentration.
4. Rules Governing the Work of the Judicial Investigation Officers.
5. Rules Governing the Committee for Settlement of Violations of Competition Law.

Article (24)

"The Council" may construe and amend, by deletion or addition, the Articles of "the Regulations".

Article (25)

These "Regulations" shall become effective once "the Law" is effective.

* The amendment covers Article (One, Four, Six, and Twenty Three).

APPENDIX C: INTERVIEWS SCHEDULE

Introduction

Q- What do you think of the Saudi Competition Law in general?

Section one: Control of anti-competitive agreements

Q1. Article 3 provides exception for public corporations and wholly-owned state companies from the application of Competition Law. Does this exception apply on the Saudi Arabia airlines?

Q2. The law seems to focus on dominant position prohibitions in Articles 4 and 5 more than other prohibitions. Why is that in your opinion?

Q3. What is the effect of that?

Q4. What do you think of the prohibitions contained in Articles 4 and 5, are there any prohibitions that you think should have been included/excluded and why?

Q5. Article 4(8) states that "the Council may choose not to apply provisions of this Article to practices and agreements in violation of competition". What are the conditions for such exemption?

Q6. What are the legal procedures or actions that have been taken in the cartel agreements (price fixing) case between *dairy companies* which violated Article 4(1)?

Q7. What about the cartel agreement (price fixing) case between *cement firms* (violated Article 4(1)?

Q8. What about the case of *iron storing* which violated Article 4(2)?

Section two: Control of dominance

Q1. Article 7(a) in Implementing Regulations of Competition Law declares a dominant position when the company obtains 40% from the market. What is the reason behind this percentage? Don't you think it is considerably high compared to a 25% in other competition laws such as Egypt and UK?

Section three: Control of mergers

Q1. What is the criterion for allowing companies to merge according to Article 6?

Q2. Recently, two major companies: *Al-Azizia Panda United Company and Al-Makazen Al-Kobra Company* applied to the Council to approve their merger? Was this application approved? What were the procedures/considerations the Council of Competition

Protection followed to reach its decision? Do you have any suggestion for improving the procedures?

Q3. Does this condition apply on any other merger case?

Section four: Council of Competition Protection (CCP)

Q1. According to Article 20, the Council planned to issue the Implementing Regulations of Competition Law within ninety days from its publication i.e. 5th October 2004. However, the Council adopted it on 12th December 2006. What was the reason for this delay?

Q2. Although the Council of Competition Protection (CCP) was intended to be an independent authority, it is in fact still part of the Ministry of Commerce and Industry. Does this affect its independence and efficiency?

Q3. According to the Implementing Regulations of Competition Law Article 10, the Council meetings are held regularly every three months. Do you think a meeting every three months is enough?

Q4. According to Article 9 the CCP has several jurisdictions, for example "ordering the undertaking of proceedings of inquiry, search and collection of evidence pertaining to complaints and practices in violation of provisions of this Law". What if some of these jurisdictions were granted to the general secretariat instead of the Council especially with its few meetings? How would that affect the efficiency of the law?

Q5. What was the criterion for selecting the "four members of expertise and competence" in Article 8(2) to join the Council?

Q6. According to Article 16 the CCP has the right to take decisions against any one who has violated the law. Is there any conflict with the jurisdiction of the legal committee set up under Article 15?

Q7. What is the impact of government funding for the national companies on the Competition Law and on fair competition?

Q8. The Communications and Electricity sectors in Saudi have their own regulations concerning competition such as dominant position and merger. How these regulations keep consistent with the Competition Law?

Q9. What is the criterion for the punishment of imprisonment in Article 15 which should be referred to the Board of Grievances for *ab initio* adjudication?

Q10. Referring to Article 18, is it required to provide an evidence of harm issued from the CCP before claiming compensation in front of a court?

Q11. What are the challenges and difficulties the Council usually face in implementing the law? What are the reasons for such challenges and difficulties?

Q12. What is your evaluation of the performance of the Council of Competition Protection (CCP) in implementing the Saudi Competition Law and how it could be improved?

Q13. What do you think is needed to improve the system and increase its efficiency?

Q14. Have you any thing else to say in this matter?

Case studies

Telecommunication sector

Q1. What type of services does communications companies provide?

Q2. What is the market share of the telecommunications companies (STC, Mobily, Zain)?

Q3. What are the challenges faced by your company when providing services?

Q4. What is your evaluation of the status of competition in the telecommunications sector in the region?

Q5. What do you think of the performance of the CITC in the regulation of competition in the telecommunications sector?

Q6. How do you evaluate the CITC's level of independence and neutrality with competing telecom companies?

Q7. How the fact that the state owns % 70 of STC affects the level of neutrality and independence?

Q8. What are the difficulties faced by the telecommunications company in general and with competitors in particular?

Q9. Are there any complaints against the telecommunications company related to violating laws of competition?

Q10. Are there any legal provisions issued by the Legal Committee at CITC concerning violations of legitimate competition?

Civil aviation sector

Q1. What are the steps taken by Saudi Arabia Airlines to privatize the sector of civil aviation?

Q2. How is the flight routing is determined between the various airlines?

Q3. Describe the competition level in the sector of civil aviation?

Q4. How do you evaluate the CAC's performance in regulating competition in the sector of civil aviation?

Q5. How do you evaluate its level of independence and neutrality?

Q6. How does the low-cost airline affect the level of competition?