The Role of Competition Law in the Telecommunications Sector in Saudi Arabia

A Thesis Submitted for the Degree of Doctor of Philosophy

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DECLARATION

I declare that, except where explicit reference is made to the contribution of others, that this dissertation is the result of my own work and has not been submitted for any other degree at Brunel University or any other institutions.

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ABSTRACT

The telecommunications sector is growing at an exponential rate as technology continues to advance and consumer demands continue to change. However, an evolving market brings with it a growing national economic need for a sustainable telecommunications sector. For many years, Saudi Arabia's telecommunications sector was monopolised by the majority state-owned Saudi Telecom Company. However, in an effort to bring competition to the sector and encourage privatisation, Saudi Arabia first enacted sector-specific rules within the Telecommunications Act in 2001, followed by the broad Competition Law in 2004 as part of its journey to acceptance by the World Trade Organization. However, many of the anti-competitive practices that the laws sought to eliminate persist under the current framework. This study examines the state of competition in the telecommunications sector under Sharia, under the Telecommunications Act, and after the implementation of the Competition Law. The goal is to understand what effects, if any, each step of the legislative process has had on competition. Having evaluated the current state of the sector, this study then examines the competition models of telecommunications sectors in other jurisdictions to identify what lessons can be learned by Saudi Arabia and integrated into its competition model. Ultimately, this study argues that a harmonised framework in which both the Telecommunications Act and Competition Law work in concert will be the most effective means of increasing efficiency and creating a stable economic environment. This study also looks at how such a framework could be implemented within the Saudi system.

TABLE OF CONTENTS

CHAPTER 1 1

INTRODUCTION--- 1

1.1 BACKGROUND ---1

1.1.1 The Practical Realities of Dominance vs Privatisation ------------------------------------3

1.1.2 The Importance of Competition --5

1.2 LITERATURE REVIEW --7

1.3 SIGNIFICANCE OF THE STUDY--- 14

1.4 RESEARCH AIMS AND QUESTIONS -- 16

1.5 LIMITATIONS OF THIS STUDY -- 18

1.6 RESEARCH METHODOLOGY-- 19

1.7 STRUCTURE OF THE THESIS-- 27

CHAPTER 2 30

THE REGULATION OF COMPETITION UNDER SHARIA GOVERNED SAUDI LAW30

2.1 INTRODUCTION-- 30

2.2 STRUCTURE OF THE SAUDI LEGAL SYSTEM-- 30

2.2.1 The Executive --- 31

2.2.2 The Legislature-- 32

2.2.3 The Judiciary -- 32

2.2.3.1 Ineffectiveness of the Judicial System --35

2.3 THE SAUDI COMPETITION REGIME -- 36

2.3.1 Overview-- 36

2.3.2 The Influence of Sharia --- 37

2.3.2.1 The Fiqh --38

2.3.2.2 The Suitable Method of Interpretation---40

2.3.2.3 Sharia Law Principles for Business Practices---41

2.3.2.3.1 Maslahah ---42

2.3.2.3.2 La Dhararwa La Dhirar--44

2.3.2.3.3 Riba ---46

2.3.2.3.4 Ihtikar---49

2.3.2.3.5 The Prohibition of Monopoly--51

2.3.2.3.6 Saddu Zarai---52

2.3.2.3.7 Assuf Fi Al-Isti ---53

2.3.2.3.8 Maqasid al-Syriah ---54

2.3.2.4 Islamic Perspective on Market Abuse--55

2.3.2.4.1 Price Fixing ---55

2.3.2.4.2 Unjust Pricing---57

2.3.2.5 Does the Sharia Guarantee Fair Competition? --61

2.3.2.5.1 Ensuring Fair Competition for Foreign Companies ----------------------------------62

2.3.3 The Competition Law --- 65

2.3.3.1 State-owned Enterprises ---66

2.3.3.2 Restrictive Agreements ---67

2.3.3.3 Abuse of a Dominant Position--70

2.3.3.4 Penalties---70

2.4 THE EFFECT OF THE SHARIA ON THE IMPLEMENTATION OF THE COMPETITION LAW --- 71

2.4.1 The Exemption of State-Owned Monopolies -- 71

2.4.2 Lack of Objectivity--- 73

2.5 CONCLUSION-- 74

CHAPTER 3 76

DEVELOPMENT OF THE TELECOMMUNICATIONS SECTOR IN SAUDI ARABIA AND ITS REGULATORY FRAMEWORK ------------------------------------ 76
3.1 INTRODUCTION--76
3.2 EMERGENCE OF THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR ---76
3.2.1 The Problem of Public Monopolies---79
3.2.1.1 Advantages of the Monopoly System ---80
3.2.1.1.1 Meeting Operational and Financial Objectives-------------------------------------80
3.2.1.1.2 Meeting the Expectations of Customers---81
3.2.1.1.3 Enabling Poor Customers to Access Quality Products ---------------------------82
3.2.1.2 Disadvantages of the Monopoly System ---83
3.2.1.2.1 Price Discrimination--83
3.2.1.2.2 Restricting the Output of Substitute Products--------------------------------------83
3.2.1.2.3 The Negative Impact on Consumer Welfare ---------------------------------------85
3.22 The Implementation of the Privatisation Strategy --86
3.3 THE REGULATIONS AND LEGAL FRAMEWORK --89
3.3.1 The Regulators--89
3.3.1.1 The Ministry of Communications and Information Technology ------------------------89
3.3.1.2 The CITC --90
3.3.1.2.1 Overview---90
3.3.1.2.2 Functions of the CITC--91
3.3.2 The Legislation ---95
3.3.2.1 The Telecommunications Act --95
3.3.2.1.1 The Primacy of Public Interests---96
3.3.2.1.2 The Effectiveness of the Regulation by the State ------------------------------------97
3.3.2.2 The Competition Law of 2004--99
3.3.2.2.1 Obstacles to the Implementation of the Competition Law-------------------------100
3.4 CONCLUSION--- 102
CHAPTER 4 104
DIFFERENT TYPES OF ABUSE BY DOMINANT PLAYERS IN THE SAUDI TELECOMMUNICATIONS SECTOR--104
4.1 INTRODUCTION--- 104
4.2 PRE-COMPETITION LAW TELECOMMUNICATIONS MARKET-------------------------- 105
4.2.1 The Impact of the Free Market Economy-- 106
4.2.1.1 Government Intervention in the Free Market --- 108
4.2.1.2 Government Intervention in Saudi Arabia -- 110
4.3.1 Primary Types of Abuse of Dominance -- 112
4.3.1.1 OPERATING INDEPENDENTLY OF COMPETITORS -------------------------------- 113
4.3.1.2 LACK OF SUBSTITUTE PRODUCTS-- 114
4.3.2 The Two Main Categories of Abuse of Dominance ------------------------------------ 115
4.3.2.1 exclusionary Abuse --- 115
4.3.2.1.1 Predatory Pricing --116
4.3.2.1.2 Margin Squeeze--117
4.3.2.1.3 Tying ---117
4.3.2.2 EXPLOITATIVE ABUSE --- 118
4.3.2.2.1 Price Discrimination---118
4.4.3.2.2.2 Pricing ---119
4.4.3.3 Other Types of Abuse -- 120
4.3.3.1 Restricting the Entry of Other Firms -- 120
4.3.3.2 Illegal Trade Agreements-- 121
4.4.3.3.3 Market Sharing-- 122
4.3.3.4 Predatory Pricing-- 122
4.3.3.5 Cross-Subsidization -- 123
4.3.3.6 Limited Consumer Options-- 123

4.3.3.7 Pricing Tactics ---------- *124*
4.3.3.8 Brand Positioning ---------- *124*
4.4 THE CONSEQUENCES OF THE LACK OF A COMPETITION LAW IN THE TELECOMMUNICATIONS SECTOR ---------- 125
4.4.1 Restriction of Foreign Competition and Hindered Investments ---------- 126
4.4.2 Slow Economic Growth ---------- 126
4.4.3 Innovation and Creation of Ideas ---------- 127
4.4.4 Corruption ---------- 127
4.5 CONCLUSION ---------- 128
CHAPTER 5 131
THE DEVELOPMENT OF A REGULATORY FRAMEWORK IN THE TELECOMMUNICATIONS SECTOR ---------- 131
5.1 INTRODUCTION ---------- 131
5.2 HISTORICAL BACKGROUND ---------- 131
5.2.1 The Journey to the World Trade Organization ---------- 133
5.2.2 Pre-accession Regulation in the KSA ---------- 138
5.2.2.1 The Gulf Cooperation Council Unified Policy ---------- *138*
5.2.2.2 The Telecommunications Act ---------- *141*
5.2.3 The Need for a Competition Law in Saudi Arabia ---------- 143
5.3 THE COMPETITION LAW ---------- 148
5.3.1 Enforcement of the Law ---------- 148
5.3.1.1 The Fairness Consideration ---------- *150*
5.3.1.2 Delineating the Scope of the Law ---------- *153*
5.3.1.3 Anti-Competitive Agreements ---------- *155*
5.3.2 Limitations of the Law ---------- 157
5.3.2.1 Vertical Agreements ---------- *157*
5.3.2.2 Concerted Practices ---------- *158*
5.3.2.3 Abuse of Dominance ---------- *159*
5.3.2.4 Merger Control ---------- *160*
5.4 REGULATING THE TELECOMMUNICATIONS MARKET ---------- 161
5.4.1 The Centrality of Economics ---------- 162
5.4.2 The Competition Law Alone is Not Sufficient ---------- 165
5.4.2.1 The Problem of Overlapping Jurisdiction ---------- *165*
5.4.2.2 Resolving Jurisdictional Conflicts ---------- *166*
5.4.3 Competition Policy Coherence ---------- 167
5.4.3.1 Streamlined Enforcement ---------- *168*
5.7 Potential Solutions ---------- 168
5.5 CONCLUSION ---------- 169
CHAPTER 6 171
UNDERSTANDING THE RELATIONSHIP BETWEEN THE COMPETITION LAW AND THE TELECOMMUNICATIONS ACT: A COMPARATIVE ANALYSIS OF SELECTED JURISDICTIONS ---------- 171
6.1 INTRODUCTION ---------- 171
6.2 COMPARATIVE SELECTION CRITERIA ---------- 172
6.2.1 A Comparative Analysis of the Relationship Between Competition Laws and the Telecommunications Regulations in Selected Jurisdictions ---------- 175
6.3 LESSONS FROM THE GULF COOPERATION COUNCIL ---------- 178
6.3.1 United Arab Emirates: Exclusion of the Telecommunications Sector ---------- 179
6.3.1.1 Scope of the UAE Competition Law ---------- *180*

6.3.1.2 UAE Telecommunications Regulations ---------- 181
6.3.1.3 Interaction Between the Competition Law and Telecommunications Regulations ---------- 181
6.3.1.4 Evaluating the Model ---------- 184
6.3.2 Qatar: Inclusion of the Telecommunications Sector ---------- 185
6.3.2.1 Scope of the Qatar Competition Law ---------- 185
6.3.1.3 Interaction Between the Competition Law and Telecommunications Regulations 186
6.3.1.4 Evaluating the Model ---------- 189
6.4 UNITED STATES: A MODEL FOR PROCEDURAL HARMONISATION? ---------- 191
6.4.1 Background ---------- 192
6.4.2 Development of Telecommunications Laws in the United States ---------- 194
6.4.3 Interaction Between the Antitrust Laws and Telecommunications Regulations - 195
6.4.4 Suitability of the US Model to the KSA ---------- 198
6.5 SITUATING REFORM OF THE KSA LEGAL SYSTEM IN THE BROADER DEBATE201
6.6 BRIDGING THE GAP BETWEEN COMPETITION LAW AND SECTOR-SPECIFIC REGULATION IN KSA ---------- 204
6.6.1 The Impact of Sharia on Competition Law ---------- 205
6.6.2 Development of the Saudi Model ---------- 207
6.6.3 Ascertaining the Purpose of Competition Law ---------- 208
6.7 CONCLUSION ---------- 211
CHAPTER 7 213
RECOMMENDATIONS AND CONCLUSIONS ---------- 213
7.1 INTRODUCTION ---------- 213
7.2 RESEARCH QUESTIONS ---------- 215
7.2.1 Principles of the Sharia that Guide Competition Policy ---------- 215
7.22 How the Saudi Competition Regime Addresses the Monopoly System ---------- 217
7.2.3 The Importance of a Separate Competition Legislation ---------- 219
7.2.4 Improving the Applicability of the Competition Policy ---------- 221
7.3 LESSONS TO BE LEARNT FROM THE COMPARATIVE MODELS ---------- 223
7.3.1 Understanding Why Exclusion is Not Ideal ---------- 224
7.3.2 A Harmonized Model as the Way Forward ---------- 225
7.4 ACHIEVING THE OBJECTIVES OF COMPETITION LAW ---------- 226
7.4.1 Establishing the Goals of Sector-Specific Regulation ---------- 228
7.4.2 Harmonizing the Two INTO an Efficient, Complementary Regime ---------- 229
7.4.3 Competition Policy Coherence ---------- 230
7.4.3.1 Procedural versus Substantive Guidance ---------- 232
7.4.3.2 Ex Ante and Ex Post Enforcement ---------- 233
7.4.3.3 Information Necessary for Enforcement ---------- 234
7.4.3.4 Nature of Enforcement Remedies ---------- 235
7.5 CHALLENGES FOR THE SAUDI COMPETITION REGIME IN THE TELECOMMUNICATIONS SECTOR ---------- 236
7.5.1 Jurisdictional Conflicts ---------- 236
7.5.2 Substantive Issues ---------- 237
7.6 PROPOSALS FOR REFORM ---------- 238
7.6.1 Changes to the Telecommunications Act ---------- 239
7.6.2 Changes to the Competition Law ---------- 239
7.6.3 Deregulation and Re-Regulation ---------- 242
7.6.4 Coordinated Legislative and Enforcement Efforts ---------- 242
7.6.5 Increased Transparency ---------- 243

7.6.6 Regulatory Impact Analysis -- 244
7.7 THE FUTURE OF THE KSA'S COMPETITION POLICY IN THE TELECOMMUNICATIONS SECTOR -- 245
7.8 AREAS FOR FURTHER RESEARCH AND DEVELOPMENT ------------------------------- 246
7.9 CONCLUSION-- 247

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ABBREVIATIONS

CITC: Communications and Information Technology Commission

EU: European Union

GCC: Gulf Cooperation Council

GDP: Gross Domestic Product

ITC: Information Technology Commission

KACST: King Abdulaziz City for Science and Technology

KSA: Kingdom of Saudi Arabia

MENA: Middle East North Africa

PBUH: Peace Be Upon Him

STC: Saudi Telecom Company

TFEU: Treaty on the Functioning of the European Union

FDI: Foreign Direct Investment

VMMEA: Virgin Mobile Middle East & Africa

MVNO: Mobile Virtual Network Operator

ISP: Internet Service Providers

SAGIA: Saudi Arabian General Investment Authority

CMA: Capital Market Authority

ISU: Internet Service Unit

FTTH: Fiber to the home

OECD: Organisation for Economic Co-operation and Development

WTO: Wrold Trade Organization

CCP: Council of Competition Protection

SAMA: Saudi Arabia Monetary Agency

CHAPTER 1

INTRODUCTION

1.1 BACKGROUND

The telecommunications sector is one of the fastest growing sectors in the Kingdom of Saudi Arabia (KSA) due to continuous innovation.[1] It is also one of the Kingdom's most valuable sectors, providing extensive support to its economic development.[2] The sector's growth has given rise to the need for competition legislation to control and regulate anti-competitive practices.[3] The growth may be attributed to the creation of a wide range of commercial opportunities.[4] The KSA was compelled to widen its different telecommunications services to keep pace with global trends and technological advancements made in developed countries.[5] According to the statistical BMI Research Data Report, the KSA incorporates a modern and expanding telecommunications system with over 3.6 million main line users across the Kingdom, which puts its growth on a par with the technological developments of advanced nations.[6]

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[1]See Anis Ali and Mohammed Imdadul Haque, 'Telecommunication Sector of Saudi Arabia: Internal and External Analysis' (2017) 21(3) Academy of Accounting and Financial Studies Journal 1, 1-2; Asma R Al Saleh and Mohammed D Othman, 'How Far the Saudi Telecom Companies' Commitment to Marketing Ethics is and Impact of this on the Achievement of Customers' Satisfaction?' (2015) 3(8) Journal of Economics, Commerce and Management 388, 405; Nasser A Kadasah, 'An Evaluation of Service Quality of Mobily and STC Telecommunication Companies in Saudi Arabia' (2014) 4(10) British Journal of Economics, Management and Trade 1599, 1600.

[2]Ingy Shafei and Hazem Tabaa, 'Factors Affecting Customer Loyalty for Mobile Telecommunication Industry' (2016) 11(3) EuroMed Journal of Business 347, 348.

[3]Both theoretical and empirical studies have established a link between growth and competition policy. Growth expands the market and creates room for more participants while competition enhances productive and dynamic efficiency. See John Stanley Metcalfe and Ronald Ramlogan, 'Competition and the Regulation of Economic Development' in Paul Cook, Raul Fabella and Cassey Lee (eds), Competitive Advantage and Competition Policy in Developing Countries (Edward Elgar 2007) 26; Yiuchiro Uchida and Paul Cook, 'Domestic Competition and Technological and Trade Competitiveness' in Paul Cook, Raul Fabella and Cassey Lee (eds), Competitive Advantage and Competition Policy in Developing Countries (Edward Elgar 2007) 311; William W Lewis, The Power of Productivity: Wealth, Poverty and the Threat to Global Stability (University of Chicago Press 2004) 288.

[4]Anastassios Gentzoglanis and Anders Henten, Regulation and the Evolution of the Global Telecommunication Industry (Edward Elgar 2010) 25-67.

[5]This may also be explained by globalisation which has amongst other things promoted the emulation of Western consumerism lifestyle in the KSA. See Soraya W Assad, 'The Rise of Consumerism in Saudi Arabian Society' (2008) 17(1/2) International Journal of Commerce and Management 73, 73-104.

[6]BMI Research, 'Saudi Arabia Telecommunication Report' (BMI, 2006) <http://store.bmiresearch.com/saudi- arabia-Telecommunication-report.html> accessed 10 October 2017.

The cutting-edge technology in domestic lines includes a wide range of advanced technical equipment such as coaxial cable, microwave radio relay and fibre-optic cable across the whole nation. The establishment of seven earth stations linked with the INTELSAT Satellite System has enabled Saudi citizens to avail themselves of direct dialing access to more than 200 nations.[7] The telecommunications service in the KSA includes 151 telephone mainlines per 1,000 people located across different parts of the nation.[8] Additionally, mobile, cellular phones along with the use of advanced packet data have seen incessant growth over the last decade. In this regard, it can be stated that the telecommunications sector of the KSA has achieved major growth throughout its different developmental stages in recent years.[9]

However, such expansion also brings challenges. Until recently, the provision of telecommunications services in the KSA was dominated by a few government-owned entities. This has changed as the telecommunications industry has become increasingly driven by a move towards privatisation. The entry of private entities in the market posed a threat to the de facto dominance of the government-owned entities. The latter did not take well to such changes and sought to engage in practices that limited competition and allowed them to maintain their positions of dominance. Initially, there was the impression that rapid privatisation of the nation's telecommunications industry, beginning around 1998, would result in the promotion of self-regulation by entities operating in the sector. However, in practice this turned out not to be the case. The anti-competitive behaviours of dominant government-owned entities underscored the need for both general competition laws within the Kingdom and, more specifically, sector-specific telecommunications regulations that could address these issues directly. It is the development and harmonisation of competition legislation and sector-specific regulations that this work critically

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[7]INTELSAT controls about seventy-nine per cent of international traffic. See Barney Warf, 'Eyes in the Sky: Satellites and Geography' in Barney Warf (ed), Handbook on Geographies of Technology (Edward Elgar 2017) 154. The carrier used by Saudi Arabia is called Arabsat. As early as 1976, Saudi Arabia spearheaded the Arabsat initiative that involved 18 earth stations and three satellites to be used by seventeen countries of the Middle East and North Africa. See Barney Warf, 'Geopolitics of the Satellite Industry' (2007) 98(3) Tijdscrhrift voor Economische en Sociale Geografie 385, 391.

[8]In 2005, there were 164 telephone mainlines, 376 personal computers and 575 mobile telephone subscribers per 1,000 people. See World Bank, The Little Data Book on Information and Communication Technology (World Bank 2007) 179. By 2017, there were 10.99 telephone mainlines per 100 people. See The World Bank, 'Fixed-Line Telephone Subscriptions (Per 100 People)' (2019) The World Bank < https://data.worldbank.org/indicator/IT.MLT.MAIN.P2> accessed 28 February 2019.

[9]Hunt Janin and Margaret Besheer, *Saudi Arabia* (Marshall Cavendish 2003) 12-34.

examines.

1.1.1 THE PRACTICAL REALITIES OF DOMINANCE VS PRIVATISATION

The formation of the Saudi Telecom Company (STC) was a prime example of continuous development in the communication channels across the different parts of the KSA by utilising a wider network. According to one report, price reforms of telephony services along with subscription levels of the mobile service providers led to significantly better market performance when compared to marketers with fixed-line services,[10] which reflects a positive change in the market trends in the telecommunications sector.

The wave of privatisation in the KSA's telecommunications sector was primarily driven by the increasing demand for cutting-edge telecommunications products and services by the population.[11] Indeed, the nation's telecommunications industry was one of the key recipient sectors in terms of receiving higher amounts of foreign direct investment (FDI) into the KSA. More importantly, global changes and the Persian Gulf War also contributed to this change as the outside influence of global forces on the KSA imprinted their positive effects on a number of sectors,[12] including the telecommunications sector, and helped the KSA develop. It has also been contended that this growth was mainly due to the attack on the telecommunications installations in the KSA during this conflict.[13]

From 1996 to 1998, the telecommunications sector was the major commercial sector of the KSA with 58 per cent of operations receiving FDI.[14] Food and beverages and tourism stood at 55 per cent of FDI during the same period.[15] This clearly indicates the telecommunications sector's fast economic development and strong economic

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[10]Federal Research Division, Country Profile: *Saudi Arabia* (Library of Congress 2009) 1-9.

[11]Faisal A Alroqy, 'The Impact of Privatisation on Management Accounting Control Systems: A Case Study of Two Saudi Arabian Privatised Companies' (PhD thesis, Newcastle University, 2011) 52-89.

[12]See Zeechan Javed Hafeez, Islamic Commercial Law and Economic Development (Heliographica 2005) 28-29.

[13]See Joseph Mann, 'Saudi Arabia's Economic Needs and the Price of Oil' (Rubin Center, 6 December 2010)
<http://www.rubincenter.org/2010/12/mann-2010-12-06/> accessed 10 October 2017.

[14] OECD, 'Telecom Privatization and Learnings in the Kingdom of Saudi Arabia' (OECD Global Conference on Telecommunication Policy for the Digital Economy 2002) 3-12<http://www.oecd.org/internet/broadband/1810617.pdf> accessed 25 February 2015>

[15] Ibid.

position in the Saudi market. Prior to the period of privatisation, the STC was the only telecommunications firm and so enjoyed the full benefit in terms of extending its exceptional range of telecommunications products and services across the Kingdom and ensuring customer loyalty.[16]

It should be noted that the STC was the only telecommunications provider in the country until the Saudi Arabian Communications Commission made it possible for other companies to compete in 2004 under the newly established Competition Law. This development effectively meant that before 2004 the STC had an absolute monopoly with regard to the provision of telecommunications services in the KSA for individual citizens, business enterprises and other organisations.[17]

Given that the KSA is an absolute monarchy, most of the important government posts are held by key members of the royal family. This influences the different policies and mindsets of those in charge of the sector's regulations and was certainly one of the reasons for the monopoly of the STC.[18] Due to this monopoly, it was possible for the STC to set the prices for telecommunications services the way they saw fit and without having any concerns about competition. If an individual or business wanted a telephone service, they had no other option but to go with the STC.[19] This state of affairs continued until Etisalat and Kuwait Telecommunications Company were granted licenses and a small share of the STC's market was lost to these competitors.

During its period of dominance, the STC sought to take advantage of consumers' lack of options as evidenced by the level of customer service and price and quality of the products they provided. The lack of competition meant that it was possible for the company to pay less attention to customer service than it otherwise would have if there had been more competition. This is supported by the fact that at the time the

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[16] Tariq Khizndar, Abdel Fattah M Al-Azam and Iyad A Khanfar, 'An Empirical Study of Factors Affecting Customer Loyalty of Telecommunication Industry in the Kingdom of Saudi Arabia' (2015) 3(5) British Journal of Marketing Studies 98, 99.

[17] See Chapter Three.

[18] Global Comms Database, 'Saudi Telecom Company' (*Teleography,* 30 September 2014) <https://www.telegeography.com/page_attachments/products/website/research-services/globalcomms-database- service/0005/5890/gcd-saudi-telecom-company-stc.pdf> accessed 10 October 2017.

[19] AS Al Aklabi and B Al-Allak, 'Saudi Telecommunication Company: A Strategy for Sustainable Competitive Advantage' (2011) Journal of Advanced Social Research 1, 76.

KSA was found to lack an extensive landline network because it did not experience the telephony revolution common in more mature economies.

However, since 2004, the general population in the KSA has not only been able to access both mobile services and the internet but the telecommunications sector has also been opened up to private industry with a view to moving away from the STC's absolute domination.[20] As a result of opening the sector to private industry development, there are now five key companies working in this industry: STC Mobile, Integrated Telecom Company, Mobily, ZIN Zain and GO ATHEEB.

Such an increase in privatisation caught the attention of globally renowned telecommunications companies that sought to establish their subsidiaries in the emerging market of the KSA. In this regard, Virgin Mobile MEA (VMMEA) in association with the STC entered into the market as a Mobile Virtual Network Operator (MVNO) mid-2013. The company was awarded an operating license during the first quarter of 2014 and introduced its VMMEA services during early October 2014. It became another private participant in the market.

1.1.2 THE IMPORTANCE OF COMPETITION

The competition law that seek to stimulate market rivalry do not always make a useful contribution to the economic development of less developed countries, whilst global economies benefit when competition is healthy.[21] However, where competition laws enhance economic performance in a given sector, the lives of consumers are affected in observable ways. This is because the level of customer service, innovation, and price and quality of the product or service improve throughout the whole country as a result of private entities gaining a place in the market.[22] This understanding is supported by the observations that as new companies are introduced into the sector, they begin to provide a higher level of quality in services

[20] Badr Alharbi, 'Customer Choice in Mobile Service Providers in Saudi Arabia' (2012) 3(18) International Journal of Business and Social Science 283.

[21] William E Kovacic, 'Competition Policy, Consumer Protection and Economic Disadvantage' (2007) 25 Washington University Journal of Law and Policy 101, 104-114. See also Eleanor M Fox, 'Economic Development, Poverty, and Antitrust: The Other Path' (2007) 13 Southwestern Journal of Law and Trade in the Americas 101, 101-125 (examining the fundamental perspective of competition law in developing countries).

[22] See Nasser A Kadash, 'An Evaluation of Service Quality of Mobily and STC Telecommunication Companies in Saudi Arabia' (2014) 4(1) British Journal of Economics, Management & Trade 1599, 1600-1601.

across the market at significantly more affordable prices than when one company has an absolute monopoly across the whole industry. In other words, the organisation of a market or industry affects the quality and durability of its products; profit-maximising monopolies prefer lower durability of products while perfectly competitive firms choose higher durability in order to ensure constant returns to scale.[23]

As the sector continues to grow and develop, additional regulations have been enacted to enhance mobility and access and produce efficiencies. The KSA has seen a sharp decrease in the mobile and cellular services price rates because of new legislation and competition regulations introduced by the government in the telecommunications sector. The Communications and Information Technology Commission (CITC), established in May 2001 as an independent committee overseeing the KSA telecommunications services, has observed that there has been a phenomenal increase in mobile phone users and data consumption by individual users over the last decade.[24]

Even with this, the price rates of these telecommunications services have continued to decrease while innovation and the quality of the services have improved due to the government's encouragement of new companies to enter the market, creating better regulatory structures, and establishing the foundation of a very competitive market in the Saudi telecommunications sector.[25] This was coupled with a shift in the mindset of the people tasked with making these policies.

Nevertheless, in spite of the recent shift to open up the telecommunications industry to additional players in the wake of the STC's establishment in the country through the implementation of the Ministry of Economy and Planning's 'Eighth Development Plan', the STC still retains a significant share of the market and may still exercise monopoly power over much of the industry. In practice, it continues to place certain limitations upon consumer choice. One of the reasons for this is government

[23]Morton I Kamien and Nancy L Schwartz, 'Product Durability under Monopoly and Competition' (1974) 42(2) Econometrica 289, 289-301. However, see Maurice E Stucke, 'Is Competition Always Good?' (2013) 1(1) Journal of Antitrust Enforcement 162, 163-197 (who argues that competition is not always beneficial to society and discusses four scenarios where competition yields suboptimal outcomes).

[24] See Chapter Four.

[25] Anthony Cordesman and Nawaf Obaid, *National Security in Saudi Arabia: Threats, Responses, and Challenges* (Center for Strategic and International Studies 2007) 96.

ownership and control of the company.[26]

By way of illustration of these limitations, since the internet first became available in the country in 2001, the STC has been recognised as the only complete provider of internet services. There are only a few companies operating in the country as internet service providers largely because the STC was also the country's only provider of telephone lines. As a result, this meant that all customers had to pay two amounts, one to the STC to provide them with the ability to pick up an internet service and a second amount to their chosen ISP to then provide them with their internet service.[27] However, along with having to make two payments to be able to access the internet, the current state of the telecommunications industry has led to much criticism of the STC's monopoly. In fact, some customers have had to wait many months to be given the opportunity to access the internet in the first place despite significant investment in the industry to reduce waiting times.[28]

1.2 LITERATURE REVIEW

The telecommunications sector in the KSA has grown quite significantly in the recent past. As a result, the level of competition in the industry has also continued to rise over the years. Al Aklabi and Al-Allak employed a descriptive approach to discussing the developmental journey of the telecommunications industry in the KSA.[29] The STC was the centre of interest for their study. The study revealed that strategic planning is an essential component for the success of any firm in the telecommunications industry. In addition, the study proved that diversification of service and the provision of products that meet customer demand are important aspects to consider in a competitive industry,[30] as well as for healthy competition to exist.

In comparison, Zhaojing conducted extensive research on the abuse of administrative powers to restrict the scope of the implementation of competition law in China.[31] After providing background information on the Anti-Monopoly Law of

[26] See Chapter Three.
[27] Raj B Sharma, 'Customers Satisfaction in Telecom Sector in Saudi Arabia: An Empirical Investigation' (2014) 10(13) European Scientific Journal 354, 354.
[28] MM Hossain and N Suchy, 'Influence of Customer Satisfaction on Loyalty: A Study on Mobile Telecommunication Industry' (2013) Journal of Social Sciences 9, 73.
[29] Al Aklabi and Al-Allak (n 19) 76.
[30] Ibid.
[31] Luo Zhaojing, 'Development of Abuse of Administrative Power to Eliminate or Restrict Competition

China, Zhaojing focused his research on the causes of abuse of administrative powers and compared these with those of Article 106 of the Treaty on the Functioning of the European Union to suggest the amendments required in the Chinese competition law. He used the telecommunications sector as a case study to provide evidence of abuse of administrative power provisions through three areas of the telecommunications sectors of developing countries. He argued that the Anti-Monopoly Law of China should be amended so that the abuse of administrative power provisions can serve the purpose of fair competition in the Chinese market. This serves as a useful benchmark in determining whether similar abuses of administrative power are occurring within the Saudi system. While this thesis will not explicitly address the EU framework in its comparative analysis, and instead focuses more specifically on the US and GCC approaches, certain aspects of the EU framework, particularly the issues relating to state monopolies, will be alluded to in the course of the discussion and analysis.

Looking specifically at the telecommunications sector, it is a rapidly changing environment where innovation is of utmost importance for it to keep pace with demand and the market. Fiske conducted research on a rapidly changing telecommunications sector and concluded that the similarly paced development of legislation was necessary for the positive growth of the sector.[32] He used the qualitative approach to point out the underlying problems in competition laws that are not resolved and due to which market dominance poses a threat to fair competition in the telecommunications market. He focused on EU competition law policies but suggested that these problems are also prevalent in other systems. Fiske conducted his research in the early years of the liberalisation of the telecommunications sector in the EU, that is before 1998. He strongly argued that competition law policies should be re-assessed to keep them in line with the changes in the telecommunications sector in order to achieve its purpose. This lends support to the need for continuous review, development and amendment of competition law

in the Anti-Monopoly Law of the People's Republic of China and the Impact of Article 106 of EU Competition Law and Free Movement Rules' (Unpublished PhD Thesis, University of Glasgow 2013)<http://theses.gla.ac.uk/4045/1/2012luophd.pdf> accessed 10 October 2017.

[32] Jonathan Fiske, 'E.C. Competition Law in the Era of Modern Telecommunication' (PhD thesis, Hull University, 1998) <http://core.ac.uk/download/pdf/5222488.pdf> accessed 10 October 2017.

regimes to reflect changes in the sectors to which they apply.

For his part, Alharbi conducted a comprehensive study on customer choice and found that Saudi Arabian mobile customers valued quality over all else.[33] In essence, the study revealed that telecommunications firms that have established reliable product brands have a broader customer base than those that do not value product branding. Alharbi adopted the quantitative methodology in the study to assess the choice of mobile service providers among Saudi Arabian customers. The research showed that the name of the firm influenced customer choice, with preference being given to big companies. Essentially, the study showed that competition in the telecommunications industry is controlled by quality, brand and company name.[34]

Alsuraihi and Bashraheel also conducted a quantitative analysis of the use of information and communications technology by households in the KSA.[35] Their research established that households moved several miles on matters of ICT. They found that the use of ICT had improved over the past decade as people have become more informed about it. In this regard, they suggested that the Saudi Arabian government should pursue full implementation of ICT in the education system to facilitate its effective use. In essence, this study demonstrated that the ICT sector requires continued funding to facilitate future developments.

Hossain and Suchy conducted a descriptive analysis of the influence of satisfaction on consumer loyalty in the telecommunications sector.[36] They divided satisfaction into two areas—psychological and physical comfort. They described psychological satisfaction as the fulfilment that occurs once the emotional needs have been taken care of. Physical satisfaction, on the other hand, is expressed as the fulfilment attained due to the value of the product bought. This study revealed that customers develop loyalty to the company whose services and products satisfy their intended needs. Some of the factors that develop customers' loyalty include attractive calling rates, price schedule variations and internet browsing fees. In essence, consumer loyalty and a company's total sales go hand-in-hand. As consumer loyalty increases,

[33] Alharbi (n 20) 283.
[34] Ibid.
[35] MD Alsuraihi and HO Bashraheel, 'Information and Communication Technologies, ICTS in the Saudi Household' (2013) 3(3) Journal of Asian Scientific Research 286.
[36] Hossain and Suchy (28) 73.

the number of sales increases as well.

Sharma conducted an investigative research into the factors that influence consumer satisfaction in the KSA's telecommunications sector.[37] He describes satisfaction as the outcome of mental peace and points out that the STC and Mobily are the two largest firms in the KSA's telecommunications industry. This study revealed that there are several common factors that affect consumer satisfaction including network coverage, internet browsing rate, call charges and messaging services. The study noted that the government has established some control measures to protect the customers' interests and eliminate unhealthy competition among the top firms in the industry

Other studies have shown that modern technology has brought diverse transformation in the field of knowledge management. Al Rowaily and Al Sadhan for example present a case study of the integration of knowledge management in telecommunications in the KSA.[38] They used both quantitative and qualitative research tools. Some of the research instruments for the study were interviews and observations. The study revealed that the upsurge in business growth has obliged telecommunications companies in the KSA to institute knowledge management systems for systematic monitoring of knowledge built by the companies. In addition, the researchers noted that knowledge management is the core parameter for industry growth in modern times. In essence, effective knowledge management facilitates the smooth relations between the business and its clients and also with the corporate world.[39]

Looking at the primary telecommunications provider within the KSA, El Emary, et al critically examined knowledge management implementation at the STC.[40] They established that knowledge management implementation is one of the most important aspects that can give a company a competitive advantage over its rivals.

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[37] Sharma (n 27) 354.

[38] K Al Rowaily and A Al Sadhan, 'Integration of Knowledge Management System in Telecommunication: A Case Study of Saudi Telecom' (2012) 12(11) International Journal of Computer Science and Network Security 42.

[39] Ibid.

[40] Ibrahiem MM El Emary, Hassan A Alsereihy and Adel A Alyoubi, 'Towards Improving the Performance of STC Saudi Using Knowledge Management Strategies' (2012) 12(2) Middle-East Journal of Scientific Research 234.

The study deduced that the STC has established an effective structure for proper knowledge management. However, it was noted that the STC had to make changes in some of its management techniques. The company was advised to embrace modern technology to aid in knowledge management implementation.[41] Thus, it is imperative to recognise that knowledge is the most valuable tool that a company can use to succeed in a competitive environment.

With regard to the quality and durability of products in a competitive market, Kadash conducted a qualitative analysis of the services provided by Mobily and the STC in telecommunications industries of the KSA.[42] The data from the study were collected through interviewing customers and administering questionnaires. The study revealed that the STC is more popular than Mobily among customers the respondents based their answers on the nature of services provided by the two companies as well as convenience. A further examination of the responses revealed that the STC was also more popular because it had been providing services for a long time. In addition, the company has always been up-to-date on market trends and technological changes.

Expanding beyond the sector’s workings and into its impact on the overall economic health of the nation, Gawad and Muramalla evaluated the evolution of telecommunications in the KSA and its impact on economic development.[43] They revealed that the telecommunications sector has undergone massive transformation over the past two decades. The use of mobile phones in the KSA has increased significantly in the recent past. In this regard, the market has diversified as well as become more competitive. The study also revealed that the revolution in the telecommunications sector has contributed positively to the economic development of the KSA. By 2012, the number of mobile phone subscriptions was in excess of 53 million and continued to rise.[44] This indicates that the telecommunications industry can have a significant influence on the economic growth of the KSA.

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[41] Ibid, 240-241.

[42] Kadash (n 22) 1599.

[43] GM Gawad and VS Muramalla, ‘Telecommunication Revolution and Its Effects on Economic Development: An Applied Study of Developing Economies such as Egypt, Saudi Arabia and India’ (2013) 7(2) British Journal of Economics, Finance and Management Sciences 203.

[44] Ibid, 204.

An increase in competition also brings with it the possibility of disputes. In this light, Bruce et al analysed primary data and earlier studies to investigate the issue of dispute resolution in the telecommunications sector.[45] They established that the telecommunications sector is at peak transformation, as are dispute resolution strategies. They observed that traditional practices have been bypassed by the new developments in the sector. The major observation throughout the study was that the court has taken a central position in dispute resolutions in the telecommunications sector. With the rapid developments in the KSA's telecommunications sector, disputes are likely to emerge frequently. In this regard, the judicial system has turned out to be an important dispute resolution centre.

Finally, in assessing the Saudi Competition Law, Alotaibi focused on the applicability of the Law and the regulations surrounding it.[46] His research put a question mark on the fairness of competition law in the KSA. He applied the black letter approach and socio-legal model to tackle the research questions. His research was primarily based on primary research methods as he used interviews and case studies to answer the questions. The study revealed that the Saudi Competition Law contains twenty-one articles that regulate competition in all sectors of the economy. The study is important because it facilitates the understanding of how the Saudi Competition Law tackles monopoly and other anti-competitive behaviour in the marketplace. Alotaibi identified flaws in four main areas, namely anti-competitive agreements, abuse of dominant powers, mergers and enforcement. He then suggested policy reforms for the modernisation of the Law.

Esan used a diverse model to study competition law in Middle Eastern countries, as well as the EU and the US.[47] He collected the data for the study from secondary resources. The study established that some countries neighbouring the KSA have adopted competition regulation policies similar to those employed by the government of the KSA. This indicates that competition law in the KSA has undergone massive

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[45] Robert Bruce and others, 'Dispute Resolution in the Telecommunication Sector: Current Practices and Future Directions' (ITU, 2013) <https://www.itu.int/ITU-D/treg/publications/ITU_WB_Dispute_Res-E.pdf> accessed 10 October 2017.

[46] Alotaibi MN, Does the Saudi Competition Law Guarantee Protection to Fair Competition? A Critical Assessment (Unpublished PhD thesis, University of Central Lancashire 2010) 51

[47] Adenike Esan, 'Competition Law the Legality of OPEC under US Antitrust Law and EC Competition Law' (2012) <http://www.dundee.ac.uk/cepmlp/gateway/?news=28006> accessed 10 October 2017.

improvements over the years to the point of influencing other states. Esan argues that governments of these countries, including the KSA, should pursue full implementation of competition law in the telecommunications sector to promote future growth. In addition, the governments should be neutral parties in matters of competition in order to enhance equality in court proceedings.

Finally, Cave, Corkery and Tice conducted research on competition in the mobile sector in developed and developing countries.[48] They made substantial use of data from secondary sources such as business journals and world business reports. The research revealed that the use of mobile phones has been on the rise in both developed and developing countries in the past decade. As a result, the number of telecommunications service providers has increased significantly. Moreover, the number of investors entering the telecommunications sector every year has been increasing. As a result, the need for competition regulation has risen and the governments of various nations have employed different measures that suit their countries. Their conclusion was that governments should make great efforts to provide a level ground for all players in the industry.

The present study is different from those discussed above because it examines the KSA's telecommunications market before and after the implementation of the Competition Law and discusses the influence of the competition law regimes and policies of comparative and developed states. Further, it situates the Saudi approach within the global competition law environment by engaging in a comparative analysis of the Saudi and US competition regimes and primary telecommunications competition law models used by these nations. Through such an analysis, one can draw conclusions as to the effectiveness of the Saudi Competition Law, identify flaws and make suggestions for further improvement.

Some unique aspects of this work that further differentiate it from the previous studies

[48] Martin Cave, Matthew Corkery and Julian Tice, 'Competition and the Mobile Sector in Developed and Developing Countries' (GSMA, 2007) <http://www.gsma.com/publicpolicy/wp-content/uploads/2012/09/Tax-Competition-and-the-Mobile-Sector-%E2%80%93-in-Developed-and-Developing-Countries.pdf> accessed 10 October 2017.

are that this study covers not only the enactment of the Competition Law but also the amendments made to the Competition Law in 2014. It seeks to draw clear conclusions on the relative success of its implementation in the KSA before pointing out areas of concern that need attention and propose suggestions for the effective resolution of these problems. This study also considers how these suggestions could be successfully implemented in the telecommunications sector. Further, this study differs from Alotaibi's study in that the latter focuses on the fairness of competition law whereas this study focuses on the functional and regulatory role of competition in the KSA's telecommunications sector. This research is also different from the research done by Esan because he focused only on the mobile sector whereas this research covers the telecommunications sector as a whole in the KSA. Finally, this study is original because it evaluates the telecommunications sector of the KSA under both monopolistic and liberalised market structures –corresponding to the state of the telecommunications sector before and after the implementation of the Telecommunications Act and Competition Law in the KSA.

1.3 SIGNIFICANCE OF THE STUDY

As mentioned above, the telecommunications sector of any growing economy is considered to be one of the most valuable and diversified resources; the KSA is no exception. In light of the issues identified above, it is important to not only understand the history of the telecommunications sector development in the KSA and the introduction of its governing legislation but also its attempts at introducing an overarching competition law regime that applies to all sectors of the Saudi market, including the telecommunications sector. For the KSA to continue to strengthen its economic and social modernisation, it must also streamline and harmonise its approach to managing competition in this sector. Healthy competition will allow the sector to achieve optimum growth while permitting the Saudi economy to make progress toward its ultimate goals.

Therefore, this study undertakes to perform an in-depth analysis of the changes introduced by the competition law in the telecommunications sector. First of all, this research will analyse the development of competition law in the Saudi telecommunications sector from a historical perspective. It then will discuss different models and approaches in countries such as the United Arab Emirates (UAE), Qatar

and the United States. Finally, this research will explore the impact of the competition law on the telecommunications sector of the KSA and propose recommendations for further development.

The Competition Law in the KSA has undergone massive improvements over the years since its introduction in 2004. To the best of the author's knowledge, the only study that is close to this research is one conducted by Alotaibi, who also examined the Competition Law in the telecommunications sector in the KSA but focused on critically assessing its fairness.[49] This has forced the researcher to rely more heavily on doctrinal analyses and empirical observations to help this thesis fill a needed gap in addressing competition issues within the Kingdom's telecommunications sector.

This is the first comprehensive study that examines the KSA's telecommunications market before and after the implementation of the Competition Law. It also covers the amendments made to the Competition Law in 2014 and determines both the successes and failures of its implementation. Actionable suggestions for addressing these problems to ensure the successful implementation of the Competition Law in the telecommunications sector are made. Further, this study is unique because it evaluates the telecommunications sector of the KSA under polar market structures—monopoly and liberalised or competitive markets—which was the experience of the telecommunications sector before and after the implementation of the Competition Law. This study also attempts to examine the two primary competition law models, those that include the telecommunications sector within the competition law's purview and those that specifically exclude it, to identify the most appropriate model for use within the Saudi system.[50]

The results of this research will contribute to the knowledge and understanding of the subject of competition law and its application in the KSA telecommunications sector, as well as the relationship between competition law and sector-specific regulation in general. It therefore supports and enriches the theory and model of

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[49] Musased N Alotaibi, Does the Saudi Competition Law Guarantee Protection to Fair Competition? A Critical Assessment (Unpublished PhD Thesis, University of Central Lancashire 2010).

[50] Sahin Ardiyok and Dilara Yesilyaprak, 'Saudi Arabia: Spotlight on Saudi Arabia's Competition Rules' (*Mondaq*, 19 June 2015) <http://www.mondaq.com/x/406002/Trade+Regulation+Practices/Spotlight+On+Saudi+Arabias+Competition+Rules> accessed 10 October 2017.

competition law in the telecommunications sector in the KSA by creating better awareness about the significance of competition law and the practical implementation of regulations in the telecommunications sector. This study also provides useful knowledge on factors that impact on the successful adoption of the Competition Law in the telecommunications sector in the KSA.

The intended outcome of this thesis is to promote a consideration and evaluation of the role of competition law in telecommunication sectors. This thesis focuses on the KSA's telecommunications market, but its findings can be applied to other countries as well. This thesis aims to bring to the fore the problems that require attention and will suggest solutions to overcome them. It does not aim to cover global competition law because it would cause it to lose its focus. Neither does this research intend to explain the long-term effects of mobile virtual networks in the KSA telecommunications sector or the future of a saturated telecommunications industry with decreasing revenues or with companies entering the telecommunications industry with motives other than profits. It will also not discuss topics like telecommunications providers mergers to increase market share and gain a dominant position in the market. Including all these topics would detract from the original course of this research; each of these topics is a thesis topic in itself. Therefore, this thesis is focused on the role of competition law in the KSA telecommunications market and covers the period before the introduction of the Competition Law in 2004 and the changes and developments in the market after 2004.

1.4 RESEARCH AIMS AND QUESTIONS

This study attempts to investigate the changes that appear in the telecommunications sector due to the introduction and development of the competition provisions of the Telecommunications Act and the Competition Law in the KSA. To comprehensively explore this area, it is imperative to examine the history and development of the sector prior to the introduction of these laws. This is then compared with the state of the sector after the introduction and implementation of these laws.

The goal of this study is to provide a foundational piece of research that provides

customers, businesses, organisations and the government with the necessary information to understand the development of competition in the telecommunications sector and the impact of the current Saudi competition regime. Further, the author hopes that this research will serve as a basis for evaluating the need for and impact of future competition policies to further the Kingdom's goal of fair competition in the telecommunications market. The insights provided in this study also serve to suggest areas in which the laws can be further developed to deter and restrict anti-competitive practices within the telecommunications sector.

To achieve these goals, this study undertakes an in-depth exploration of the interplay between competition laws and the telecommunications sector within the KSA. This research charts the development of competition law principles in Saudi society both informally through cultural practices and Sharia principles, and formally through incorporation into legislative regulations. By identifying the role that competition principles have played in the telecommunications sector, the impact that the formalisation of these provisions has had on the market is measured. Consideration is also given to the factors that have inspired the Kingdom to enact such laws.

This research also looks at the recent amendments to the Competition Law, in order to chart the evolution of the law and assess its effectiveness in its current state. The goal of this analysis is to understand how the initial Competition Law was implemented in the KSA's telecommunications sector, how it has evolved, how the current law operates from a regulatory perspective in practice, and how successful the law has been in achieving its stated goals. Therefore, this study is based on a number of research questions which are outlined below.

The primary objective of this study is to determine to what extent the Competition Law has affected the telecommunications sector in the KSA. This can be further broken down into a number of key questions:

1. What are the underlying principles of Sharia that serve as guide to competition policy in the KSA?
2. How does the Saudi competition regime address the monopoly system?
3. Why is separate competition legislation important given that it overlaps with sector-specific legislation and the Sharia?

4. How can the applicability of the competition law and policy to the telecommunications sector in the KSA be improved?

The first research question is important because the Saudi legal system is based on the Sharia. Thus, prior to the enactment of the main competition statute and implementation regulation, Sharia maintained market competition and regulated anti-competitive conduct by businesses. Moreover, all laws and regulations enacted in the KSA must be aligned with the Sharia. Understanding Sharia law is therefore an essential aspect to understanding the implementation of any law or regulation in the KSA.

The second research question is important because the main impediment to competition in the KSA's telecommunications sector is the monopoly system established by the government under the previous regime. It must be determined whether the Telecommunications Act and Competition Law create a balance between the advantages and disadvantages of monopoly or they simply perpetuate the monopoly system by allowing the government to indirectly retain a dominant control in the market.

The third research question is important because prior to the enactment of the Competition Law there were laws and policies providing different levels of protection to investors and the public, especially consumers. Also, the government's privatisation policy enhances the participation of the private sector in the domestic economy. Hence, it may be argued that what was needed was more clarity regarding the regulatory framework rather than a separate competition legislation.

The fourth research question is important because proposals for the reform of competition policy require an examination of the relationship between competition law and sector-specific regulation. This also helps to identify ways in which the Saudi legislative structure can be improved through a balance of the considerations specific to the KSA while also learning from the experience of more sophisticated competition law systems that have withstood the challenges of time and technological advancement.

1.5 LIMITATIONS OF THIS STUDY

There are a number of limitations that should be taken into consideration. First, one

should note the relative resistance of the Saudi Arabian legislature to codifying its laws.[51] In fact, it was not until King Abdullah initiated judicial reorganization in 2007 that the KSA began to focus on expanding the scope of its legislative provisions.[52] Both the Telecommunications Act and the Competition Law addressed by this study were promulgated prior to this shift in legislative drafting. As a result, these laws do not reflect the attempts at more comprehensive legislation embodied in more recent laws. In practice, this means that the provisions are minimalist in nature and often uncover as many questions as they provide clarifications. One of the crucial arguments in this study is that these laws should be revisited for clarity and consistency in order to align them with more recent Saudi legislative drafting trends.[53]

Second, as a result of the lack of clarity within the Saudi legislative enactments and the civil law nature of the KSA, there is little in the way of interpretative precedent to inform the understanding of the relevant laws. Saudi courts do not utilize a precedential approach which means that judicial rulings and regulatory authority interpretations often differ.[54]

1.6 RESEARCH METHODOLOGY

This research employs a number of key methods to collect and analyse data. First, it employs doctrinal research employing in-depth analyses of both primary and secondary sources.[55] in order to generate original conclusions and reconcile them with the research already in existence.[56] Use of research tools such as relevant journals, analysis of telecommunications laws and online sources facilitated the process of conducting this research. The primary data included the laws and regulations governing the telecommunications sector in the KSA. The secondary

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[51] Nathan J Brown, 'Why Won't Saudi Arabia Write Down its Laws?' (*Foreign Policy,* 23 January 2012) <http://foreignpolicy.com/2012/01/23/why-wont-saudi-arabia-write-down-its-laws/> accessed 10 October 2017.

[52] Ibid.

[53] Caryle Murphy, 'Saudi to Codify Sharia 'For Clarity'' (*The National*, 21 July 2010) <https://www.thenational.ae/world/mena/saudi-to-codify-sharia-for-clarity-1.518063> accessed 10 October 2010.

[54] US Department of State, 'Saudi Arabia' (2017) <https://www.state.gov/documents/organization/160475.pdf> accessed 10 October 2017.

[55] Mark Saunders, Philip Lewis and Adrian Thornhill, *Research Methods for Business Students* (4th edn, Prentice Hall 2007).

[56] Dana Lynn Driscoll, 'Introduction to Primary Research: Observations, Surveys and Interviews' in Pavel Zemlianksy and Charles Lowe (eds), Writing Spaces: Readings on Writing (Vol 2, Parlor Press 2010) 153-156.

data included analyses and findings of previous peer-reviewed studies.

Second, the doctrinal method was used due to this study's grounding in a particular set of legislative provisions. Doctrinal research can be pure or applied research and is the most suitable method for this study because it is concerned with the development of legal principles to answer questions related to the legalities of a particular issue.[57] Also, the method enables the researcher to determine how knowledge is developed and applied by legislators and judges. Hence, this is theoretical work undertaken with the primary goal of obtaining new knowledge with specific practical application.[58] This study aims to provide an in-depth analysis of legal reasoning related to the development of competition law in the telecommunications sector of the KSA[59] According to Pearce, Campbell and Harding, this type of research 'provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and, perhaps, predicts future developments'.[60] Therefore, the researcher took the legal propositions from the Competition Law related to the telecommunications sector as a starting point and as the focus of the research.

Finally, given that the researcher could not find a wealth of peer-reviewed research on the application of competition law in the telecommunications sector of the KSA, this research also employs comparative elements where it compares different models for competition regulation of the telecommunications sector. The broader worldview inspired by the comparative research enabled the researcher to confront 'the non-inevitability of the law of [his] own country'.[61] Specific countries were chosen as examples based on a set of selection criteria that aim to represent distinct competition law models. The countries include the United Arab Emirates (UAE),

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[57] Vijay M Gawas, 'Doctrinal Legal Research Method: A Guiding Principle in Reforming the Law and Legal System Towards the Research Development' (2017) 3(5) International Journal of Law 128, 128-129.

[58] Terry Hutchinson, 'Developing Legal Research Skills: Expanding the Paradigm' (2008) 32 Melbourne University Law Review 1065, 1069.

[59] Mike McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 4.

[60] Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (AGPS 2007) 142.

[61] Charles Sampford, 'Rethinking the Core Curriculum' in John Goldring, Charles Sampford and Ralph Simmonds (eds), *New Foundations in Legal Education* (Cavendish 1998) 129, 147.

Qatar and the US.

The UAE and Qatar have been selected for comparison due to the religious, geographical, cultural and historical linkages that exist between these Arab nations and the KSA.[62] Crucially, these countries also share a common legal heritage. The UAE and Qatar, similar to the KSA, have Sharia-based systems and are members of the regional intergovernmental political and economic union called the Gulf Cooperation Council (GCC).[63] It is worth noting, however, that the role and application of Sharia under the legal systems of the Arab world will vary, depending on the social structures and religious traditions of each country.[64] More critically, from the standpoint of the lawyer, the application of Sharia is often dependent on the relationship between civil and common law provisions within the relevant legal system.[65]

Depending on the provisions of their Constitutions, Islamic countries will typically identify sources of Sharia (primarily the Quran and Sunnah) as either: a primary source of law (to be weighed and balanced against other secular sources of legislation) or as *the* singular and therefore most authoritative source of *all* law.[66] Consequently, Sharia is incorporated into a national legal order in one of two ways. Firstly, Sharia may have direct application and effect through its judicial enforcement as the common law of a country. Direct application of Sharia is typically associated with countries lacking a comprehensive Civil Law Code or developed system of statutory law.[67] In the second instance, Sharia has indirect application and is supplementary to the statutory law, either through its full or partial codification as a set of principles that judges rely upon to 'fill in gaps' in legislation.[68]

The KSA lacks a comprehensive civil law code. [69]The Basic Law of KSA, a set of

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[62] Maria Casoria 'Competition Law in the GCC Countries: The Tale of a Blurry,' (2017) 16 (3) Chinese Business Review 141, 142

[63] John A. Sanwick, *The Gulf Cooperation Council* (Boulder, 1987) 107

[64] William Ballantyne, *Essays and Addresses on Arab Laws*, (Curzon, 2000) 5-8, 210-213

65 For an overview see William Ballantyne, 'The States of the GCC: Sources of Law, the Shari'a and the Extent to Which It Applies,' (1985) 1(1) Arab Law Quarterly 3, 16-18

[66] Uwe Kischel *Comparative Law* (Oxford, 2019) 847-848

[67] Ballantyne [n 65] 7-8

[68] Ballantyne [n 65] 210-213

[69] See Sebghatullah Qazi Zada and Mohd Ziaolhaq Qazi Zada, 'Codification of Islamic Law in the Muslim World: Trends and Practices' (2011) 6(12) Journal of Applied Environmental and Biological

laws that is functionally equivalent to a constitutional document, identifies the Quran and Hadith (the reported teaching and practices of the Prophet Mohammed) as the primary source of all laws.[70] Accordingly, the Sharia operates as the common law of the land and is directly applied to matters of public as well as private law. It should be noted, however, that the direct applicability of Sharia is limited to areas that are not explicitly regulated by the enacted law known as regulations.[71] All proposed regulation must, however, conform to general principles of Sharia. Correspondingly, no foreign judgment or contractual undertaking deemed contrary to Sharia may be enforced in the KSA.[72]A further distinguishing `characteristic of KSA legislation is its customary (and historically strict) adherence to Hanbali fiqh (Islamic schools of jurisprudence).[73] While KSA authorities are not prohibited from applying the teachings of the other main schools of jurisprudence (Hanafi, Shafi and Maliki) under the existing law,[74] Hanbali fiqh is regarded as the official fiqh of the KSA.[75] Courts and other authorities are therefore encouraged to give preference to rulings and opinions associated with Hanbali scholars before considering or giving effect to judgments associated with other fiqh schools. [76]

Sciences 160, 160-171.

[70] It has been suggested that: "To the extent that the Basic Law can be considered an 'informal' constitution, Article I establishes the Qur'an and the Sunnah as the 'formal' constitution." See Kevin M. Whiteley, Brad S. Keeton, and Matthew T. Nagel, Kingdom of Saudi Arabia (Al Mamlakah Al Arabiyah As Suudiyah) (ICM Publication, 2006) <http://law.wustl.edu/GSLR/CitationManual/countries/saudiarabia.pdf>

[71] To this point, KSA has enacted a growing body of legislation known as "Regulations" covering areas of competition and commercial law. See e.g. Muhammad Al-Atawneh, 'Religion and State in Contemporary Middle East: The Case of Saudi Arabia' (2006) 2 Journal of Islamic Practice of International Law 28, 34.

[72] See for example, Articles 76 and 77 of the United Arab Emirates Federal Commercial Transaction Law, No 18 of 1993 which permits some forms of interest taking in commercial contracts. This can be contrasted with the stricter Hanbali based restrictions placed on interest taking by religious authorities in Saudi Arabia. Fatwa of "Majma' Albohouth Al Islamiya Bil Azhar" the Islamic Research Committee of Alazhar concerning banking interest)

[73] For an overview of the 4 Sunni schools see J.N. Coulson, *A History of Islamic Law* (Edinburgh, 1964) 38-91

[74] In 1926, King Abdul Aziz noted that that no court or jurist is bound by any one school of Islamic jurisprudence see 05/09/1344 A.H 18/03/1926. See also See Frank E Vogel, *Islamic Law and the Legal System of Saudi: Studies of Saudi Arabia* (Harvard University Press 1994) 169-222.

[75] A Royal Decree, issued in 1349H (1930) confirmed this, stating "[i]t will be sufficient to rule by what is found in the authentic law books of the school of Imam Ahmed ibn Hanbal, which can be applied without the meeting of court members, while judgment with no basis in these text will require an obligatory meeting." Cited in Fuaad Hamza, Al -Bilad Al-Arabia Al Saudiah (Kingdom of Saudi Arabia, 1988) 175-176

[76] For a broader discussion, see Najmaldeen K. Kareem Zanki, 'Codification of Islamic Law Premises of History and Debates of Contemporary Muslim Scholars' (2014) 9(4) International Journal of

Sharia plays a less prominent role in Arab countries with a mixed legal character, sometimes referred to as a dualistic legal system.[77] This typically occurs in a legal system that has adopted a civil law code whilst retaining a Sharia based system of common law.[78] The UAE represents one such example of a mixed legal system. On the one hand, the UAE has adopted parts of a civil code borrowed from the French-Anglo system.[79] At the same time, Sharia is recognised as a primary source of law. In this regard, Article 1 of the UAE Civil Law Code stipulates that on any given matter on which the Civil Law Code is silent, the court must issue a ruling that conforms to requirements of the Sharia, giving preference to the Maliki and Hanbali schools.[80]

Qatar is closely aligned to the KSA with regard to the legal operation and application of Sharia. The Hanbali school of Sunni jurisprudence is the official fiqh of the Qatari legal system, a legal tradition it shares with the KSA.[81]In this regard, Article 1 of Qatar's Provisional Constitution of 19 April 1972 stipulates that Islamic Sharia is the main source of legislation'.[82] Unlike the Basic Law of Saudi Arabia, however, which makes several references to the Islamic foundations of the KSA legal system, Article 1 of Qatar's Provisional Constitution is the only provision that directly references Sharia.[83] Notably, Article 65 of Qatar's Constitution states that '[J]udges shall be independent in the exercise of their power and that there shall be no interference in the administration of justice by any one'.[84] It should be emphasised, however, that all Qatari nationals and Muslims from other countries remain subject to the jurisdiction

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Humanities and Social Science 127, 127-134

[77] See Frank Vogel, 'Islamic Governance in the Gulf: A Framework for Analysis, Comparison, and Prediction' in Gary Sick and Lawrence Potter (eds), The Persian Gulf at the Millennium; Essays in Politics, Economy, Security, and Religion (Saint Martin's Press 1997) 275. For a discussion on the dual aspects of the Saudi legal system, see Amr Daoud Marar, 'Saudi Arabia: The Duality of the Legal System and the Challenge of Adapting Law to Market Economies' (2004) 19(1) Arab Law Quarterly 91, 112

[78] See Ballantyne [n65] and the discussion on Kuwait pp 4-8

[79] Ibid at 11-18

[80] See UAE Provisional Constitution 2nd of December 1971. See also Art. 75 of Law 10/1973 which states: [T]he Supreme Court shall apply the provisions of the Islamic Shari'a, the federal laws, and the other laws in force in the Emirates, that are members of the federation, and which are consistent with the provisions of the Islamic Shari'a. Usages, the principles of natural law and of comparative law shall be applied inasmuch as they do not contradict the provisions of this Shari'a]

[81] See Ballantyne [n65] 8-10

[82] al-Jaridah al-Rasmiyah (Qatar Official Gazette) No.5, 22 April 1972

[83] A. Niza Ham-zeh, 'Qatar: The Duality of the Legal System,' (1994) (30) Middle Eastern Studies 79, 80-81

[84] al-Jaridah al-Rasmiyah (Qatar Official Gazette) No.5, 22 April 1972

of Sharia courts.[85]

As outlined above, there are differences of a more or less subtle nature between KSA and the other Arab jurisdictions selected for comparison in this thesis, namely Qatar and UAE. Provisions of the UAE's Civil Law Code have been partially codified, suggesting that courts have less latitude to apply principles of Sharia. Where no existing legal provision exists, scholars may also give more customary weight to the Maliki school of Islamic jurisprudence. [86] By contrast, the KSA may be said to fall at the extreme end of the civil-to-common law continuum. [87]As the KSA has not adopted a comprehensive civil law code, local courts play a more significant role in judicial interpretation (and creation) of the law in the absence of detailed regulations.[88] Moreover, all enacted laws and provision must be reviewed to determine their compliance with Hanbali fiqh first, before other fiqh schools can be considered. Qatar is more closely aligned to KSA and follows a Sharia-based common law system based on Hanbali fiqh, in contrast with other Arab countries under which Sharia is afforded less importance in the hierarchy of legal sources.[89]

The above notwithstanding, all countries share a common legal tradition in the broadest sense: Qatar and the UAE continue to apply the Hanbali school of Sharia as a primary source of law and are therefore broadly comparable with the KSA in most fundamental respects. In all countries, for instance, no law may expressly contradict mandatory aspects of Sharia.[90] Moreover, all three countries have established Sharia courts with jurisdiction over matters expressly regulated under the Quran and Sunnah.[91]

As suggested above, the comparative aspects of this thesis are focused *primarily* on key differences in *regulatory approach* implemented by the KSA as compared with

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[85] Majmu'at qawanin Qatar (Collection of Qatar Laws for the Years 1961-1985) (Doha, 1988). Vol.3, decree No. 13 317-2

[86] See Ballantyne [n65]

[87]Ibid at 18

[88] Ali Saeed Alshamrani, 'The Merger of commercial companies in the Saudi Arabian Stock Exchange (Tadawul) and its impact on the rights of Foreign Direct Investment (FDI) in the Saudi system' 4(1) Academic Journal of Business, Administration, Law and Social Sciences (2018) 40, 46-47

[89] See Ballantyne [n65] and the discussion on Kuwait pp 4-8

[90] Ballantyne [n65] 3-4 (Saudi Arabia); 8-10 (Qatar) and 11-18 (UAE)

[91] ibid

other Gulf economies (Qatar and the UAE) in response to common economic challenges.[92] As major oil producing economies, the selected countries have introduced significant structural economic reforms. In its 2030 Vision, the Saudi government announced plans to diversify its economy away from oil dependency.[93] Qatar and the UAE have introduced similar legislative steps to promote trade and increase market access in and outside of state borders.[94] In common with the KSA, these countries have witnessed a shift away from state ownership of public utilities to the partial privatisation of emerging sectors such as construction, energy and telecommunications.[95] National regulators have acknowledged the need to combat barriers to market access and entry and to mitigate against anti-competitive practices such as monopolies and state dominance.[96] Suffice to say these regulatory objectives will only be effectively achieved with clearly defined and robustly enforced competition rules. [97]

In the above regard, Qatar and the UAE offer a useful point of comparison with legislative developments taking place in the KSA. This thesis will consider the value gained from the enforcement of specific pro-competitive rules under the powers conferred by domestic laws to general competition authorities. Applying the doctrinal method outlined above, the thesis will assess the relevant merits of a harmonised approach to competition law, focusing on contemporary efforts to further consolidate the powers of Saudi competition authorities to monitor market conduct with the aim of promoting consumer welfare and eliminating anti-competitive behaviours across different economic sectors. It will then go on to contrast and compare the regulatory approach of the KSA with the implementation of competition regimes in relation to

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92 Maria Casoria 'Competition Law in the GCC Countries: The Tale of a Blurry,' (2017) 16 (3) Chinese Business Review 141, 142-143

93 Saudi Arabia Vision 2030 <http://vision2030.gov.sa/download/file/fid/417> Last visited 23 February 2019

94 Muhamed Biygautane, Paula Gerber and Graeme Hodge, 'The Evolution of Administrative Systems in Kuwait, Saudi Arabia and Qatar: The Challenge of Implementing Market Based Reforms' 26(1) Digest of Middle East Studies (2016) 102 and World Bank, 'Doing Business in UAE' <http://www.doingbusiness.org/data/exploreeconomies/united-arab-emirates>

95 See for example Simeon Kerr, 'Saudi Arabia looks to raise $10bn in privatisation scheme' (Financial Times, 25 April 2018) <https://www.ft.com/content/9edcae6c-4878-11e8-8ae9-4b5ddcca99b3> Last visited 23 February 2019

96 Bader Abdulaziz Alkhaldi, 'The Road towards Globalisation and Stability in the Saudi Arabia's economy' (2015) 4 European Journal of Economics and Management Sciences 52

97 Casoria [n 92] 143

the telecommunications sector in Qatar and the UAE.[98] In particular, this thesis draws scholarly attention to the fact that the UAE specifically excludes telecommunications from the scope of its competition legislation whereas Qatar employs both a competition law and sector-specific regulations.

The analysis of the Gulf country competition regimes will demonstrate that the KSA has yet to effectively achieve and enforce the aims of its competition laws and policy. One reason for this is that the KSA's competition regime is still relatively embryonic and underdeveloped, particularly in respect of the formally stated controlled telecommunications sectors. In this light, the US was chosen as a third template, representing the longest-standing competition law regime in one of the world's most developed nations.[99] It reflects an established harmonised approach that mirrors the Qatari and Saudi approaches while allowing for a degree of flexibility in regulations that can adjust to industry developments without undermining the core policy aims of free and fair competition. While this thesis briefly reflects on the EU experience of competition regulation, in addition to examining the impact of the WTO rules on the KSA's competition policy, it proposes that the US approach provides a more appropriate model of comparison and model of reform. It is suggested that the aims underpinning US competition legislation are more closely aligned with the goals and structure of the KSA regime and provides possible lessons on how sector-specific telecommunications regulation can be more effectively embedded in an antitrust framework towards improved market efficiency and consumer protection.

These models are, in the final analysis, independently evaluated to draw conclusions about their format, structure and effectiveness. They are then compared with each other and with the approach taken by the KSA to highlight the similarities and differences between them. This comparative analysis then forms the basis for a suggestion of the most appropriate model for the KSA and what lessons can be learned from the other models.

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[98] See 7.3 and 7.4 of this thesis

[99] Richard J Pierce, 'Comparing the Competition Law Regimes of the United States and India' (2017) GWU Law School Public Law Research Paper No. 2017-27 1, 1. < https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2523&context=faculty_publications>

1.7 STRUCTURE OF THE THESIS

The main focus of this research is on competition law in the telecommunications sector of the KSA. It has been undertaken with a view to making appropriate recommendations for the improvement of the Competition Law within the telecommunications sector. In order to achieve this goal, there are a number of concepts which have been addressed, including competition and fairness under the Sharia, dominance and abuse of dominance, and monopoly. Also, selected comparable jurisdictions in the GCC are examined as well as the US in order to use the knowledge of the laws of these other jurisdictions to better interpret and understand the laws of the KSA and make suitable recommendations.[100]

This thesis is organized into seven chapters. Following this introductory chapter, Chapter Two explores the role of Sharia, which is the fundamental law according to which the KSA is governed. Hence, understanding Sharia is essential to analysing the implementation of competition law in the KSA. Chapter Two determines the extent to which anti-competitive practices are prohibited under Sharia. It identifies the underlying Islamic principles for business practices and shows how they guide competition policy. It therefore answers the first research question. It argues that the effective implementation of competition law in the KSA is a function of how it is aligned to Sharia.

Chapter Three examines the background of the regulation of the telecommunications sector in the KSA. It looks at the development of the CITC and the relevant legislative provisions governing the sector within the KSA, specifically the Telecommunications Act and the Competition Law. This chapter therefore discusses the history and development of the Saudi telecommunications market prior to the implementation of the Competition Law. It identifies the monopoly system as the main anti-competitive behaviour in the market before the enactment of the Competition Law. It then determines whether the Competition Law and the Telecommunications Act create a balance between the advantages and disadvantages of monopoly. It therefore

[100] See Esin Orucu, 'Developing Comparative Law' in Esin Orucu and D Nelken (eds), *Comparative Law: A Handbook* (Hart Publishing 2007) 53-56 (discussing the objectives of comparative legal research). See also, H Patrick Glenn, 'The Aims of Comparative Law' in JM Smits (ed*), Elgar Encyclopaedia of Comparative Law* (Edward Elgar 2006) 57-65.

addresses the second research question. In this light, it argues that these statutes have perpetuated the monopoly system.

Chapter Four examines the telecommunications sector prior to the promulgation of the Competition Law. Specifically, it looks at the anti-competitive practices perpetrated by the largely state-owned STC, which consistently took advantage of its dominant market position in the KSA telecommunications sector. It shows how this company acted in clear contravention of the competition provisions of Sharia and the Telecommunications Act. It seeks to determine whether the coming into force of the competition provisions of the Telecommunications Act resulted in any significant changes. It places emphasis on the effects-based approach adopted by the Saudi legislator. It answers the third research question and argues that although a free market economy is beneficial to the telecommunications sector, government intervention remains essential.

Chapter Five examines how the KSA addresses competition concerns through the Competition Law and its subsequent amendments. It looks at how the need for a stand-alone competition law arose, including how the KSA sought to bring its legislation in line with global standards, how the Competition Law was implemented, and how it has evolved over time to meet the Kingdom’s needs. It also answers the third research question. It argues that the main objective of enacting the Competition Law was to offer a transparent environment for foreign investment in accordance with the WTO rules. In this way, the Law advances goals beyond the competitive process as understood by local undertakings. It also shows that the Law is susceptible to a multitude of considerations that impact on the transparency and certainty of the process of implementation. It then notes that it is unclear what role the Law plays in the KSA’s competition policy given that it overlaps with Sharia and sector-specific legislation such as the Telecommunications Act.

Chapter Six conducts a comparative analysis of three jurisdictional models. The objective is to better understand how the KSA can improve the applicability of competition policy to the telecommunications sector. Thus, it answers the fourth research question by identifying ways in which the Saudi legislative structure can be improved through a balance of the considerations specific to the KSA while also learning from the experience of more sophisticated competition law systems that

have withstood the challenges of time and technological advancement. The comparison also helps to explore the relationship between competition law and sector-specific regulation, as well as ascertain the position of the current Saudi competition law regime in relation to the global trends in competition culture.

Finally, Chapter Seven concludes by showing how the research aim was achieved and the research questions answered. It makes suggestions for further improvements to the system and identifies the potential way forward for the sector. It also makes recommendations for further studies in the KSA and from a theoretical perspective.

CHAPTER 2

THE REGULATION OF COMPETITION UNDER SHARIA GOVERNED SAUDI LAW

2.1 INTRODUCTION

This chapter seeks to determine the extent to which anti-competitive business practices are prohibited under Sharia. Understanding Sharia is an essential aspect to understanding the Saudi Arabian implementation of competition law given that the Saudi legal system is based on Sharia. Hence, many underlying principles of Sharia serve as a guide to competition policy. In fact, prior to the enactment of the main competition statute and implementation regulation, Sharia maintained market competition and regulated anti-competitive conduct by businesses. This chapter analyses six cardinal Sharia principles for business practices and shows the extent to which they guarantee fair competition. It also critically examines the competition regime in the KSA and determines the extent to which the requirement to align positive law with Sharia may explain the poor implementation of the main competition legislation. It begins with a brief discussion of the Saudi legal system in order to understand how this system works especially in the context of Sharia.

2.2 STRUCTURE OF THE SAUDI LEGAL SYSTEM

On 1 March 1992, King Fahad enacted Royal Orders that established three fundamental laws of the KSA. These were the Basic System of Governance or Basic Law, the Constitutional Council Law, and the Regional Law. Article 1 of the Basic Law provides that the constitution of the KSA consists of the Qur'an and the Sunnah. Article 7 states that the government draws its authority from the Qur'an and Sunnah, and Article 23 provides that the state's primary role is to enforce the Sharia. The combination of the Qur'an and Sunnah is often compared to that of reason and revelation.[101] The Saudi legal system is therefore based on the Sharia which serves as the guideline for all legal matters. It is important to note that although Sharia is derived essentially from the Qur'an and Sunnah, the application of the legal rules enshrined in

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[101] Rafat Y Alwazna, 'Islamic Law: Its Sources, Interpretation and the Translation of It into Laws Written in English' (2016) 29(2) International Journal for the Semiotics of Law 251; Wael B Hallaq, *An Introduction to* Islamic Law (Cambridge University Press 2009) 15.

these sources requires interpretation.[102] Diverse interpretations therefore logically led to the emergence of several schools of thought (madhhab) within the Islamic jurisprudence (fiqh). Amongst the four recognised Sunni schools of thought, the laws of the KSA, including the principles, rights, duties and freedoms enshrined in the Basic Law, are applied in light of Sharia law as interpreted by the Hanbali school.

Before analysing these principles, rights and duties, as well as their implementation and enforcement processes, it is important to note that Article 44 of the Basic Law establishes three state authorities, namely the executive, legislative and judicial authorities. Given that there is no provision for the separation of powers per se,[103] and the best interpretation of the Basic Law does not require us to embrace the principle of the separation of powers as a background legal principle in the KSA,[104] it may be contended that the three state authorities established by the Basic Law are tasked with interpreting and enforcing the Sharia.

2.2.1 THE EXECUTIVE

The KSA is a monarchical state and the executive branch is headed by the King. Other executive and administrative bodies operate under the King.[105] These include the Council of Ministers, local governments, various ministries and their branches, and other independent and quasi-independent public agencies, often created by empowering legislative Acts.[106] The King is responsible for setting the Kingdom's

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[102] Wael B Hallaq, 'Was the Gate of Ijtihad Closed?' (1984) 16(1) International Journal of Middle East 3, 3.

[103] Executive, legislative and judicial powers are not vested in separate bodies. See Jeremy Waldon, 'Separation of Powers in Thought and Practice' (2013) 54(2) Boston College Law Review 433, 454; Elizabeth M Magill, 'Beyond Powers and Branches in Separation of Powers Law' (2001) 150 University of Pennsylvania Law Review 651, 653; Rebecca L Brown, 'Separated Powers and Ordered Liberty' (1991) 139 University of Pennsylvania Law Review 1513, 1534.

[104] In other words, one may still conclude that the principle has not been adopted in the KSA if one refers to Dworkin's conception of the role of judge. This is because Dworkin. He drew a line between what judges should do (statutory construction and gap-filling) and what they should not do (legislate and make decisions based on policy). This line conforms to that required by the separation of powers doctrine. See Ronald Dworkin, Taking Rights Seriously (Harvard University Press 1978) 84; Ronald Dworkin, *Law's Empire* (Harvard University Press 1996) 225. See also George Anhang, 'Separation of Powers and the Rule of Law: On the Rule of Judicial Restraint in "Secur[ing] the Blessings of Liberty"' (1990) 42 Aaron Law Review 211, 222. Courts in the KSA make decisions on policy and the executive often legislates.

[105] Basic Law of Governance, art 45.

[106] Abdulla F Ansary, 'A Brief Overview of Saudi Arabian Legal System' (*NYU Global,* 2016) <http://www.nyulawglobal.org/globalex/Saudi_Arabia.html#_ednref16> accessed 10 October 2017.

national public policy and ensuring that it conforms with the principles of Islam.[107] The King also oversees other entities which fall within the executive branch tasked with implementing all laws, regulations, resolutions and policies within the Kingdom.[108]

2.2.2 THE LEGISLATURE

The Saudi legislative branch, otherwise referred to as the Kingdom's legislative or regulatory authority, drafts and enacts all statutory laws and regulations within the Kingdom.[109] There is some overlap between the Saudi legislature and the executive to the extent that the King and the Council of Ministers are involved in both.[110] Additionally, the executive also incorporates the Consultative Council (the Shura), which exercises oversight functions to ensure adequate citizen participation in the legislative process.[111] Expressed succinctly, the Basic Law provides that:

> The regulatory authority shall lay down regulations and proposals to further the interests of the State, or remove what might be prejudicial thereto, in conformity with the Islamic Sharia. The said authority shall exercise its functions in accordance with [the Basic Law of Governance] and the Council of Minister and the Consultative Council Laws.[112]

2.2.3 THE JUDICIARY

Another important area is the active resolution and settlement of disputes since a competitive environment often results in disputes. Also, competition law deals with the investigation and punishment of infringements and does not provide compensation to the parties adversely affected by the infringements. Resolution of disputes in such circumstances has to be carried out in a timely manner to prevent loss of resources and any undue losses. Sharia law provides clear-cut guidance regarding the process of dispute settlement that can help in conflicts arising secondary to competition. The Settlement Regulation of the KSA consists of 25 articles and is the guiding document

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[107] Basic Law of Governance, art 55.
[108] ibid; see also Council of Ministers Law, art 29.
[109] Ansary (n 106).
[110] Basic Law of Governance, arts 1, 55.
[111] ibid art 68; Shura Council Law, art 13.
[112] Basic Law of Governance, art 67.

regarding resolution of disputes based on Sharia. Sayen has asserted that the administration of justice in the KSA is divided between governmental boards and Sharia courts.[113] The governmental boards have been given the responsibility of applying statutes and Sharia in such a way that statutes supplement Sharia instead of modifying it.

Governmental boards hear disputes between different parties, including foreign businesses. Since the KSA is an important trading and strategic partner of the West, it has always worked to find appropriate dispute resolution options based on the laws of Sharia. This is essential to create an environment that is attractive for foreign businesses. Hence, between 2005 and 2010 when the KSA opened new industries, including the telecommunications sector, to foreign companies, the KSA became the eighth largest recipient of FDI in the world.[114]

Also, it has been noted that telecommunications companies operating in the KSA have a well-developed system of arbitration available for the resolution of their disputes with other competitors in the same market.[115] Hence, it might perhaps be argued that disputes are less likely to hinder their path to progress within the KSA due to the prevailing Sharia-based law. Hasan states that Islam and Sharia are neither simply a religion nor a mere ideological vision but instead a practical system on how to run one's life and the principles governing life.[116] Thus, Islam is a comprehensive religion which covers many principles such as etiquette and manners and how to live a proper life. Not only does it teach how to live but its teachings also apply to specific aspects of life such as trade and business.[117]

The enforcement aspects of Saudi regulations are divided between administrative actions that fall within the purview of the executive and the courts within the Saudi judiciary. The Telecommunications Act and the subsequent Competition Law were implemented prior to the Kingdom's judicial reform. At the time, the Saudi judicial

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[113] George Sayen, 'Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia' (2003) 24 University of Pennsylvania Journal of International Economic Law 905.

[114] Hussain Naser Agil, 'Investment Laws in Saudi Arabia: Restriction and Opportunities (PhD dissertation, Victoria University, 2013).

[115] University of London, *Yearbook of Islamic and Middle Eastern Law* (Kluwer Law International 1994)

[116] Zulkifli Hasan, 'Corporate Governance: Western and Islamic Perspectives' (2009) 5(1) International Review of Business Research Papers 277, 286.

[117] Ibid.

system was composed of the Supreme Judicial Council, the courts of appeal, and the general and summary courts of first instance.[118] This judicial system was also complemented by the Board of Grievances, an administrative judicial body that functioned alongside the judiciary to hear both first-instance and appellate cases. The jurisdictions of these courts were determined by the law under which they were constituted or a subsequent law that expressly identified what court would have jurisdiction over disputes arising under its provisions.[119]

In 2007, King Abdullah approved a significant reform of the Saudi judicial system. Under the Law of the Judiciary, the Supreme Judicial Council's functions were assumed by the High Court, the Kingdom's highest judicial authority.[120] Further, appellate courts were established in each province along with subject matter-specific courts created on an as-needed basis.[121] Thus, for instance, at the first-instance level there are labour courts, commercial courts, criminal courts, personal status courts, general courts and enforcement courts.[122] The courts of appeal are then separated by dispute jurisdiction into labour circuits, commercial circuits, criminal circuits, personal status circuits and civil circuits.[123] All appeals from the appeal courts are made to the High Court for a final determination.[124] A hierarchy was also established for the courts of the Board of Grievances The highest-ranking court is the High Administrative Court, followed by the Administrative Courts of Appeal and then the Administrative Courts of first-instance.[125]

Regardless of how the courts are structured, their basic mandate remains the same:

> [To] apply the rules of the Islamic Sharia in the cases that are brought before them, in accordance with what is prescribed in the Qur'an, the Sunnah and statutes decreed by the Ruler which do not contradict the Book or the Sunnah.[126]

[118] Ansary (n 106).

[119] Ibid.

[120] Law of the Judiciary 2007.

[121] Ibid.

[122] ibid arts 19, 49.

[123] ibid arts 17, 49.

[124] Ibid art 10.

[125] See Law of the Board of Grievances 2007.

[126] Basic Law of Governance, art 48.

Individuals or undertakings who claim to have been affected by acts or practices which they believe violate the Competition Law and Implementing Regulations may submit complaints in writing against any firm to the General Authority for Competition (GAC) (previously, the Council of Competition Protection(CCP)). The complaints must contain sufficient information for the GAC to conduct an investigation with the help of police officers, where necessary. The GAC may also conduct investigations even when it has not received any complaint. The GAC is empowered to issues orders requiring the prohibited practice to cease or impose financial penalties. Where a crime is deemed to have been committed, the accused undertaking shall be prosecuted by the GAC before the Board of Grievances.[127] Article 15(4) of the Competition Law requires the GAC to refer criminal cases to the Board of Grievances for 'ab initio adjudication'. This means that the Board of Grievances is the competent court to preside over the adjudication if the GAC establishes that there was an offence within the meaning of the Competition Law.

2.2.3.1 INEFFECTIVENESS OF THE JUDICIAL SYSTEM

For a law to be effective, the judiciary needs to be robust and deliver speedy justice together with the correct interpretation of laws. This is particularly important when disputes arise between corporations doing business in the KSA and the government while the latter is attempting to enforce competition policies. It is also notable that the lack of effectiveness among the legal bodies and authorities dealing with competition law, which include the Saudi Arabian General Investment Authority (SAGIA) and the Capital Markets Authority (CMA), has been a major concern for potential players in the telecommunications sector.

The judicial system of the KSA has not set up effective structures to empower the legal bodies and authorities to improve processes and mechanisms pertaining to competition law within the nation.[128] In fact, there are no dedicated bodies to hear issues relating to competition law issues, with any disputes regarding such matters being presented before the general Sharia courts. The Sharia courts are the courts of first instance and are presided over by generalist judges that may not necessarily

[127] See Articles 9 and 11(2)(a) of the Competition Law.

[128] Musaed N Alotaibi, *Does the Saudi Competition Law Guarantee Protection to Fair Competition? A Critical Assessment* (Unpublished Dissertation, University of Central Lancashire, 2010) 5-97.

understand the societal and economic implications of preserving competition and adequately deterring anti-competitive behaviours generally, and within the telecommunications sector in particular.

The ineffectiveness of the judicial system in addressing competition issues was notable in the case of *Al-Nasser Company*[129] wherein the judgement was considered ambiguous since it followed Sharia and was not based on any express competition law provision.[130] In addressing these concerns, both traditionalist and progressive judges were in concert that withholding and buying goods in strained conditions contributed towards the unlawfulness of the company's monopoly. Further, the restrictive agreements at play prohibited the effective implementation of competition law in the case. The restrictive agreements related to price discrimination and acquisition of competitors, among others. This illustrates the persistence of unfair competition practices within the KSA that spill over into other industries such as the telecommunications industry and which ultimately affect the business processes of larger organisations including the STC.

2.3 THE SAUDI COMPETITION REGIME

2.3.1 OVERVIEW

The notion of a market mechanism is well established in several Islamic jurisprudential studies and many leading scholars are in favour of the mechanism to operating freely unless exceptional circumstances mandate state intervention. Since the KSA largely follows the interpretations of the Hanbali school, the discussion in this chapter is more in line with this school – specifically focusing on the views of Shaykh Al-Islam Ibn Taymiyyah and his prominent disciple Ibn Al-Qayyim.

The KSA competition regime and a formal legal framework were not set up until as late as 2004 when the competition legislation was promulgated through royal decree and became effective in January 2005.[131] The KSA competition regime also includes

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[129] Appeals No. 396 and 398, 12 March 1974.

[130] No competition legislation was in force in the KSA. Thus, the Court relied on its understanding of the Shari'ah that monopolies are only prohibited where necessary goods or services to consumers are involved.

[131] Grahame Nelson, 'Saudi Arabia: The Competition Law Regime' (Al Tamimi & Co.) <https://www.tamimi.com/law-update-articles/saudi-arabia-the-competition-law-regime/> accessed 20 May 2018.

other relevant regulations and bye-laws[132] although the 2004 Competition Law remains its primary source.

2.3.2 THE INFLUENCE OF SHARIA

This section discusses competition law only in the context of its alignment with the principles of Sharia. It must be noted that the link between competition and the Sharia may be traced to the early years of Islam.[133] The right of individuals to engage in trade was recognised but the abuse of this right was prohibited. Thus, Sharia provided for public intervention in the marketplace where the right had been abused. The intervention was initially in the form of a market inspector or agent (Sahib al suq) who was director and sole member of the regulatory body called Hisba.[134] It follows that Islamic countries have a good reason to embrace competition law although it must comply with Sharia and be tailored to the geographical and economic realities of each country.

Sharia means ‘path’ in Arabic and guides all aspects of Muslim life, including daily routines, familial and religious obligations, and financial dealings. Sharia is derived primarily from the Qur’an and the ways of life of Muhammad (PBUH) known as the Sunnah, which includes the sayings, practices and teachings of the Prophet Muhammad.[135] As noted above, these primary sources of Sharia have been subject to interpretation in light of the views of different Islamic scholars and schools of thought, and the KSA government has devised a way to run the country and develop its laws on the basis of Sharia. In fact, all laws within KSA are required to comply with Sharia law as discussed above. Beyond the text of the laws, the inherent belief is that Sharia originated with the Holy Book and what is written therein, and Muslims follow the text reverently and consider it sacred. Many Islamic legal scholars have made sincere attempts to interpret Sharia and to adapt it to cater to the expanding Muslim Empire.[136]

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[132] ibid.

[133] See Maher M Dabbah, ‘Islam, Islamic Countries and Competition Law: From Past Glory to Modern Day Challenges’ (2012) 2 CPI Antitrust Chronicle 1, 2-3.

[134] Ibid.

[135] Toni Johnson and Mohammed Aly Sergie, ‘Islam: Governing under Shari’ah’ (CFR, 25 July 2014)

[136] Ibid.

Sharia is also the source of law that governs all administrative regulations of the state. As noted above, the Basic System emphasizes that the role of the state and its objectives are to primarily protect the principles of Islam and to enforce Sharia. The document is based on and seeks guidance from Sharia when defining the nature, objectives and responsibilities of the state. Further reference to the Sharia is made when defining the relationship between the ruler and the ruled based on brotherhood, consultation, friendship and cooperation - the tenets on which the whole law is based.[137]

The significance of the Basic System is important when considering its similarity to the Constitutions of other countries. In comparing the contents of these Constitutions, one can confirm that the monarchy and the system prevalent in the KSA reaffirm the principles of government, justice, consultation and the equality of citizens under Sharia, with great emphasis on the Saudi family and the importance of Islamic values, justice and the unity of the family. There is also a strong emphasis on individual rights within the system in that the state must protect human rights in accordance with Sharia and its principles,[138] and protect the sanctity of private homes and private communications,[139] and guarantee the protection of private property and individual freedom from arbitrary arrest and punishment, except in cases of legal due process.[140]

2.3.2.1 THE FIQH

Muslims believe the Qur'an to be the last and final message from Allah containing the complete code of life. The Qur'an is hence a primary source of Sharia, Islamic law. Another primary source is the Sharia, Sunnah or Hadith, which are the sayings, actions and implied approvals by the Prophet Muhammad (PBUH). Thus it is commonly understood that Sharia has been complete during the lifetime of the Prophet.[141] About 90 percent of the Muslims around the world are Sunnites, a sect which is divided into

[137] Ibid.
[138] Basic Law, art 26.
[139] Basic Law, arts 37 and 40.
[140] Basic Law, art 18.
[141] D Zacharias, 'Fundamentals of the Sunni Schools of Law' (2006) 66 ZaoRV 491, 493.

four orthodox schools of law (Fiqh) namely - Hanafi,[142] Maliki,[143] Shafi'i[144] and Hanbali.[145] The schools recognise fixed principles of jurisprudence known as *Usool Al-Fiqh* which deal with the sources of Sharia and the method of juristic deduction and inference,[146] which is designed to provide the conceptual framework by which Muslim scholars approach Islamic legal methodology.[147] These schools of thought came into being to provide solutions or judgments on various religious and legal issues where the text in the primary sources (Qur'an and Sunnah) is ambiguous.[148]

It must however be noted that Islamic law is based completely on divine origin which has nothing to do with the human system of law.[149] Its truth and authenticity are not open to question or subject to critique owing to the finite nature of human wisdom and reasoning.[150] Every Muslim, including all the schools of thought, are in agreement that the canons of Islamic law were fixed and laid down by God for once and for all.[151] To Ahmad Ibn Hanbal, the originator of the Hanbali school - which is known as the strict traditionalist school, "the Qur'an in its wording, without any exegetic infringements and correcting interpretations, was the absolute, irrefutable basis of the law."[152] He also maintained that the secondary source of law was attributable to the traditions of the Prophet.[153]

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[142] Named after Abu Hanifah al-Numan b. Thabit (81-150/700-767), the founder of the Hanafi School of jurisprudence. He was born in Kufah and died in Baghdad. He himself was a great business man. Thus, his opinions on different socio-economic issues reflect pragmatic orientation.

[143] This school was named after Malik b. Anas (94-179/716-795). He was the founder of the Maliki school of jurisprudence, born and died in Madinah, he gave customary usages of Madinah (*'amal ahl al-Madinah*) great importance in derivation of rules. His work *al-Muwatta* is the earliest collection of *hadith*.

[144] Named after was named after Shafi'I Muhammad b. Idris al-Shafi'i (150-205/767-820). The author of famous work *Kitab alUmm*, he was the architect of systematic Islamic Law. He did not himself found a school of jurisprudence; this was done by his disciples.

[145] The school was named after Ahmad b. Hanbal (164-241/780-855), the originator of the Hanbali school of jurisprudence. He studied in Baghdad and received instructions from the great legal theoritician imam alShafi`i. He is also the compiler of a large collection of hadiths; Zacharias D, 'Fundamentals of the Sunni Schools of Law' (2006) 66 ZaoRV 491, 494-507.

[146] ibid 494-507. See also, I Mat and Y Ismail, 'A Review of *Fiqh al-Mua'malat* Subjects in Economics and Related Programs at International Islamic University Malaysia and University of Brunei Darussalam' (The First International Conference on Islamic Economics, held in Mecca in 1396H.1986M) 327, 330.

[147] ibid.

[148] Thomas Nagel, Das islamische Recht. Eine Einführung (Westhofen 2001) 215.

[149] ibid 220.

[150] ibid 267.

[151] ibid 205.

[152] Zacharias (n 145) 504.

[153] ibid.

The KSA largely follows the Hanbali school of law, the strict traditional and dogmatic school.[154] The Hanbali school stands in stark contrast with the Hanafi school which allows for human considerations ie *ijma*[155] and *qiyas,*[156] to be a part of the sources of law.[157] It is therefore important to shed light on the views of the Hanbali school as regards the subject matter of this thesis owing to the fact that it determines the competition law framework and the telecommunications industry in the KSA. Any discussions, analysis and critique of the competition law regime in the KSA ought to be made in light of the principles of the Hanbali school and the influence it may have had on the drafting and framing of the law which ultimately came into being. Ibn Hanbal was opposed to establishing a new source of law in Islamic jurisprudence and his focus was primarily on attaining the authentic interpretation of the Qur'an and Sunnah.[158] In line with this stance, Ibn Hanbal was opposed to allowing for other means such as ijma and qiyas to attain the status of source of law, citing deviation from the authentic interpretation of the Qur'an and the Sunnah thus inviting arbitrariness.[159]

The Hanbali school is more of a dogmatic traditionalist legal school that relies heavily on the text in scriptures rather than on analogy and reasoning – which are more readily found to be accepted in the Shafi school andeven more so in the Hanafi school. Based on this it may be argued that the Hanbali school lacks insight in many circumstances and more so from a modern context and law-making as its expertise is not on analogy and reasoning but on the literal meaning of texts – this is the traditional interpretation the Qur'an and Sunnah.

2.3.2.2 THE SUITABLE METHOD OF INTERPRETATION

One could logically argue that such an approach to interpretation at times might fail to provide the desired results or attain the objective it was meant to achieve. This is so because the Qur'an claims itself to be the miracle of miracles and as being relevant

[154] ibid 506.
[155] Scholarly consensus.
[156] Individual analogy.
[157] Zacharias (n 145) 504.
[158] Ibid.
[159] AT Khoury and Die Rechtsschulen, in: A. Th. Khoury/P. Heine/J. Oebbecke, Handbuch Recht und Kultur des Islams in der deutschen Gesellschaft. Probleme im Alltag – Hintergründe – Antworten, (Gütersloh 2000) 37, 51; Zacharias (n 145) 504.

and applicable to all societies and times – such a dogmatic approach to interpretation without resorting to sound reasoning and analogy to deduce the correct interpretation Sharia aimed to achieve might fail to achieve the very purpose the law aimed to fulfil.

There would perhaps be instances in competition law and telecommunications law among others, where Islamic scholars in the early centuries failed to appreciate the modern context or the complexity in the financial system it currently stands – a more reasonable approach under such circumstances would be to correctly interpret the Sharia's text sticking to the fundamental principles of the Sharia while remaining open to extending and modifying the interpretation to such an extent that the purpose of the text is served, ie by resorting to a purposive approach to interpreting the Sharia text, and apply them accordingly so that people from different times and ages are served with the true idea of justice that the religion of Islam endeavours to deliver. A failure on the part of current schools to interpret the Qur'an and the Sunnah using a purposive approach would be a blunder owing to their short-sightedness rendering a failure to provide correct legal meaning as demanded by the change in times and circumstances and so miscarriages of justice ensues. Thus, the failure of a school to enunciate the correct meaning and interpretation of a Sharia text should not be attributed to the religion of Islam but the particular school under consideration.

2.3.2.3 SHARIA LAW PRINCIPLES FOR BUSINESS PRACTICES

Islam has always considered business and trade to be an important part of social life.[160] As such, it provides sufficient guidance in the form of Islamic laws and the Qur'an. The teachings of Islam regarding business practices are focused on providing equal opportunities to all businesses while establishing an environment that promotes businesses without affecting the rights of other individuals in society.[161] In this light, many principles and rules have been formulated to promote fair and just competition in the market. They show the extent to which anti-competitive conduct is prohibited under Islamic law. This section analyses some of the key principles that are relevant for competition in the telecommunications sector. They include, the maslahah, la

[160] See Sayed Kazeem Sadr, The Economic System of the Early Islamic Period: Institutions and Policies (Palgrave Macmillan 2016) 162-163

[161] See Siti FA Jabbar et al, 'Business Ethics: Theory and Practice in an Islamic Context' in Jing Bian and Kiymet Tunca Caliyurt (eds), Regulations and Applications of Ethics in Business Practice (Springer 2018) 262-263; Sohail Mahmood, Good Governance Reform Agenda in Pakistan: Current Challenges (Nova Science Publishers 2007) 218-219.

dhfararwa la dhirar, riba, ihtikar, saddu zarai, assuf fi al-isti, and maqasid al-syriah.

2.3.2.3.1 Maslahah

The renowned Islamic philosopher al-Ghazali described maslahah as the rule of being guided by the need to preserve the goals of maqasid (goals to be achieved) with the interest of the general good in mind (i.e. the community as a whole). This rule is similar to the one discussed in the Maslaha journal[162] which is reliant upon the fact that due to the lack of firm guidelines concerning competition and business in the Qur'an, maslahah as a philosophy has been applied and has becomes a key pillar in administering Islamic finance.

According to maslahah principles, organisations need to ensure that they facilitate and protect the needs and requirements of their stakeholders as they run their businesses. Equally, the aforementioned stakeholders are required to adhere to Islamic axioms such as fard (duty to Allah). This means that the individuals have positive obligations to the organization. Maslahah insists that in the course of running a business, the owners and affiliated parties should have the public interest in mind and not individual gains and, therefore, the proper application of maslahah will see an efficiently running organization with satisfied stakeholders.

Islam promotes the notion of maslahah, which is equivalent to the concept of bringing about a balance between private and public interests[163] while ensuring that the balance is maintained and equal opportunities are guaranteed. Abbas J. Ali contends that the concept of maslahah distinguishes the Islamic ethical perspective from that of the two other monotheistic religions, namely Judaism and Christianity.[164] This is because Islam aligns business ethics with the interests of the people. Hence, every human enterprise is foremost obligated to serve people.[165] This explains why certain forms of deception or preventable ambiguity (gharar) may be excused where an

[162] Maslaha (2016) <http://www.maslaha.org/islamic-answers/glossary/maslaha> accessed 10 October 2017.

[163] Abdullaah Jalil, 'The Significances of Maslahah Concept and Doctrine of Maqasid (Objectives) Al-Shari'ah in Project Evaluation' (2006) 2(1) Journal of Muamalat and Islamic Finance Research 171, 171-202; AW Dusuki and NI Abdullah, 'Maqasid al-Shari'ah, Maslahah and Corporate Social Responsibility' (2007) 24(1) American Journal of Islamic Social Sciences 25, 25-45.

[164] Abbas J Ali, *Business Ethics in Islam* (Edward Elgar 2014) 18-20.

[165] Ibid.

overriding public benefit is involved.[166] Islamic law therefore emphasizes stewardship and trusteeship, which means that the business owner or manager is the trustee of the wealth that belongs to God and society.[167] The concept of maslahah therefore mirrors that of stakeholder primacy whereby individuals are given the freedom to start, manage and organise business activities but are also required to think more generally about how the activities affect all constituencies.[168] Hence, businesses are only ethical from an Islamic perspective where they are based on trade-offs in managing the different needs of the diverse stakeholders.[169] It follows that monopolies and negative externalities are proscribed by Islamic law given that their existence may be interpreted as the failure to maximise social welfare.[170] This may be problematic for industries such as the telecommunications industry that included a natural monopoly component since the only operator was owned and managed by the Saudi government for many decades until partial privatisation in 2003.[171]

The improved operations brought about by maslahah in an organization will lead to better service to a greater part of society as argued by Hasan and Asutay.[172] Competition is experienced daily in business practices but by adhering to the maslahah principle, severe and detrimental competition can be managed effectively and lead to healthy businesses. Also, adherence to the maslahah philosophy will ensure that competing parties will have the public interest in mind and focus on quality of services rather than outdoing each other. Additionally, maslahah can be used to resolve issues encountered in a business administrative setting by also considering

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[166] Vincent J Cornell (ed), *Voices of Islam: Family, Home and Society* (Praegar Publishers 2007) 211.

[167] MM Sulphey, 'Corporate Governance in Islam vis-à-vis the Modern Corporate World' (2015) 14(1) Malaysian Accounting Review 81, 88.

[168] For an in-depth analysis of the concept of maslahah, including its epistemology and integration into legal analogy, see Felicitas MM Opwis, *Maslahah and the Purpose of the Law* (Brill 2010).

[169] Dusuki demonstrates how the pyramid of maslahah may be used to develop an effective model for managing the conflicts of interests of different stakeholder groups. See Asyraf W Dusuki, 'Corporate Governance and Stakeholder Management: An Islamic Perspective' (2016). <https://pdfs.semanticscholar.org/65c7/a867ce59799d12fae6562f8a50e5a57bc81b.pdf > accessed June 28, 2018, 13-20.

[170] R Edward Freeman et al, Stakeholder Theory: The State of the Art (Cambridge University Press 2010) 13-14. See also, Michael C Jensen, 'Value Maximization and Stakeholder Theory' (2000) Research & Ideas, Harvard Business School. < https://hbswk.hbs.edu/item/value-maximization-and-stakeholder-theory > accessed June 28, 2018.

[171] See Chapter Three.

[172] Zulkifli Hasan and Mehmet Asutay, *Maslahah in Stakeholder Management for Islamic Financial Institutions* (1st edn, USIM 2008) 1-30.

the interests of others.[173]

Islam also promotes the idea that when harm is inevitable every attempt should be made to avoid greater harm, even if society has to endure the lesser harm. As such, anti-competitive conduct such as exclusive dealing or the imposition of resale prices may be tolerated where they are crucial for the supplier's continuous existence and an overriding public benefit is involved. It is important to note that Islam does not consider the rights of individuals or the government to be absolute in nature.[174] Every right has to be used in a correct manner while remaining cognizant of the context of the situation. If a business aims to take a rightful action that can be detrimental to the society as a whole, Islam does not allow such actions[175] despite being otherwise permissible.

Although Sharia is applied in the KSA in light of the interpretation by the Hanbali school, it must be noted that all of the Sunni schools of Islamic jurisprudence regard any kind of anti-competitive conduct to be prima facie unlawful. This is because it is detrimental to social welfare. This is further supported by the different hadiths[176] that set the foundation on which the main competition laws within the Kingdom are based. One such hadith says, 'La dhararwa la dhirar'. This can be translated as 'loss itself and any cause that results in loss should not exist,'[177] which gives rise to the debate as to whether a monopoly or other anti-competitive conduct creates gain for one and losses for another.

2.3.2.3.2 La Dhararwa La Dhirar

This is a philosophy that was widely advocated by the Prophet Muhammad (PBUH) in the Qur'an.[178] It means that 'one should not inflict harm to others or payback harm

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[173] Elvan Syaputra and others, 'Maslahah as an Islamic Source and its Application in Financial Transactions' (2014) 2(5) Quest Journals 66, 66-71.

[174] E Ann Black et al, *Modern Perspectives on Islamic Law* (Edward Elgar 2013) 199; Joseph Schact, 'Islamic Law in Contemporary States' (1959) 8(2) The American Journal of Comparative Law 133, 133-134.

[175] Hasan (n 173) 278.

[176] The Hadith is the documentation of the sayings of the Prophet Muhammad.

[177] Mohammed H Kamali and Karim Abdul, *Islamic Finance: Issues in Sukuk and Proposals for Reform* (Islamic Foundation 2014).

[178] Al-Nawawi, Hadith no 32; Jamal Ahmed Badi, 'Commentary on the 40 Hadiths of An Nawawi' (2002) <http://ahadith.co.uk/downloads/Commentary_of_Forty_Hadiths_of_An-Nawawi.pdf> accessed 10 October 2017.

done with harm'.[179] In a contract scenario, it creates a clear guideline that a party engaged in a contract can opt out if the other party commits some serious injustice without fear of suffering unprecedented repercussions at the behest of that party.[180] To further understand this philosophy, additional guidelines are set out below. The philosophy adds that the lesser of two harms is to be used in settling a dispute if that is the only way to resolve the differences.

For instance, in the running of a casino, if a customer loses a coin in a machine then it is better to lose the lesser valued coin rather than incur greater costs in trying to retrieve the coin and possibly damaging a machine that is worth thousands. Again, in a similar scenario, if a person loses a valuable item inside equipment in a shop that is cheaper than the item then it is acceptable to dismantle the equipment to retrieve the more valuable item.[181] He further explains that harm cannot be set-off by harm. In a typical business instance, when a buyer purchases a piece of faulty equipment and the equipment develops an additional fault while in the possession of the buyer, the buyer then loses the ability to claim compensation. This is similar to the agreement terms set out in warranties.

In order to fulfil the envisaged ideas of this philosophy, firms in pursuit of proficiency and mastery should not bring harm to competing firms. An example of this is if a company is trying to advance in a certain field but does not possess the necessary manpower and skilled labour. It would not be prudent for the company's owner to poach skilled workers from a competing company with the aim of bringing them down. Not only is the individual poached to bring the rival business down but also to ensure that the poaching business will outshine others in the similar trade. While some might find such a scenario sound, realistic or normal business practice, if viewed on the grounds of morality and the principles of Sharia it is unethical.

Further, a final hadith that enlightens us regarding business practices relates to how

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[179] Ibid.

[180] Shah Hannan, 'Islamic Jurisprudence (Usul Al Fiqh): Interpretation of the Qur'an and Sunnah' (*Muslimtents,* 2016) <http://www.muslimtents.com/aminahsworld/islamic_jurisprudence_interpretation.html> accessed 10 October 2017.

[181] Abu Umar Ahmad, *Theory and Practice of Modern Islamic Finance: The Case Analysis from Australia* (BrownWalker Press 2010) 92-97.

different businesses should interact with each other. It states that: 'businesses should not attempt to cancel each other's deals'.[182] This is a common practice in today's business world. Businesses will often try to affect the deals of others by offering competitive prices in an attempt to draw customers. Such practices can prevent other businesses from conducting honest and lawful transactions as they attempt to compete knowing that their customers are more inclined to try out the business offering better prices.[183] As more parties enter into the telecommunications sector in the KSA, it is essential to monitor their tactics to ensure that dominant players are not abusing their position to drive down prices and remove competitors from the market in a similar fashion.

The la *Dhararwa La Dhirar* philosophy therefore established the legal basis of the prohibition of anti-competitive conduct under the Sharia.[184] Any act that causes an unfair loss to competitors is unacceptable since the Sharia forbids acts that are detrimental to lawful competition.

2.3.2.3.3 Riba

A major extension of the Sharia principle of preventing firms from harming competitors can be seen in the prohibition of interest (riba). Any business deal that aligns with the principles of riba is considered unlawful according to Sharia and is, therefore, not allowed within the KSA. Riba constitutes any increment or addition which is unjustified according to Islamic principles. It concerns the profits received through the borrowing or lending of money where it is paid in kind or the money is above the amount of the loan being a condition imposed upon the borrower by the lender to ensure that the loan is given on the basis of promises of such profits or increments.[185] An example of this prohibition can be seen in the Charter of the Saudi Arabian Monetary Agency (SAMA). Article 2 of this Charter states that an 'Agency shall not pay or receive interest, but it shall only charge certain fees on services rendered to the public and to

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182 Sahih Muslim, 'The Book of Transactions' <http://www.iium.edu.my/deed/hadith/muslim/010_smt.html> accessed 10 October 2017.

183 Stacy Mitchell, 'Wal-Mart Charged with Predatory Pricing' (*ILSR,* 2000) <https://ilsr.org/walmart-charged- predatory-pricing/> accessed 10 October 2017.

184 Abdulrahman Y Baamir, *Shari'ah Law in Commercial and Banking Arbitration: Law and Practice in Saudi Arabia* (Routledge 2010) 35-36. See also, Muhammad BA Ash, *Parent Book of Islamic Economics* (Zahra 2008) 580.

185 Islamic Banking, 'Meaning of Riba' (*Islamic Banking,* 2016) <http://www.islamic-banking.com/iarticles_8.aspx> accessed 10 October 2017.

the Government'. This provides an insight into how Sharia asserts its influence on business activities within the KSA.[186]

This effectively means that companies working in the telecommunications sector in the KSA are required to consider the fact that no interest-based transactions can be conducted within the system. This is in sharp contrast to the business conditions and rules that are prevalent in most other parts of the world which follow profit-centred business practices in which interest-based transactions are a legitimate practice and businesses are officially entitled to earn interest on any investments they make. An example of interest as a common practice can be seen in the global banking system which allows for banks to pay a lower percentage of interest to those who deposit their earnings in the banks, while charging a higher percentage of interest to those who take loans from the former.[187] Such practices are contrary to Islamic principles. Hence, the fact that interest cannot be charged becomes a challenge for the telecommunications sector, especially one growing in line with technological advances and involving players that have yet to adhere to the system prevalent within the Kingdom.

Similar to the prohibition against charging more via interest, the Qur'an also advises: 'Give full measure and weight and do not undervalue people's goods.'[188] This is yet another example of how Sharia guides the process of trading in an Islamic country. Sharia regards such practices as unethical and also forbids them. This is an imposition of a moral imperative on businessmen in the Sharia system which prohibits them from using their position to take advantage of others. As will be discussed later in this chapter, this provision becomes particularly important with regard to competition policy. The purpose of emphasising these provisions of Sharia law is the need to find a fine balance between these principles and those of competition law. Such a balance is the only way to ensure the eradication of unfair competition between participants in the telecommunications sector, which is also mandated by the Sharia notion of 'fair trade' that requires the protection of the rights and privileges of all those who

[186] Abdullah Saeed, Islamic Banking and Interest: A Study of the Prohibition of 'Riba' and Its Contemporary Interpretation, volume 2 (Brill 1996) 8.
[187] Abdul Kader S Thomas, Interest in Islamic Economics: Understanding Riba (Psychology Press 2006).
[188] Quran (7: 85). See also, Garry Wills, What the Quran Meant: And Why It Matters (Penguin Books 2017) 167.

participate in business transactions.[189]

According to Islamic fiqh, riba is any unjustified additional margin over and above a borrowed item or loan paid back in terms specified by the affiliate parties.[190] It can be further categorized into riba al-duyun, the classic riba described above, or riba al-buyu, which occurs when the lender and the borrower exchange goods of a kind at different proportions. For example, the exchange of two kilograms of high-quality dates in exchange for ten kilograms of low-quality dates.

According to the Holy Qur'an, any form of riba is an act condemned without a shadow of doubt and followers are encouraged to steer clear of engaging in such practices.[191] However, the riba system was fully introduced into the Islamic way of life only at the beginning of the twentieth century with the emergence and spread of interest-based banking systems through legislations and banking practices around the world.[192] To reconcile these practices with Islamic law, the concept of *riba* is explained as the excessive imposition of interest to the point that it is exploitative and certainly against the notions propagated in the Qur'an. This is an argument made by a number of orthodox Islamic scholars. Thus, any predetermined rate of return on funds, whether from a loan or financing transaction, is deemed to be riba.[193] The prohibition of riba cannot be disputed as the Qur'an (S2: 225) clearly states that 'God permitteth trading and forbideth riba.'

However, there is less clarity regarding the meaning and scope of the concept.[194] The lender is required to receive only the principal and no increase over and above. It is therefore uncertain whether interest can be used as a reward for the time-value of investments. Kiyi and others argue that interest on the margins close or equal to

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[189] S Taman, 'Concept of Corporate Social Responsibility in Islamic Law' (2011) 21 Indiana International and Comparative Law Review 481.

[190] Munawar Iqbal and Philip Molyneux, Thirty Years of Islamic Banking: History, Performance and Prospects (Palgrave Macmillan 2005) 10.

[191] Abdel Rehman Yousri Ahmed, 'Riba, its Economic Rationale and Implications' (Islamic Banking, 2016)
<http://www.islamic-banking.com/iarticles_8.aspx> accessed 10 October 2017.

[192] Muhammad A Khan, What is Wrong with Islamic Economics?: Analysing the Present State and Future Agenda (Edward Elgar 2013) 124.

[193] Ibid.

[194] Latifa M Algaoud and Mervyn Lewis 'Islamic Critique of Conventional Financing' in Kabir Hassan and Mervyn Lewis (eds), Handbook of Islamic Banking (Edward Elgar 2007) 46.

inflation rates cannot be considered riba, and therefore should be treated as an acceptable form of trading. Nonetheless, Sole and Jobst note that 'the general consensus among Islamic scholars is that riba covers not only usury but also the charging of interest and any positive, predetermined rate of return that is guaranteed, regardless of the performance of an investment or granted benefit.'[195] From the perspective of Islamic scholars, this distinguishes Islamic finance from capitalist systems that allow unbridled competition, monopoly and the accumulation of wealth.[196] Although banking without interest puts Islamic banks at a serious disadvantage when confronted with conventional competition, it must be noted that when given the choice most Muslims keep away from conventional banks since they charge interest which is strictly prohibited by the Sharia.[197] Also, the Islamic laws do not prohibit profit, or set limits on it.

2.3.2.3.4 Ihtikar

Ihtikar has been defined as 'hoarding, being the prohibitive practice of purchasing essential commodities, such as food and storing them in anticipation of the price increase.'[198] It is argued that Allah has provided the treasures of the world and no individual has the absolute right to withhold any of it for self-gain and from the reaches of others, especially in times of famine and need.

Mawdudi, Ahmad and Hashemi further explain that people should acquire wealth legally and spend what they need and reintroduce the savings, if any, into the economic system in a legal manner. [199] Savings are what a household puts aside after incurring expenditure from an income and is used for various purposes. However, these purposes should not involve illegitimate endeavours. Hoarding consumer goods

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[195] Juan Sole and Andreas Jobst, 'Operating Principles of Islamic Derivatives: Towards a Coherent Theory' (2012) IMF Working Paper WP/12/63 1, 7.

[196] Hesham M Sharawy, 'Understanding the Islamic Prohibition of Interest: A Guide to Aid Economic Cooperation between the Islamic and Western Worlds' (2000) 29 Georgia Journal of International and Comparative Law 153, 155; Shahid H Siddiqui, Islamic Banking: Genesis and Rationale, Evaluation and Review, Prospects and Challenges (Royal Book Co 1994) 71.

[197] Jana Illieva et al, 'Banking without Interest' (2017) 8(2) UTMS Journal of Economics 131, 135.

[198] Islamic Banker, 'Definition of Ihtikar' (Islamic Banker, 2016) <https://www.islamicbanker.com/dictionary/i/ihtikar> accessed 10 October 2017; see also, MH Ṭūsī and AF ʿIzzatī, Al-nihayah: Concise Description of Islamic Law and Legal Opinions (al-Nihayah fī mujarrad al-fiqh wa al-fatawa) (ICAS Press 2008).

[199] Abdul A Mawdudi, Khurshid Ahmad and Shafaq Hashemi, *First Principles of Islamic Economics* (The Islamic Foundation 2013).

is strictly prohibited by Islam and anyone perceived to be engaged in it is given the same standing as a bandit.[200]The prohibition of hoarding ensures a free market whereby a just price emerges from open and fair competition.

On the same basis, an individual is not allowed to run a monopolistic business. The term ihtikar is also often translated as 'monopoly' because the prohibition may be traced to actions taken to prevent certain clans in Mecca in 500 CE from hoarding foodstuff in order to artificially increase the price.[201] Thus, it is a concept that was analysed by classical Islamic fiqh with a hiatus of about one millennium.[202] The most influential scholars in this regard were Ibn Taymiyyah and his disciple, Ibn al-Qayyim.[203] In this context, a monopoly is a business that is the exclusive supplier or trader of a needed commodity or service among the masses.[204] The exclusive supplier can therefore change the quantity of the commodity available in the market and manipulate the price. Competition is considered to be a healthy thing in an Islamic economy and businesses are discouraged from engaging in ihtikar. Islam makes it illegal for entities to exclusively run the source of means or opportunities, and in the process prohibit others from accessing the same. It can also be argued that hoarding of acquired expertise is in contravention of the ihtikar philosophy. Businesses can create a virtual shortage of their goods and services, thus driving up prices. With this in mind, businesses in possession of a certain proficiency in a field should share necessary information so as to be in line with the philosophy, that is, not to hoard information.[205]

Looking at the business aspect of ihtikhar, it seems that competition law regimes around the world are broadly based on these principles in their prohibition of monopolistic practices. Hasan argues that ihtikar is the Islamic concept which has paved the way for the competition law regimes around the world and is now prevalent

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[200] See Muhammad A Khan, 'Consumer Protection in Islamic Law (Shari'ah): An Overview' (2011) 45(31) AL Adwa 77, 85-86.

[201] Arvie Johan, 'Monopoly Prohibition According to Islamic Law: A Law and Economics Approach' (2015) 27(1) Mimbar Hukum 166, 167.

[202] Muhammad A Al-Zarqa, 'Monopoly and Monopolistic Markets' in Muhammad N Siddiqui (ed), *Encyclopaedia of Islamic Economics* (Vol II 2009) 97.

[203] Ibid.

[204] Richard A Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press 1976) 8.

[205] Arvie Johan, *Monopoly Prohibition According to Islamic law: A Law and Economics Approach* (1st edn, UGM 2015) 1-13.

in the Kingdom.[206]

2.3.2.3.5 The Prohibition of Monopoly

It must be noted that, unlike the other concepts discussed above, there is no consensus on what constitutes a monopoly, when the viewpoints of the four Sunni schools of thought are taken into account. The Maliki school holds that monopoly involves hoarding goods (excluding foodstuff) with the objective of making abnormal profits when the prices increase. The Hanafi School argues that monopoly involves the buying of goods (including foodstuff) from the market and the hoarding of the goods for forty days until the prices increase. The Shafi school maintains that monopoly involves the amassing of goods that society needs and their resale at a higher price. Lastly, the Hanbali School holds that monopoly involves buying and amassing goods needed in society to such an extent as to adversely affect the wellbeing of the entire society.[207] Given that the interpretation by the Hanbali school is the recognised version of the Sharia in the KSA, it may then be contended that monopoly only involves goods and services that are essential to life and the consumers do not have any other alternative in light of the quality and price. Also, the monopolising firm or person must intend to accumulate a large stock of the goods in order to create artificial scarcity. All the concepts discussed in this chapter justify the prohibition of monopoly under Sharia.

Maslahah, for example, condemns those who earn profit through monopolistic practices because they produce less output and charge prices that are higher than the public would pay in a competitive market. Also, saddu zara'I and assuf fi al-isti mal al-haq, which are discussed below, highlight some of the activities carried out when misusing rights to create a monopoly. The major reason why Sharia principles forbid the use of monopoly, assuf fi al-isti' mal al-haq claim, is that it leads to damage to economy and harm to society,[208] which will have an adverse effect more broadly. Moreover, maqasid al-syariah which is discussed below, holds that the main objective of Sharia is to maintain prosperity, which will be damaged by the practice of monopoly

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[206] Zulkifli Hasan, 'Islamic Perspective on the Competition Law and Policy' (*IEFpedia,* 2016) <http://www.iefpedia.com/english/wp-content/uploads/2010/03/ISLAMIC-PERSPECTIVE-ON-THE-COMPETITION-LAW-AND-POLICY.pdf> accessed 10 October 2017.

[207] The different definitions are analysed in Musaed N Alotaibi, (n 128) 37-38. See also Johan (n 206) 169.

[208] Johan (n 206) 167-169.

– a claim supported by tauhid.

According to Sharia, monopolistic and other unethical practices including anti-competitive practices and agreements should be completely banned in order to restrict companies from maximizing profits through unconscionable means. As is the case with laws regulating monopolies, certain agreements and actions are set aside for special attention because they are presumed to be anti-competitive. Examples include complicity in tenders and price fixing.

Nonetheless, a monopoly granted and protected by the state is not necessarily unethical and contrary to Sharia. This is common with regard to public utilities. As noted above, monopoly is outlawed because of the tangible harm it causes or potential harm it may cause to the general public. Thus, where the state-run monopoly does not reduce output or hoard products (that constitute a necessity) in order to artificially raise the prices, the existence of such a monopoly is not contrary to Sharia. The state may also be justified in buying the patent of a new drug that cures an epidemic in order to ensure that the drug is sold to the public at a reasonable price.

2.3.2.3.6 Saddu Zarai

This philosophy suggests that it is prudent to intervene and prohibit a means through which a foreseen or expected, mostly evil, outcome may occur if no action is taken.[209] In a business setting, those running the businesses are in a position to foresee certain trends and possible outcomes if certain actions are taken. It is therefore in their mandate to make sure that the outcomes are not detrimental toward their competitors or their clients regardless of the possibility of earning more revenue.

The principle of saddu zarai can be applied in a scenario where a deliberate action is taken which, in the perception of many, is morally wrong but causes no harm to anyone. In this case, the perceived wrongdoer cannot be considered to be at fault. This point of view can be elaborated by considering a scenario where two businesses (business A and business B) share a common entrance or access road to their premises but one business has no use for the said entrance because it has a better access to its premises.

[209] Johan (n 206) 1-13.

Business A then decides to use the entrance for individual use and puts up a structure. Though this action is perceived as wrong, it causes no harm to the other business. In that case, business A is not at fault. It is in the philosophy's spirit that a deed or action that may lead to an illegal action should be avoided. In business terms, any means of attaining a goal or success that may drag the business down into illegal or immoral deeds should be avoided.[210]

Within the telecommunications setting, it is important that businesses do not engage in anti-competitive practices that will intentionally harm consumers or other businesses. Telecommunications companies are often in a position to understand how certain choices made at any given time will affect the future of the sector within the Kingdom. To comply with Sharia principles, they must not make decisions to the detriment of the general public regardless of what profits they may obtain from such a decision.

2.3.2.3.7 Assuf Fi Al-Isti

Briefly described, assuf fi al-isti is the misuse of rights and privileges. According to Johan, this philosophy can take two forms. A person or entity is not entitled to arbitrarily exercise their rights in a way that is detrimental to their neighbours. In business practice, the running of the business within the confines of its legal and rightful constraints should not in any way come to, or be seen to, cause undue harm to others.[211]

Although it is the prerogative of an individual to exercise their knowledge and skills, it is wrong for them to cause harm in the process of enjoying these rights and privileges. For example, the collapse of the US housing sector was the result of individuals with extensive knowledge of the mortgage industry inappropriately using their right to do business and receive the privileges awarded by their customers to trade on their behalf. A gross violation of this philosophy led to the suffering of millions of clients and the housing and banking crises because of which, as an adverse effect of the fall in house prices. During the financial crisis of 2007-2009, many major banks around the

[210] P Wan Yusoff, 'The Role of Ethics, Maqasid Al-Shari'ah, Morality and Altruism in Economic Life' (PhD thesis, Kolej Universiti Insaniah, 2010).

[211] Arvie Johan (n 206) 170. See also, Nasroen Haroen, *Ushul Fiqh* (Logos Publishing House 1996) 10-11.

world went bankrupt while others were bailed-out with taxpayer's money owing to the fact that debtors were unable to pay for their mortgages.[212]

A second view of this philosophy is that persons should not use their rights solely for personal gain but for the prosperity of the society or community as a whole. This establishes the basis for businesses to engage in community development and improve the conditions of the people they interact with. Basing the argument on this philosophy, the use of given rights to outshine others and, in the process, cause some sort of harm is not allowed, which brings this doctrine in line with the anti-competition laws.[213]

The creation of cartels to advance individual goals, and which in the process of achieving the goals infringe on the rights of others, is a violation of this philosophy. Assuf fi al-isti, as discussed above, offers a proper guideline in the exercise of proper business competition for the fair running of society. According to Yaacob and Azmi, the use of individual rights should strive to advance the greater good of society, such as through charitable works and developing the community's economic strength.[214]

2.3.2.3.8 Maqasid al-Syriah

Imam Al-Ghazali, following Imam al-Haramain al-Juwaini, teaches that maqasid al-syriah is anything that tends to enrich the faith and preserve it in its form.[215] Maqasid can be described as the goals of Islamic law. These goals can be listed as the need to preserve life, wealth, progeny, religion and intellect. The use of these five goals from an economic point of view focuses on the individual rather than the businessman and highlights the necessary doctrines that govern the behaviour of these individuals and society.[216]

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[212] The Economist, 'The Origins of Financial Crisis – Crash Course' (*The Economist*, September 2013) <http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years- article> accessed 10 October 2017.

[213] Johan (n 206) 1-13.

[214] Y Yaacob and I Azmi, 'Entrepreneur's Social Responsibilities from Islamic Perspective: A Study of Muslim Entrepreneurs in Malaysia' (2012) 58 Procedia 1131, 1131.

[215] See Abdullahi A Lamido, 'Maqasid al-Shari'ah as a Framework for Economic Development Theorization' (2016) 2(2) International Journal of Economics and Finance Studies 27, 32-33, 36.

[216] See Al-Raysuni A, *Imam al-Shatibi's Theory of Higher Objectives and Intents of Islamic Law* (The International Institute of Islamic Thought 2011) 1433; Ibn Ashur MA, *Treatise on Maqasid al-Shari'ah* (The International Institute of Islamic Thought 2006) 67.

An ethical man will conduct business in an ethical way and the business will reflect his moral and ethical character. In this regard, it is impossible to separate an ethical individual from the same ethical business person. The availability and continuous adherence to religious virtues has been a key pillar in ensuring that businesses thrive and operate true to the concepts of Islam.

It would be impossible to run a business without certain virtues such as trust, compliance with the obligations set by contracts and observance. With the basis set by the philosophical goals, faith is paramount for any individual. Running a business practice with faith can be the difference between a particular business and its fellow competitors. Hence, faith is a compulsory ingredient of all aspects of a human social and corporate life.

According to Yusoff, the other goals of the philosophy—namely life, intellect, progeny and property—also come together to guide individuals through economic life.[217] Life includes sustenance with proper nutrition, education on business processes, advances in intellect and handing over the business reins to the younger generation. These goals if utilized can aid in improving business practices, create healthy competition and advance know-how.

2.3.2.4 ISLAMIC PERSPECTIVE ON MARKET ABUSE

Islam teaches and encourages altruism over self-indulgence – to act for the betterment of society and people. This is true in all aspects of one's life including in family, social, economic and political aspects. Greed has been discouraged and even abhorred when it is resorted to by someone at the expense of another's right – ie the exploitation of the latter by the former. Likewise, excessive profit making and withholding goods to render an artificial lack of supply to drive the prices up has also been prohibited by Islam. A fair and just market is what is advocated by the religion. This ensures choice, price, quality and a good deal for the consumers; while allowing for earning of *just* profits to be earned by businesses and tradesman.

2.3.2.4.1 Price Fixing

To begin with, issues relating to price fixing were raised during the lifetime of the

[217] Yusoff (n 211).

Prophet who declined to fix it, impliedly and through conduct which indicated his approval of the market mechanism and the interaction of demand and supply, to determine the price.[218] Imam Shafi'i was quoted by Al-Kasani on the function of demand and supply in determining the market price. The value of a commodity changes each time there is change in the price, due to increase or decrease of people's willingness to acquire the commodity (demand) and depending whether it is available in a small quantity or large quantity (supply)"[219] Awareness of the market mechanism was clearly comprehended by early Muslim jurists. Al-Ghazali maintained that markets evolve in a natural order and market participants act in self-interest with a desire to satisfy mutual economic needs.[220] This is once again indicates the profoundness of economic knowledge and the awareness amongst Islamic scholars from centuries ago regarding the nature, functions and the determinants in a freely-operating market.

It may also be important to consider the viewpoints of two of the most reputed scholars', Shaykh Al-Islam Ibn Taymiyyah[221] and Ibn Al-Qayyim,[222] as well as the views of the Hanbali school. Ibn Taymiyyah, a highly regarded and revered Islamic scholars who is largely followed in the KSA and other parts of the Arab world, had a greater alignment to the Hanbali school than others. He was a distinguished scholar with a wealth of knowledge in the legal sciences as well as in economic sciences. His notion of just price was that 'the price of the equivalent where one is not already in place, taking into consideration the subjective value of the object to the buyer as well as its subjective value to the seller.'[223] Ibn Taymiyyah was well versed in the free

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[218] AA Islahi, 'Contributions of Muslim Scholars to the History of Economic Thought and Analysis Upto 15th Century' (2005) MPRA Paper No. 53462, 27 <https://mpra.ub.uni-muenchen.de/53462/> accessed 18 May 2018.

[219] Ala al-Din al-Kasani, *Bada'i` al-Sana'i`*, (Cairo, Shirkat al-Matbu'at, alIlmiyyah) 16.

[220] Islahi (n 219) 29.

[221] Taqi al-Din Ahmad bin Abd al-Halim Ibn Taymiyyah (661-728/1263-1328) most versatile genius, well versed in Shari'ahh sciences studied Greek ideas but criticized and rejected them and preferred the pattern of *muhaddithun* and jurists. His two works *al-Siyasah alShar`iyyah'* (English tr. by Farrukh Omar, 1966) and *al-Hisbah fi'l-Islam* (tr. by Muhtar Holland 1980) present his great insight in economic matters. Collection of his *Fatawa* (35 volumes 1380 H.) has wealth of materials on socio-economic and religions issues. For his contribution to economic thought one may refer to Islahi (n 219).

[222] Abu Abd Allah Muhammad b. Abu Bakr Ibn al-Qayyim (691-751/1292-1350). Born and lived in Damascus, was the most famous pupil of Ibn Taymiyyah and co-associate in his struggle of social and religious reform and academic activities, like his teacher he combated the philosophers. *Zad al-Ma'ad, I'lam al-Muwaqqi`in, al-Turuq al-Hukmiyyah* and *Uddat al-Sabirin* are some of his important works.

[223] MH Abdullah, 'Book Review: *Economic Concepts of Ibn Taimiyah*' (1998) 10 Journal of King Abdulaziz University: Islamic Economics 67, 69.

market mechanism and favoured the contention that market price is determined by the intersection of demand and supply. However, he was in favour of price control by the state. He supported two forms of price control: first, unjust and invalid and second, just and valid.[224]

2.3.2.4.2 Unjust Pricing

Unjust pricing which is prohibited occurs when there is a price hike even when it is determined by market forces, increase in demand or a fall in supply.[225] He recommended the use of just and valid price fixing at the time of war or famine or even market imperfection that leads to a rise in prices.[226] Paul A. Samuleson is in favour of price fixing in times of emergency albeit for a short-period of time.[227] It could be argued that once the state fixes the price and the tradesmen willingly restrains themselves from seeking excessive profits and keeps the price at a reasonable and just level, state intervention is not necessary to fix prices which would instead be deemed to be determined by the market forces and participants.

The soundness of Ibn Taymiyyah's economic concepts can further be evaluated from his response to an enquiry where he contended that price fluctuation does not always occur due to injustice (zulm) i.e. monopoly or market manipulation. It may be sometimes due to a deficit in production or inadequate importation of goods in demand. In a case where demand is on the rise while its availability is in decline leading to a rise in prices, the converse is also true. Lack of supply or increase in the same may not be down to the action of individuals, ie indicating individuals' inability to manipulate the demand and supply artificially in a perfect market, and sometimes scarcity or abundance may have its roots in injustice, while at other times this may not be the case.[228]

The views of Ibn Taymiyyah and the Sharia should be analysed by taking into account the Islamic philosophy of markets, the values ingrained and the objectives they seek to achieve. As was articulated at the outset, altruism is highly encouraged in Islam and

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224 Ibid.
225 Ibid.
226 Ibid.
227 Ibid.
228 Ibn Taymiyyah, *Majmu` Fatawa Shaykh al-Islam Ahmad Ibn Taymiyyah* (edn 1963) Vol. 8, 583.

communal welfare takes precedence over self-indulgence or individual welfare. This is a concept that is far above and beyond the scope of principles adhered to in western societies where individualism is of paramount importance and individuals and businesses work in their self-interest rather than the interest of the wider stakeholder groups within the society in which they operates. As such, it is unlikely for a western scholar to grasp the very ideas of Islamic economic justice (here price fixing by the state in the best interests of all consumers leading to lower profits for the producer or the seller) as their notions of macroeconomics have inherent values of self-interest and individualism.

Therefore, the two notions of market mechanism and hence competition law in turn are incongruous with each other – it would be unjust and unwise to judge one of them by the standards of the other. Both notions may well be just for their own societies taking into account the difference in the idea of justice between Islamic and western societies and the variance in substantive justice they attempt to achieve through their own means. By all means, Islamic values enjoin a welfare state whereas western states are essentially capitalist. These are two diverging views of economics. The substantive economic justice that the two systems aim to realise are unlikely to converge.

Moreover, Ibn Al-Qayyim, a prominent and influential thinker, a jurist and the most famous student of Ibn Taymyiyah, was of the opinion that all economic activities are permissible except those which have been forbidden under Sharia.[229] Ibn Al-Qayyim largely followed his teacher's opinions and sometimes extended them in terms of market mechanism and price regulation.[230] He even recommended state intervention in cases where the individual owners of property uses it against the wider interests of society.[231] As regards market mechanism and price regulation, Ibn Al-Qayyim stressed that a price determined by the free play of demand and supply was a just price.[232] Absence of just price would warrant price fixing by the government wherein consideration must be given to the subjective value of the object to both the seller and

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[229]AA Islahi, 'Economic Thought of Ibn al-Qayyim' (2012) MPRA Paper No. 41369, 3 <https://mpra.ub.uni-muenchen.de/41369/> accessed 17 May 2018.

[230] ibid 19.

[231] ibid 4.

[232] ibid.

the buyer.[233] It is not to say that he was of the opinion that business would be made burdensome for the tradesman and businessman as he also called for just profit[234] (profit maximisation is allowed so long as exploitation or wider social interests are not interfered with), just compensation[235] (allowing for recruitment of specialists and experts in a field of business), just wages[236] (workers would be ensured just minimum wages and other favourable conditions at work giving them an incentive to work to their full potential and thus allowing for the production of an optimum level of output).

He believed that the central aim behind price policies in the markets is to maintain justice in society and provide guidelines for the regulators to protect consumers from being exploited.[237] His position as regards price fixing is that the state should not intervene when a just price is produced through competitive market forces. However, in the absence of competition and the existence of monopoly and other market imperfections, the regulators should intervene and fix the price.[238] The underlying principle was to serve the best interests of the people (of many rather than few), in cases market forces were enough justice in market places could be attained through market forces, no state intervention is recommended and vice versa.[239]

The concerned regulator under Islamic rule is known as Al-hisbah which is empowered to oversee people do Al-Ma'ruf (good) and avoid Al-Munkar (evil). The regulator's powers are not limited to economic activities only which spans between spiritual, moral, social and civil works.[240] However, both Ibn Taymiyyah and Ibn Al-Qayyim concentrated more on its economic role which is said to include provision of necessities and their supply, supervision of trade and service industries, inspection of weights and measures, curbing the practice of dealing in riba (interest), and other economic wrongdoings.[241]

On fixing prices owing to monopoly or other market imperfections, Ibn Al-Qayyim

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[233] Ibn al-Qayyim, *al-Turuq al-Hukmiyah* 244, 245.
[234] Ibid 251-255.
[235] Ibid 254.
[236] Ibid 247.
[237] Ibid 248; Islahi (n 230) 19.
[238] Ibn al-Qayyim (n 234) 245, 247.
[239] Ibid 264.
[240] Islahi (n 230) 20.
[241] Ibn al-Qayyim (n 234) 244.

advised to take into account the cost of providing the product in question. He proscribed the fixing of a lump sum amount of profit but instead recommended a reasonable ratio of profit taking into consideration the cost of supply.[242]

The essence of Sharia is to ensure justice in all aspects of life, including in economic and financial transactions. In order to secure justice any action so pursued should be approved by the Sharia and become imperious. Both Ibn Taymiyyah and Ibn Al-Qayyim aegued for price fixing only when monopoly or imperfect market conditions lead to unjust prices so as to ensure justice in markets.[243] Justice requires that everybody should be provided with an equal opportunity in terms of production or trade, and the necessity to bar a monopoly that would otherwise defeat the required condition for justice – the central reason as to why Ibn Al-Qayyim stood firmly against monopoly and recommended price fixing exceptionally.[244]

However, Ibn Taymiyyah and Ibn Al-Qayyim's position on price fixing by regulator may be seen to be in conflict with the views of Al-Maqdisi.[245] According to Al-Maqdisi the demerits of price fixing may outweigh its merits as its results might be counter-effective and opposite to what was intended by the regulator.[246] Al-Maqdisi illustrates this by stating that outside traders, ie foreign investors in the modern context, would avoid a market where they are forced to sell goods at a price against their will and local traders would have an incentive to hide their stocks.[247] Consequently, deficiency of supply would be furthered while the demand for the product would be on the rise due to lack of availability of the goods.[248] This would make prices soar and the situation would deteriorate even further.[249]

Notably, Al-Maqdisi's arguments against price fixing by authorities are sound and reflects his deep knowledge of economic concepts and far-sighted ideas. Even though

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[242] Islahi (n 230) 23.

[243] ibid 25.

[244] Ibn Al-Qayyim (n 234) 245; Islahi (n 230) 25.

[245] Shams al-Din Abd al-Rahman b. Muhammad Ibn Qudamah al-Maqdisi (597-682/1200-1283). Born and lived in Damascus, champion of Hanbali fiqh. He was first to be appointed as Hanbali judge in Damascus which he served twelve years before voluntarily retiring.

[246] IQ al-Maqdisi, *Al-Sharh Al-Kabir* (Beirut 1972) Vol. 4, 44,45; Islahi (n 230) 31.

[247] ibid.

[248] ibid.

[249] ibid.

Ibn Taymiyyah and Ibn Al-Qayyim attempted to resort to price fixing as an immediate solution to the problems of market manipulation or curtail or monopoly, it might not be too good a solution in the long run as foreign traders or investors would not want to invest in such a country where the regulator is too authoritative, lacking in autonomy of the market participants and also that local traders might want to shift to a foreign land seeking less intervention by authorities. Under such circumstances, supply of goods and services would dry up, lacking in consumer choice and quality of products – meaning that those consumers who were meant to be protected by price fixing would now be forced to pay even higher prices for lower quality products with limited or no choice. This might even give rise to an opportunity for the creation of a monopoly for the surviving business in such a market amidst all these state measures should all other tradesmen and businesses choose to move away from such a market in a country. As such, Al-Maqdsi's view is also a dominant Hanbali view which is consistent with the free market principles as practised in the West.

2.3.2.5 DOES THE SHARIA GUARANTEE FAIR COMPETITION?

Bowen's analysis of the Sharia may be summarised as follows:

> 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.[250]

As shown above, the Sharia is essentially a law shaped and developed by jurists and students of jurisprudence over many centuries.[251] However, they have largely developed the part of the Sharia that deals with civil or legal obligations, given that the part that deals with religious obligations has a much narrower room for *ijtihad*. Competition law falls under the part that deals with civil or legal obligations, and it was shown above that there are six main principles that explain why Islam prohibits anti-competitive conduct. These principles are fundamental principles of belief, Shalabi has

[250] John Bowen, Islam, Law and Equality in Indonesia (Cambridge University Press 2003) 9.
[251] See J Schact, An Introduction to Islam Law (Clarendon Press 1964) 28.

demonstrated that the four Sunni schools of thought agree on these principles.[252] The differences between the schools relate to definitions such as the definition of monopoly as shown above.

The analysis of the six principles above therefore shows that the Sharia prohibits anti-competitive conduct because it requires businesses to prioritise the promotion of the interests of all constituencies (maslahah), refrain from inflicting harm on others (la dhararwa la dhirar), refrain from conducting interest-based transactions (riba), refrain from hoarding or limiting the output in order to artificially increase the price of products (ihtikar), refrain from using evasive legal devices (saddu zara'i), and refrain from misusing rights and privileges (assuf fi al-isti). These principles generally seek to prevent two things: damage to others and monopoly or hoarding. Hence, the prohibition of both ensures a free market whereby a just price for healthy products emerges from open and fair competition.

However, it is also noted above that monopoly is not unlawful per se; monopoly that causes tangible harm or may cause potential harm to the general public is unlawful. Thus, the government may grant a company an exclusive license to operate in a specific market under the Saudi Competition Law of 2004.[253] Nonetheless, there are several anti-competitive practices other than monopoly, and the Competition Law, inspired by Sharia, contains provisions that prohibit agreements and conduct that restrict competition.[254]

2.3.2.5.1 Ensuring Fair Competition for Foreign Companies

As far as Sharia is concerned, concepts like domicile or nationality are unimportant. The only aspect that Sharia takes into account are the notions of 'Muslim' and 'Non-Muslim'. The Holy Qur'an has a verse which says that: 'Those who do not judge by what Allah has sent down—it is they who are the transgressors.'[255]

Therefore, all matters related to justice should be dealt with according to what God has revealed through the Qur'an. As far as the application of Sharia on non- Muslims

[252] Mustafa Shalabi, Introductory in the Shari'ahh Law (Dar-Al-Nahdah Al-Arabia 1985) 209-210.
[253] Competition Law promulgated by Royal Decree No M/25 of 04/05/1425H (22 June 2004).
[254] These provisions are largely found in Article 4.
[255] Quran, 5: 47.

is concerned, Sharia is applicable to all non-Muslims who are operating within the Islamic territory. Since Sharia is not applicable to non-Muslims when they are not in Islamic territory, some degree of freedom is inherent within Sharia for non-Muslims. However, this implies that all the competitors who are operating within the KSA have to accept an adjudicator's decision made according to Sharia.[256] Sharia law takes every case on an individual basis to decide the outcome of the legal processes, with the ultimate aim of providing a benefit to the masses.

In 1998, allegations were levelled against Microsoft for violating regulations regarding antitrust for which Islamic law removed Microsoft from the Sharia stock exchange.[257] According to Saudi law indicated that Microsoft was attempting to use of its prodigious market power and huge profits to exploit any firm that insisted on pursuing initiatives which could enhance competition against one of their core products. Furthermore, the judge presiding over the case stated that, beucase Microsoft enjoyed substantial power in the market, this allowed it to set higher prices for its Windows software, and there were a number of innovations that could have benefited consumers but never came to fruition due to the sole fact that they clashed with Microsoft's self-interest. As discussed above, Sharia requires the entrepreneur or firm to refrain from harming others. Thus, what Microsoft did through its endeavours was prohibited, and for this reason, Microsoft was held liable for violating the laws of the Kingdom.[258]

It has been shown that there are notable differences between the competition law of the KSA and different nations of the world. This is largely due to the fact that the KSA's Competition Law has must comply with the principles of Sharia. However, it must be noted that the EU Competition Law also has projected some influence on the enactment of competition policies within the Kingdom.[259]

Arguably, the Sharia elements within the law may have made foreign companies shy

[256] Salma Taman, 'An Introduction to Islamic Law' (2014) 16(2) European Journal of Law Reform 221, 222.

[257] Ibid.

[258] Lawrence M Salinger, Encyclopedia of White Collar & Corporate Crime (Sage 2004) 42-45.

[259] Sahin Ardiyok & Dilara Yesilyaprak, 'Saudi Arabia: Spotlight on Saudi Arabia's Competition Rules' (Mondaq, 19 June 2015) <http://www.mondaq.com/x/406002/Trade+Regulation+Practices/Spotlight+On +Saudi+Arabias+Competition+Rules> accessed 10 October 2017.

away from investing in the country. Businesses often prefer to invest and expand into legal systems with which they are familiar and have favourable laws. The concept of a Sharia-based legal system is often difficult to comprehend for businesses based in secular societies. However, once a company moves into the KSA, that company must comply with Saudi law. The Foreign companies operating in the KSA are forced to obey the Saudi Competition Law, which includes some Islamic elements such as applying a halal business model, being forced to know the identity of your partners, ensuring that every partner has equal rights. Due to the fact that the abovementioned organisations are mostly not religious in nature, they often find it difficult to carry out their operations in regions where they are required to observe certain religious practices.

As such, it may be argued that the KSA competition regime overlooks relevant international frameworks, and this in turn acts as a deterrent to foreign companies from investing in the KSA. This is because, unlike the KSA's Competition Law, which is mainly based on the Qur'an, international competition law is derived from international customs, treaties, the decisions of courts, general principles of law and scholarly writings.[260] For instance, Shell Oil entered the KSA but failed to sustain its operations because it could not gain a competitive advantage. The Director of International Business at Shell Oil claimed that it failed in its exploration campaigns in the KSA because prices were highly monitored so they could not raise funds for the exploration through the selling of oil in the KSA, thus rendering their business ineffective. Critics claim that the KSA competition framework has effectively discouraged both local and foreign companies from setting up operations in the KSA due to the economic fear that they might fail to reach their intended targets.[261]

As such, it is important to clearly illustrate how the Sharia elements embodied in Saudi Competition Law correlate with the prevailing competition principles of the countries in which many multinational companies are headquartered. While the basis of Saudi

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[260] See Jorg P Terhechte, International Competition Enforcement Law Between Cooperation and Convergence (Springer 2011) 30; Piet Eeckhout, 'The Effect of WTO Decisions in EU Law – Autonomy or Autarky?' in Inge Govaere et al (eds), Trade and Competition Law in the EU and Beyond (Edward Elgar 2011) 226.

[261] Umut Aydin and Tim Büthe, 'Success and Limits of Competition Law & Policy in Developing Countries: Explaining Variations in Outcomes; Exploring Possibilities and Limits' (Kenan/Rethinking Regulation Workshop, Duke University, May 2015) 10.

Competition Law may be in religion as opposed to business customs, the underlying intent and economic results are often the same. Eliminating this fear surrounding Sharia may help make the KSA a more attractive market for foreign investment.

2.3.3 THE COMPETITION LAW

Article 1 of the 2004 Law sets out its goals which include to protect and facilitate fair competition and prevent or eliminate private monopolies.[262] Article 2 provides the definitions of key terms such as market, firm and the concept of domination among others.[263] The latter concept is said to mean the ability of a firm to influence the market price through the control of supply of a commodity or service. This is perhaps too much of a simplistic definition of domination where complex markets are concerned – especially in the service industry such as the telecommunications industry.[264] It may be that a firm with a good reputation, because of its higher quality or the lack thereof among other firm's products, may influence the price without having to control the supply of a commodity or service. Under such circumstances the 2004 legislation would not be able to prevent such an occurrence from happening even though its effect might be anti-competitive.[265]

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[262] Article 1 of Competition Law 2004: This Law aims to protect and encourage fair competition and combat monopolistic practices that affect lawful competition.

[263] Article 2 of Competition Law 2004: Whenever they occur in this Law, the following terms shall have the meanings expressed next to them unless the context indicates otherwise:

Firm: Factory, corporation or company owned by natural or corporate person(s), and all groupings practicing 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 General Authority for Competition. Merger: Amalgamating a firm with another or the amalgamation of two or more firms into a new one. General Authority for Competition.

Ministry: Ministry of Commerce and Industry. Minister: Minister of Commerce and Industry. Regulations: Implementing Regulations of this Law.

[264] See also the definition provided by Article 1 of the Implementing Regulation of the Competition Law (as amended), enacted through Resolution 13/2006.

[265] In Europe, the European Court of Justice (ECJ) relied on the economic definition. It noted that "Dominance is a position of economic strength which enables a firm to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its customers". See United Brands v Commission, Case 27/26 [1978] ECR 207. See also, Hoffmann-La Roche & Co AG v Commission, Case 85/76, para 91.

2.3.3.1 STATE-OWNED ENTERPRISES

A further and more severe limitation of the 2004 legislation is that it does not apply to public corporations and wholly-owned state companies, as developed in subsequent chapters.[266] This limitation would have a significant impact upon the market of commodities or services and more so in terms of services which might be disguised for state's protectionism towards state owned or public corporations as they are outside the ambit of the legislation. This is rather an absurd exemption as public corporations and state-owned enterprises are generally the bigger entities which are more likely to have a dominant position in the market and a strong influence on price. One might ask if the law was enacted to legitimise their per-existent dominance over other smaller entities. In the Saudi telecommunications sector, the STC, a state-owned company, has long been the dominant player in the industry. Allowing for a few firms to dominate the industry through legal framework is dangerous and can have repercussions not only on one industry but across industries as the competition law regime is generally applicable to all industries – both commodies and services.

Saudi authorities might justify the exemption of state-owned firms or public corporations on the grounds that it is consistent with the interpretation of the Qur'an by the Hanbali school which authorities in the KSA are required to adhere to. They might also justify this exemption on the basis that it would helps fix a *just price* as state-owned firms would work in the best interests of consumers. However, such a belief is misleading and rather ill-founded as the Hanbali school, as enunciated by two prominent scholars, Shakh Al-Islam Ibn Taymiyyah and his disciple Ibn Al-Qayyim, call for price fixing only in exceptional circumstances. Nonetheless, an exemption through a legislative provision would have the effect of making it the norm rather than an exception. The aforesaid Islamic scholars were in favour of market mechanisms to operate in a fair market and believed price fixing was only required where an unjust price prevailed. However, another revered Hanbali scholar, judge and a jurist – Al-Maqdisi – was completely opposed to the notion of price fixing, stressing that it might instead be counter-effective and hence should not be practised (discussed below). Therefore, the Saudi competition regime does not appear to accurately reflect the

[266] Article 3 of Competition Law 2004: Provisions of this Law shall apply to all firms working in Saudi markets except public corporations and wholly-owned state companies.

Hanbali school principles despite the latter's long-standing hegemony in the country.

2.3.3.2 RESTRICTIVE AGREEMENTS

Of great importance is Article 4 of the 2004 legislation which prohibits agreements or contracts among current or potential competing firms or any practice by a dominant firm aimed at restricting commerce or violating competition among firms.[267] The provision further articulates the banned practices for dominant firms which include among others price controlling; restricting supply of goods or services causing an artificial deficiency in supply; abruptly contriving supply of commodities or services in abundance that unfairly affects other dealers; preventing or causing hindrance to a firm's entry or exit to the market; depriving certain firms of goods or services otherwise available in the market; dividing markets in terms of geographical regions or distribution centres or client type or by seasons and time periods; influencing quotations in auctions whether governmental or not; freezing or restricting the distribution process and other investment aspects. Despite the detailed attempt to curb prohibited practices, the list outlined is not exhaustive. The list at times appears plain

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[267] Article 4 of Competition Law 2004: 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 status 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 meant 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.

GAC 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

and simple, while at other times it seems to be vague and invites arbitrariness. Ambiguity is attracted by paragraph 6 as outlined above as it attempts to curb division or allocation based on the aforesaid criteria which may well be legitimately used by a firm as its operations, business and distribution strategy. Their mere presence attracting ban seems to be an arbitrary and a short-sighted measure lacking in thoughtful input.

In addition, further arbitrariness is introdcued by the last paragraph of Article 4 which provides the GAC with the discretion not to use the provisions of Article 4 for agreements or practices that breach canons of competition, but the GAC believes such a practice or agreement would not only improve the performance of firms but also confer benefits to the consumers which would exceed the effects of restriction of freedom of competition. A provision with this effect and the discretion it affords the GAC might invite arbitrary practices to be regarded as within the ambit of "exceeding the effects of restricting competition', and this would be exacerbated in cases where the members in the GAC have any conflicting interest. At the same time, it would allow for firms to engage in illicit activities and endeavour to attain the GAC members to render biased decision in their favour. Another problem with the aforementioned provision relates to its inability to provide the criteria upon the satisfaction of which the GAC may relax the provisions of Article 4 despite acting in contravention of it. Thus, it may well be argued that too wide a power has been conferred on the GAC which may suspend the application of Article 4 which it subjectively believes to be warranted without being provided with an appropriate objective test. This may allow for arbitrary decisions to be taken by the GAC which would in fact negatively affect the market participants including the competitors of the firm concerned, and ultimately mean that consumers purchase lower quality products at a higher price compared to a market where fair competition is established. It may ultimately have a negative impact on the competition regime and beat the legislation's core purpose – encouraging competition and combating monopolistic practices.

Article 4 revolves around prevention of practices, contracts or agreements that can restrict commerce or affect the prevailing competition between firms. Since Sharia is against businesses fixing prices for their own benefits, the law prohibits the creation of cartels by competing firms to control or establishment of a pricing system.

This law is not limited to such pricing agreements. Horizontal agreements between competitors that are meant to enhance or facilitate the division of facilities based on type of customers or geographic locations are also prohibited. The reason for this is that once companies have distributed their areas of functioning, the main player in a particular area achieves a monopoly while allowing the other player a similar position in another area. The Saudi law is clearly aligned with Sharia which is against this and so acts to prevent this from happening.[268]

Hence, such agreements are forbidden for companies operating in the KSA. In addition, the law also prohibits a company from initiating actions that can prevent the entry of new players in a given market. Moreover, sellers are prohibited from selling the same services or products for different prices at different locations. Limitation on price is also set, which prevents the sellers from setting prices that are predatory in nature.[269]

Given that the Saudi government has granted licenses to a number of foreign operators for the provision of telecommunications services in the KSA, it is important to consider how the process of conflict resolution operates in this setting. A good example is the STC. Because of the stakeholding of the royal family, there is a high probability of collusion with the STC and the decision-makers for the government edging it out at the behest of any other competitors. It is one thing to be government-owned and another to ensure that anti-competitive policies are not followed. As such, it is important to determine how much influence government policies have within the management of the STC and which in turn become anti-competitive and in contravention of the anti-competition laws enacted by the same government to keep a check on the monopolistic regimes.

According to Article 4, a monopoly is a specific market situation that includes only one company that is associated with manufacturing products and the same are consumed by many consumers. This was specifically identified as a situation where there are no competitors in the market providing the same services or products. Thus, if a firm increases its prices to a much higher level than is considered reasonable or fair, it will

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[268] Anna Korteweg and Jennifer Selby, *Debating Shari'ah: Islam, Gender Politics, and Family Law Arbitration* (University of Toronto Press 2012).

[269] Andrew Jeffreys, The Report: Saudi Arabia 2010 (Oxford Business Group 2011)

be deemed as an unlawful monopoly under Article 4. In Sharia, this is referred to as ihtikar as noted above.

2.3.3.3 ABUSE OF A DOMINANT POSITION

Article 5 articulates the practices a firm with dominant status is banned from carrying out. These include selling products at a price below their cost of production; imposition of a restriction on the supply of goods or services aimed to create artificial shortage in the market; levying certain special conditions on trading or dealing with another firm that leave the dominant firm in a weak competitive position; and refusal to deal with another firm lacking in sound rationale in a bid to deter the other firm from market entry.[270] Although the first two paragraphs of the article are somewhat straightforward, but the latter two paragraphs lack precision as the Article 4(3) fails to outline what those special conditions are which it aims to curb and yet again this would allows for firms to take undue advantage. It is right to be sceptical of the GAC's ability to oversee such matters without any legislative guidance as many such special circumstances might not even hit the radar causing regulatory capture. Article 5(4) has the inherent weakness that firms are allowed to refuse to deal with another firm to act as entry barrier if they can justify such refusal, which should not be too difficult in an era when each firm employs a number of legal and financial experts.

2.3.3.4 PENALTIES

Of considerable importance are the provisions which deal with penalties that can be imposed by the General Authority for Competition. Article 12 provides for the punishment for violations of law with a maximum penalty of five million riyals[271] allowing for its multiplication in cases of recurrence.[272] This penalty seems to be

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[270] Article 5 of Competition Law 2004: A firm enjoying a dominant status 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 special 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.

[271] (USD 133,3230 approximately)

[272] Article 12 of Competition Law 2004: Without prejudice to any harsher punishment provided by any other 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 recurrence. Judgment publication shall be at the expense of the violator.

appropriate and mostly firms will certainly not want for the violation to recur fiven its punitive nature. However, a grave weakness in terms of remedying the situation is observed in Article 16(3) which provides that once violation has been established the GAC may impose a fine between one thousand[273] and ten thousand[274] riyals daily upon the violator until the violation is removed.[275] Such a small penalty would allow for a firm with market domination to rather prolong the violation as they would probably have less incentive to rectify the situation given that their generated income from such a violation might far exceed the level of the penalty they are subjected to under the legislation.

2.4 THE EFFECT OF THE SHARIA ON THE IMPLEMENTATION OF THE COMPETITION LAW

Although the Competition Law of 2004 may be described as a piece of landmark legislation in the KSA, it has so far been poorly implemented. Besides, staff incapacity and lack of adequate skills among the members of the GAC, the exemption of state- and publicly-owned companies, and the lack of neutrality have been major contributing factors behind the ineffective implementation of the Law. This section seeks to determine the extent to which the requirement to align positive law with Sharia may explain these contributing factors.

2.4.1 THE EXEMPTION OF STATE-OWNED MONOPOLIES

The explicit exemption of state-owned and public enterprises from the competition regime directly reflects on the issue of the STC and other national companies including Al-Nasser are majority-owned by the Saudi government. In fact, their prices of their commodities are ascertained by the nation’s Council of Ministers.[276] There is logically a causal link between their exemption and the establishment of their monopolistic rule. The privatisation policy implemented in the KSA has also been problem considering

[273] (USD 266 approximately)

[274] (USD 2,666 approximately)

[275] Article 16 of Competition Law 2004: Without prejudice to provisions of Article Twelve of this Law, the GAC 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:

3. Compelling the violator to pay a daily fine not less than one thousand riyals and not exceeding ten thousand riyals, until the violation is removed.

[276] IBP, Saudi Arabia Energy Policy, Laws and Regulations Handbook, Volume 1 Strategic Information and Basic Laws (Lulu.com 2015) 42-45.

the fact that it hinders the effective implementation of competition law.[277] For many decades, the government was reluctant to privatise most government-owned companies in the telecommunications sector in order to keep them within its control. This runs contrary to the Islamic principles discussed above that prohibit monopoly and encourage freedom of competition. Monopoly may only be lawful where it is granted by the government to promote the welfare of the entire community. However, Saudi authorities have not established that the explicit exemption of state-owned and public enterprises from the competition regime confers a bigger advantage to the people of the KSA than free competition.

Also, no significant changes were introduced by the Competition Law in some of the sectors, such as the telecommunications sector. This may be because the Competition Law and Telecommunications Act seem to contradict each other. The Telecommunications Act hinders the entry of new telecommunications operators to the market and so conflicts with the law which prohibits monopoly. This internal legislative conflict can be regarded as one of the major issues that renders the competition regime ineffective in the KSA.[278] An example of this issue in practice occurred in relation to the global telecommunications giant Vodafone which was restricted from operating solely in the KSA and had to collaborate with Zain Saudi Arabia.

Government policies in the KSA have created several legal barriers that restrict the entry of foreign companies into the nation's markets. These legal barriers include the Commercial Agencies Law 1962 which effectively restricted the creation of a level playing field, with fair, open and competitive markets within the KSA. The Commercial Agencies Law also gives individual enterprises in the KSA the right to carry on monopolistic competition, such as in car trading. This law has significantly raised entry barriers to new enterprises and such ventures come up against red-tape in the form of additional costs and may even result in being denied a license to set up a business in the Kingdom.[279]

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[277] This is discussed further in Chapter Three.

[278] Martyn D Taylor, International Competition Law: A New Dimension for the WTO? (Cambridge University Press 2006).

[279] Maher M Dabbah, International and Comparative Competition Law (Cambridge University Press 2010) 1-20.

The inefficiency and unfair practices are also evident from the CITC in the KSA which is also viewed as a major concern relating to competition law. The CITC is responsible for resolving issues relating to unfair competition through integrating the guidelines of the Competition Law. It reports on a regular basis that some of its staff members misuse their position which hinders some organisations from entering the market. Therefore, they contribute to some of the alleged corruption cases in the telecommunications field. This has largely led to the ineffectuality of the current regime owing to the fact that activities of the CITC were not in favour of ensuring fair competition in the KSA.[280]

2.4.2 LACK OF OBJECTIVITY

The lack of objectivity stems from the fact that the government holds a majority of the shares in businesses like the STC that are exempt from the competition law. This majority stake makes it more likely that the government will have a say in the decision-making process, which can arguably be viewed as an anti-competitive and unfair business practice for competitors. This is one of the central reasons the STC lacked competitors for so long and the situation prevails even during this period of partial privatisation.[281] The government also continues to put up barriers to competition. For example, a license to provide internet services was only granted to the STC and no other service providers were successful with their applications until the introduction of the Competition Law in 2004.

Essentially, not only are companies able to exert positions of dominance but also when their owner is the government itself, they use their position in an anti-competitive manner without the fear of repercussions because they are exempted from the purview of the competition regime. In theory, such situations should not arise as the government is bound to abide by the same principles of Sharia as private businesses. However, in practice, the government has been observed to engage in anti-competitive behaviours such as restricting the issuance of licenses to create barriers to entry into the market, setting competitive prices and influencing legislation in such

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[280] BAG Gouda, 'The Saudi Securities Law: Regulation of the Tadawul Stock Market, Issuers, and Securities Professionals Under the Saudi Capital Market Law of 2003' (2012) Annual Survey of International and Comparative Law 116.

[281] Council of Competition Protection, Implementing Regulations of Competition Law of 2008, art 7 (Saudi Arabia).

a way to favour its position.

2.5 CONCLUSION

Prior to the enactment of the Competition Law in 2004, Sharia regulated anti-competitive conduct in markets for goods and services in the KSA. All economic sectors were therefore subject to the underlying Sharia principles for business practices. This chapter analysed six key principles and demonstrated that Sharia prohibits anti-competitive conduct by requiring businesses to do the following: prioritise the promotion of the interests of all constituencies (maslahah), refrain from inflicting harm on others (la dhararwa la dhirar), refrain from conducting interest-based transactions (riba), refrain from hoarding or limiting output in order to artificially increase the price of products (ihtikar), refrain from using evasive legal devices (saddu zara'i), and refrain from misusing rights and privileges (assuf fi al-isti). It is submitted that these principles generally seek to prevent the monopolisation of the market and avoid damage to consumers. Both objectives ensure a free market whereby a just price for healthy products emerges from open and fair competition.

The Competition Law of 2004 also guarantees fair competition by prohibiting practices, contracts or agreements that can restrict commerce or affect the prevailing competition between firms. The provisions prohibiting these practices are largely contained in Article 4 of the Law. It also prohibits actions that can prevent the entry of new players in a given market and sellers are prohibited from setting prices that are predatory in nature. However, it was shown that the Competition Law does not accurately reflect the Hanbali school principles. It is also the case that the requirement to align positive law with the Sharia cannot be blamed for the poor implementation of the Competition Law. The exemption of state- and publicly-owned companies and the lack of neutrality have been major contributing factors behind the poor implementation of the Law. State-owned monopolies carrying out actions that prevent the entry of new actors flout Sharia which prohibits monopoly except in cases where it promotes the welfare of the entire community.

Sharia also guarantees fair competition by providing clear-cut guidance regarding the process of dispute settlement related to conflicts arising due to anti-competitive conduct. The Settlement Regulation of KSA consists of 25 articles and is the guiding document regarding the resolution of disputes based on Sharia. As such, the

Competition Law would be more effective if it reflected the principles of the Sharia. A competitive market is more attractive to foreign companies. Given that the concept of a Sharia-based legal system is often difficult to comprehend for businesses based in secular societies, it is important to clearly illustrate how the Sharia elements correlate with the prevailing principles of competition law. Such an illustration as shown above helps to demonstrate how the competition regime may be strengthened by Sharia. The next chapter analyses the regulation of anti-competitive conduct in the telecommunications sector of the KSA wherein state-owned undertakings faced no competition for many years and adopted various means to restrict entry by new firms.

CHAPTER 3

DEVELOPMENT OF THE TELECOMMUNICATIONS SECTOR IN SAUDI ARABIA AND ITS REGULATORY FRAMEWORK

3.1 INTRODUCTION

To understand the role and need for competition law in the telecommunications sector of the KSA, it is necessary to first understand the background of the sector and its regulatory framework. This chapter examines the development of the sector and seeks to determine whether the statute that regulates the sector, as well as the Competition Law, maintains market competition and minimises of the adverse effects of monopoly. This is important because although the telecommunications sector is said to have been privatised, the relevant statutes have perpetuated the monopoly system whereby the government indirectly maintains a large presence in the market. Therefore, preventing the monopolisation of the telecommunications sector by state-owned enterprises is the main challenge faced by the regulators in the KSA. This chapter critically examines how the Saudi framework addresses the monopoly system and shows the extent to which the government is justified in retaining dominant control in the market.

3.2 EMERGENCE OF THE INFORMATION AND COMMUNICATIONS TECHNOLOGY SECTOR

The telecommunications sector poses a unique challenge to the enforcement of competition law and policy in the KSA. The continuous expansion of the ICT infrastructure to meet the increasing demand for digital services is one of the key factors that influence the sustainable growth of the telecommunications sector.[282] The ICT sector in the KSA is the largest across the GCC and one of the largest in the Middle East by both capital market and spending.[283] The Internet Service Unit (ISU)

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[282] Shearman & Sterling, 'Telecoms in the Kingdom of Saudi Arabia – An Overview' (2016) < https://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/09/Saudi-Arabia-Publications/Telecoms-in-the-Kingdom-of-Saudi-Arabia--An-Overview.pdf> 10 August 2018.

[283] See Mai Al-Torki, 'Saudi Arabia – Europe Economic Cooperation: Prospects and Potentialities' in Silvia Colombo (ed), *Italy and Saudi Arabia: Confronting the Challenges of the XXI Century* (Edizioni Nuova Cultura 2013) 70. In fact, the budget allocation for ICT in the KSA is more than the allocation in all other GCC countries combined. See Communications and Information Technology Commission, *ICT Report: ICT Investments in the Kingdom of Saudi Arabia* (Communications and Information Technology Commission. Riyadh 2015) 7.

created by King Abdulaziz City for Science and Technology (KACST) in 1998 may be regarded as the first ISP in the KSA.[284] Five years before the creation of the ISU, King Fahd University of Petroleum and Minerals (KFPUM) had connected to the internet through the College of Computer Sciences and Engineering.[285] However, only email was provided to KFPUM due to the low internet connection speed. The ISU established by KACST made the Internet service available to the wider public and secured the cooperation of the Saudi Telecommunications Company (STC) and other privately held ISPs in the Kingdom.[286] The STC managed and maintained the Kingdom's telecommunications infrastructure and provided the linkage between customers, ISPs and KACST; the latter supervised the internet gateway and filtered the information that the public consumed.[287]

It may therefore be contended that the ISU created by KACST established the foundation of the ICT sector in the KSA as enabled the internet service to be available to the wider population,[288] and also demonstrated the importance of new learning strategies that required the use of ICT.[289] In fact, an empirical study conducted by the US-Saudi Arabian Business Council revealed that since the establishment of the ISU a large number of young people with higher purchasing power along with broader knowledge of information and technology have joined and expanded the telecommunications industry of the Kingdom. The Business Council also revealed that since 2000, the industry has garnered 15 per cent yearly growth, which allowed the KSA to increase its spending by up to US $20 billion in 2010.[290] Additionally, the

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[284] Seymour Goodman, 'The Internet Gains Acceptance in the Persian Gulf' (1998) 41(1) *Communication of the ACM* 19, 19-24.

[285] Khalid Al-Tawil, 'The Internet in Saudi Arabia' (2001) 25(8) *Telecommunications Policy* 625, 627.

[286] Ministry of Communications and Information Technology, *Information and Telecommunication Technology in Saudi Arabia* (Report No. WSIS/PC-3/CONTR/24-E, 2003) 8.

[287] Ibid.

[288] Osman Bakur Gazzaz, 'Internet Influence and Regulation: A Case Study in Saudi Arabia' (*ProQuest*, 2015) 45-78 <https://www.google.co.in/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&cad=rja&uact=8&ved=0CCMQFjAB&url=https%3A%2F%2Flra.le.ac.uk%2Fbitstream%2F2381%2F30569%2F1%2FU224 33 1.pdf&ei=EHHoVO6EI9iiugSs64CYBg&usg=AFQjCNGr5ki-pRf9JImpf6NKiJEcpcrRfw&bvm=bv.8647 5890,d.c2E> accessed 10 October 2017.

[289] See Reem Alebaikan and Salah Troudi, 'Blended Learning in Saudi Universities: Challenges and Perspectives' (2010) 18(1) ALT-J: Research in Learning Technology 49, 51.

[290] See US/Saudi Arabian Business Council, 'IT & Telecommunication Saudi Arabia, Growth Factors and Investment Climate' (US SABC, 2014) <http://www.us-sabc.org/files/public/IT_and_Telecommunication_in_ Saudi_Arabia.pdf> accessed 10 October 2017. See also, United Nations, Review of Information and Communications Technology and Development (United Nations 2005).

Communications and IT Commission of the KSA (CITC) noted in 2016 that by the end of the year, the population penetration rate would be 74.88 per cent mobile broadband subscriptions would reach 23.9 million, mobile subscriptions would reach 74.9 million, and the fixed broadband penetration rate would be about 46.8 per cent of households.[291]

It must be noted that although the conservative government of the KSA was relatively late in connecting the internet to the public, the innovation power of the internet has provided major support to the KSA's telecommunications industry by expanding the network with strong and secure communication links.[292] Thus, as noted above, the continuous surge of ICT may be said to be one of the major factors contributing to the subnormal growth of the telecommunications sector in the KSA. It is important to note that the sector was the first to be privatised in the KSA with the objectives of encouraging foreign investment and ensuring fair competition among private undertakings in the industry.[293] This followed from a series of nine study groups created by the Ministerial Committee on Privatisation to delineate the appropriate parameters for privatising the sector.[294]

However, it will be shown below that the ownership and control of the market were not effectively transferred from the government to the private sector. What actually happened was that telecommunications activity was corporatized, but it was kept under full public ownership. This may be referred to as pseudo-privatisation given that assets were de facto transferred to state-owned undertakings or quasi-state investors, thereby expanding state entrepreneurship.[295] Pseudo-privatisation is tantamount to a privatised monopoly because the government reduces its direct participation in the

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[291] See Communications and Information Technology Commission, KSA ICT Indicators: End of Q4 2016 (Communications and Information Technology Commission. Riyadh 2016) 2-6.

[292] See Hamed A Alshahrani, 'A Brief History of the Internet in Saudi Arabia' (2016) 60(1) Tech Trends 19, 19-20. See also, Eyas Al-Hajery, History of the Internet in the Kingdom of Saudi Arabia (Al Obeikan 2004).

[293] See Anthony H Cordesman AH, Saudi Arabia Enters the Twenty-First Century: The Political, Foreign Policy and Energy Dimensions (Praegar 2003) 428; Shoult A (ed), Doing Business in Saudi Arabia: A Guide to Investment Opportunities and Business Practice (3rd edn, GMB 2006) 76.

[294] Anthony H Cordesman, ibid, 428.

[295] Alexander Radygin, Yury Simachev and Revold Entov, 'The State-owned Company: "State Failure" or "Market Failure"?' (2015) 1(1) Russian Journal of Economics 55, 69; M Mora, 'The (Pseudo-) Privatization of State-Owned Enterprises (Changes in Organizational and Proprietary Forms, 1987-1990)' (1991) 43(1/2) Acta Oeconomica 37, 38; G Ganesh, *Privatisation Experience Around the World* (Mittal Publications 1998) 156.

industry but increases the role of quasi-state investors in the management of the largest or most dominant service providers in the industry.[296]

Prior to the implementation of the privatisation strategy, there was a form of coercive monopoly whereby a government undertaking, the STC, was the sole provider of internet, mobile and fixed line telephone services and competition was prohibited. The next subsection briefly discusses the benefits and disadvantages of public monopolies and then considers whether these were present in the telecommunications industry of the KSA and may have motivated the formulation of a privatisation strategy

3.2.1 THE PROBLEM OF PUBLIC MONOPOLIES

The term monopoly market generally defines a particular market with only a single seller or selling unit with unique products or services.[297] The non-appearance of competition in a particular market that often results in higher profits to a particular business unit or group with sufficient power to set the price of the products/services denotes a monopoly.[298] A monopoly market is also considered to be an extreme phenomenon or form in capitalism which tends to meet the needs and demands of any particular customer segment for a specific product or service.[299] However, the market system must also contend with various factors that can create major dissatisfaction among customers due to the availability of a single seller of a product or service or a seller with a dominant market position. In this regard, the monopoly system can further impose major risks on the marketer if there is no additional benefit or any type of incentive to meet the expectations of customers for the particular good or service. Therefore, the following discussion differentiates the primary advantages and disadvantages of a monopoly market for customers within the context of the provision of telecommunications services.[300] It must be noted that governments that are not

[296] A similar process in Iran was criticised on the grounds that it impedes the expansion of private companies into that industry. See Kevan Harris, 'Pseudo-Privatization in the Islamic Republic: Beyond the Headlines on Iran's Economic Transformation' (2010) Monthly Review Online < https://mronline.org/2010/12/21/pseudo-privatization-in-the-islamic-republic-beyond-the-headlines-on-irans-economic-transformation/> 29 July 2018.

[297] Barry R Rodger and Angus MacCulloch, *Competition Law and Policy in the European Union and United Kingdom* (2nd edn, Cavendish 2001) 7-8.

[298] Ibid. See also, Markvin B Lieberman and David B Montgomery, 'First Mover Advantage' (1989) 9 Special Issue: Strategy Content Research 41.

[299] Glynn S Lunney, Jr, 'Atari Games v. Nintendo: Does a Closed System Violate the Antitrust Laws?' (1990) 5(1) Berkeley Technology Law Journal 15, 15.

[300] Saudi Joint Stock Company, 'Consolidated Financial Statements for the Year Ended December 31,

financially constrained may perpetuate a public or private monopoly where privatisation will reduce social welfare.[301]

On the other hand, monopolies may be beneficial for businesses and detrimental to consumers.[302] A good example is where an undertaking has control over the entire market for the product or service. It does not have to worry about competitors, price shopping patrons, or about quickly adapting to market trends as they are the ones setting them. However, from the consumers' perspective, monopolies are detrimental and leave consumers in a situation of adhesion. Given that they have no leverage in the transaction, they are subject to the terms set by the monopolist. This can lead to consumers overpaying for goods or services, receiving bad customer service and delayed responses to their concerns, and not being in a position where the goods or services provider feels that they need to earn the customers' business. This entitlement of the business in a monopoly may result in its ultimate downfall. Thus, it is important to determine whether the term monopoly is justified in the case of the KSA's telecommunications industry.

3.2.1.1 ADVANTAGES OF THE MONOPOLY SYSTEM

According to Albinger, a monopoly system provides a wide range of advantages to a single company or group of companies, especially in experiencing major growth in the number of target customers for a specific product or service.[303] This subsection focuses on three advantages that are pertinent to the KSA's telecommunications market which is dominated by a single (government-owned) entity. These include achieving operational and financial objectives, meeting the expectations of customers, and facilitating the access of poor customers to products and services of good quality.

3.2.1.1.1 Meeting Operational and Financial Objectives

From an organisational perspective, monopoly setting often helps to meet operational and financial objectives. Kousadikar and Singh in this context have shown that the

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2013' (*STC*, 2013) <http://www.stc.com.sa/wps/wcm/connect/english/stc/resources/a/b/abbbc4a0-9da5-40aa-9dad-
f9c2def78433/2013-Annual-en.pdf> accessed 10 October 2017.

[301] See Eduardo Engel, Ronald Fischer and Alexander Galetovic, 'Least-Present-Value-of-Revenue Auctions and Highway Franchising' (2001) 109(5) Journal of Political Economy 993, 994.

[302] Barry R Rodger and Angus MacCulloch (n 298) 8.

[303] Jürgen Albinger, 'Economic Model for Monopoly Analysis in Telecommunication: Proposal to Demonstrate Uniqueness' (2009) 2(1) Business Intelligence Journal 43, 43.

setting not only helps to acquire the powers for determining the price of a particular product or service but also helps reduce a major cost that is generally required for a company or group to introduce or promote the product or service in a particular market.[304] Conversely, the setting is also observed as a key element that provides a major set of advantages to the target customers. In this context, a monopoly system often helps customers to obtain adequate access to the desired products or services. Moreover, the system also offers benefits to customers in the form of exceptional features than the other similar types of products in other markets that are competitive.

A good example is the innovation of various communication services including social media services with a minimal or lesser amount of charges that provided a competitive advantage to the STC to sustain its dominant position in the telecommunications industry. Services by this company have also offered major opportunities to customers in terms of strengthening their communication process with other individuals located in different areas or nations. This largely contributed to the high penetration rate outlined above. It may also explain why since 2000 the telecommunications industry in the KSA has garnered 15 per cent yearly growth. The wider range of offerings for internet services through packet data and broadband connections have therefore enabled the STC to meet the desires and expectations of customers across the Kingdom. In addition, its feasible packet data service charges along with high speed internet services have secured its sustainable position in the KSA's telecommunications industry.

3.2.1.1.2 Meeting the Expectations of Customers

Selgin observed that the monopoly system of a market enables customers to acquire their desired product or service in accordance with their quality expectations.[305] The monopoly system also helps to avoid duplication or falsification of products offered in a particular market. Therefore, this system ensures that the product or service delivered meets the quality parameters as per the expectations of the customers.[306] A prime example of this are the telecommunications services offered by STC that often

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[304] Anant Kousadikar and Trivender Kumar Singh, 'Advantages and Disadvantages of Privatisation in India' (2013) 3(1) International Journal of Advanced System and Social Engineering Research 18, 18.
[305] George Selgin, 'Milton Friedman and The Case against the Currency Monopoly' (*CiaoNet,* 2015) <https://www.ciaonet.org/attachments/1373/uploads> accessed 10 October 2017.
[306] Ibid.

include quality-based communication tools in accordance with their changing demands. The establishment of home business units offers varied types of television channels by the organisation and has enabled a wide range of customer groups to avail themselves of quality-based television services irrespective of their income levels. Also, the advanced fibre optic network, fibre to the home (FTTH), enabled the company to extend its home-based television service for more than 18,000 kilometres in 2012.[307] The Interactive Television Service (ITS) through FTTH achieved a growth rate of 88 per cent in 2013 compared to the expansion of the network in 2012.[308]

3.2.1.1.3 Enabling Poor Customers to Access Quality Products

Research conducted by Anderson and Tollison reveals that a monopoly system may involve price discrimination which can further provide a major benefit to an economically deprived group of customers.[309] In this regard, an incentive or additional benefit may retain values of customers and increase their trust of being advantaged by the offering of the monopoly system. For instance, a government-owned transport system can provide a discount to a financially weaker segment of people, which can help them to meet their needs or demands.[310] The example of the STC can also be considered in a similar context. In relation to the current internet and data service functions of the organisation, STC provides valuable data packages with roaming data services which significantly help customers to perform necessary activities irrespective of their primary locations. Although the current business strategies of the STC provide major opportunities for the company, the monopolistic nature of its activities in the fixed broadband market has also been recognised to be very advantageous for its customers as well.[311] In this regard, the customers are offered advanced telecommunications services at an affordable cost. The strategy of maintaining penetrative pricing with highly competitive services has enabled the company to meet

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[307] See Jonathan Fiske, *E.C. Competition Law in the Era of Modern Telecommunication* (Unpublished PhD thesis, Hull University, 1998).

[308] Ibid.

[309] Gary M Anderson and Robert D Tollison, 'Morality and Monopoly: The Constitutional Political Economy of Religious Rules' (1992) 12(2) Cato Journal 373, 373.

[310] Ibid.

[311] Ministry of Communications and Information Technology, Information and Telecommunication Technology in Saudi Arabia (Report No. WSIS/PC-3/CONTR/24-E, 2003)

the needs of the customers.[312]

3.2.1.2 DISADVANTAGES OF THE MONOPOLY SYSTEM

Although the existence of a single provider may help to meet the needs and expectations of customers, such a setting can also bring major disadvantages to a particular target group in the market. The most relevant disadvantages in the Saudi Arabian telecommunications industry are discussed here.

3.2.1.2.1 Price Discrimination

The findings of the study conducted by McKenzie reveal that price discrimination due to monopoly may constitute a major hurdle to a target group of customers, especially customers with low purchasing power.[313] The system also creates a major disadvantage for the business in terms of setting its pricing structure for the product or service as a result of inadequate knowledge about its customers and the actual cost of the product. The monopoly system may also substantially reduce the opportunities of customers to consider substitute products or services. For example, the STC provides versatile mobile and wireless services by partnering with clients, especially small-and-medium-sized corporations, from different business industries. This strategy often reduces opportunities for the other telecommunications service providers to extend their business operations or achieve their desired commercial goals because the STC has spread its wings to such an extent that it contracts with other small-and-medium-sized organisations for the provision of services.

3.2.1.2.2 Restricting the Output of Substitute Products

Craig and Campbell also observe that a monopoly system has significant negative effects on the target customers because the system restricts output of substitute products into a particular market.[314] The system often undermines the bargaining power of customers due to the lack of any other marketer or availability of a particular good or service. Price discrimination is another negative effect of monopolies given that the monopolist may charge different prices to different customers for the same

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[312] Ibid.

[313] Richard B McKenzie, 'In Defense of Monopoly: How Market Power Fosters Competition' (*Cato*, 2010) <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2009/11/v32n4-3.pdf> accessed 10 October 2017.

[314] Tom Craig and David Campbell, *Organisations and the Business Environment* (Routledge 2012).

product or service.[315] This enables the monopolist to generate more profits since it is likely to charge higher prices to customers with higher purchasing power or customers who need the product or service more.

However, in the KSA, the telecommunications services of the STC may be provided to different customers at different prices since the Telecommunications Act requires the company to offer advanced communication services to customers across the Kingdom at an affordable rate or price. Article 3 in the general provision of the Act states that the national telecommunications sector is regulated to offer their public telecommunications network along with advanced equipment and services at an affordable price. What is affordable is different to different segments of customers. As such, price discrimination may not necessarily be considered a negative effect of monopoly in such markets. Nonetheless, the Telecommunications Act also seeks to ensure that the service providers create a favourable competitive environment by promoting and encouraging fair competition across each segment of communication services with adequate clarity and transparency. It is difficult to achieve this goal where a company or owner of assets has monopoly power. This is because the latter can control prices and also exclude competition. The main operators, STC, Mobily and Zain are required to adopt fair competitive practices in the mobile services market and promote a wide range of advanced communication services with adequate encouragement to all competitors in the market. Notwithstanding, it remains the case that the government as the majority shareholder in these companies can decide what is fair and appropriate in the circumstance. Moreover, the regulators, the CITC and the GAC, are government agencies which are likely to agree with the government's determination of what is fair and appropriate.

Thus, in the telecommunications market the government can compel the dominant companies to significantly increase profit levels through selling access to the network infrastructure to specific mobile services providers with inelastic demand. The latter are logically willing to pay a higher price, which can be or is agreeable due to no other competitor being present. The STC owns the network infrastructure over which the mobile service providers offer services. What this means is that although Article 1 of the Competition Law prohibits monopoly, it does not prevent the abuse of a state-

[315] Satya R Chakravarty, *Macroeconomics* (Allied Publishers 2002) 353-354.

owned company by controlling the market. Hence, the STC continues to exercise monopoly power and may adopt practices in the market that other operators do not consider fair. It may also decide not to promote a wide range of advanced communication services with adequate encouragement to all competitors in the market.

3.2.1.2.3 The Negative Impact on Consumer Welfare

Gómez-Ibáñez also demonstrated that the monopoly system is not efficient as it often reduces consumer surplus as well as economic welfare in a particular market or area.[316] The monopolist may charge a higher price to customers of any segment. This is detrimental to the consumers who do not have the choice of an alternative product or service. Hence, the communication service operations of the STC include a set of practices that the company adopted by promoting any type of activities that reduce consumers' capability for switching to any other homogeneous products or services. The strategy of not providing adequate opportunity to both the customers and the existing competitors has often helped the STC to increase its values in the markets and enabled it to retain its customers. In addition, a wide range of advanced communication services of adequate quality and affordable prices have often reduced the risk of the STC losing its valuable groups of customers in the KSA.

Research by Jayaram and Kotwani also revealed that the monopoly market system involves a minimum or lesser number of competitors that provide major growth opportunities to the monopolist to increase profits.[317] In this regard, the lack of competition in the marketplace may lead the monopolist to give less focus to maintaining the expected quality of the goods or services. The monopolist may focus on delivering outdated products or services in order to meet the demands of customer, which can substantially minimise the number of customers receiving goods that match their quality related expectations.

Although the fewer number of competitors in the telecommunications industry in the KSA provides such opportunities to the STC, the company has built its strong image

[316] José A Gómez-Ibáñez, Regulating Infrastructure: Monopoly, Contracts, and Discretion (Harvard University Press 2009).

[317] R Jayaram and Namita R Kotwani, Industrial Economics and Telecommunication Regulations (PHI Learning 2012).

and reputation through its enduring performance of offering innovative experiences to its varied customer segments, despite its monopolistic practices. In this regard, the quality of each telecommunications product and service has long been seen as a key element in the STC remaining a strong performer in this market. As such, the monopoly position of the company has not adversely affected its long-term strategy of including strong value in each of its telecommunications service. This is appropriate because the STC has long played a dominant role in the KSA telecommunications sector and acted as a pioneer for the provision of telecommunications services within the industry.

It may therefore be argued that although the telecommunications industry has experienced partial or pseudo privatisation and the perpetuation of the monopoly system, the business strategies and practices of the STC have increased social welfare. The telecommunications service giant has garnered its strong base and consolidated its dominant position through not only introducing innovative products and services but also by incentivising each group of users through its wide-ranging telecommunications services. What is important is that the state-owned company continues to successfully meet the demands and needs of customers.

As such, unlike claims made in previous studies about the motivation for privatisation in developing countries around the world,[318] the government of the KSA did not embrace privatisation because of the poor performance and inefficient operations of public or state-owned companies. Privatisation was deemed to be a means by which the government could attract foreign investment and ensure that customers across the Kingdom were offered advanced telecommunications services at an affordable cost. The next subsection discusses the process by which the privatisation strategy was implemented.

3.22 THE IMPLEMENTATION OF THE PRIVATISATION STRATEGY

The strategy was implemented in four phases:

- **Stage 1**: Corporatization (1998). In this first stage the transfer of ownership and control of the telecommunications activity was undertaken from the state-run telecommunications agency to STC. This was pseudo-privatisation given that the STC,

[318] See William Megginson and Jeffry Netter, 'From State to Market: A Survey of Empirical Studies on Privatization' (2001) 39(2) Journal of Economic Literature 321, 321-389.

although described as independent, was a joint-stock company wholly owned by the government at the time.[319] By 2003, it had sold 30 per cent of its shares through an initial public offering.[320] The government still owned 70 per cent of the shares directly.

- **Stage 2**: Policy and Regulatory Reform (2001). This involved the re-organization of the telecommunications sector and the development of a regulatory framework through the issuance of legislative instruments such as the Telecommunications Act in 2001, its Bylaws in 2002 and the Ordinance of the CITC which established the CITC as an independent regulator.
- Stage 3: Partial Privatisation of STC (2003). Partial privatisation of STC was completed in early 2003, by divesting a 30 per cent stake in the company to the public. This shows that the government intended the STC to become a shareholder-owned public company. However, given that the strategy involved moving from pseudo-privatisation to partial privatisation, it has been argued that the model prioritised by the government lacked commercial business efficiency standards.[321] One-third of the STC's shares were sold to two state-owned pension funds, namely the General Organisation for Social Insurance and the Retirement Pension Directorate, which already held over 65 per cent of the total government debt.[322] The public offering made the STC the largest publicly traded company in the KSA.[323] This implies that the Saudi government still largely controlled the activities of the STC, as well as the market in which it operated.[324] This was not privatisation per se, given that privatisation is successful where it is championed by private entrepreneurs and supported by interest groups.[325]
- Stage 4: Liberalisation. This started with the enactment of the Telecommunications Act in 2001, which established the CITC and tasked the Commission with implementing the liberalisation programme. Up until 1998, the single (state-owned) operator in the telecoms market was the then Ministry of Post, Telegraph and Telephone.[326] The CITC began issuing licenses for VSAT service provisioning in 2003 and data services provisioning in 2005. Two additional licenses were issued in 2004 and 2008 for second-generation mobile services (GSM) provisioning, in addition to third-generation mobile services (3G). This followed from an invitation to bid. Etihad Etisalat obtained a GSM licence for 25 years for SAR 13 billion (about GBP 3.1 billion), which at the time was the highest price paid for a mobile telecommunications

[319] Anthony Shoult (ed), *Doing Business in Saudi Arabia: A Guide to Investment Opportunities and Business Practice* (3rd edn, GMB 2006) 77-78.

[320] Ibid.

[321] Ibrahim Akoum, 'Privatisation in Saudi Arabia: Is Slow Beautiful?' (2009) 51(5) International Business Review 427, 428.

[322] Tim Niblock, *The Political Economy of Saudi Arabia* (Routledge 2007) 214.

[323] Ibid.

[324] Ibid.

[325] See Richard Heffernan, 'UK Privatisation Revisited: Ideas and Policy Change, 1979-1992' (2005) 76(2) The Political Quarterly 264, 264-265; Harvey B Feigenbaum and Jeffrey R Henig, 'The Political Underpinnings of Privatization: A Typology' (1994) 46(2) World Politics 185, 185-186.

[326] Oxford Business Group, *Saudi Arabia 2009* (Oxford Business Group 2010) 166.

licence.[327] In 2005, it launched its GSM mobile services, Mobily, which effectively broke the monopoly in wireless business held by the STC. Mobily gained over 30 per cent of the market in just three years. However, 72 per cent of the shares of Etihad Etisalat are held by government of the KSA.[328] This implies that the liberalisation involved increasing the role of quasi-state actors. Also, in 2005, Integrated Telecom Company (ITC) was given a license to offer broadband, connectivity, satellite and internet services to businesses and consumers.[329] Another mobile licensee, Zain, launched its commercial services in the third quarter of 2008.[330] In addition, the CITC issued the second fixed-line telephone license for Etihad Atheeb Telecom which launched its commercial services in the second quarter of 2009. Then in 2012, Lebara Saudi Arabia (through Mobily) and Virgin Mobile Saudi Arabia were licensed as wire communications providers. However, they do not own the network infrastructure over which they provide services.

In light of the above, it may be submitted that the privatisation strategy implemented in the KSA through the four stages largely involved the transfer of ownership and control from the government to five state-owned companies or quasi-state investors.[331] Hence, the telecommunications activities were simply corporatized and kept wholly under full public ownership. It is argued that this is pseudo-privatisation since it effectively expanded state entrepreneurship and privatised the monopoly previously held directly by the state. The main objective of privatisation ought to be to rectify market failures caused by lack of competition and deficiencies in state control of public companies.[332] However, where the government agency holding a monopoly simply transfers ownership of its assets to a state-owned company, the market does not become more competitive since private companies cannot expand by gaining the market share previously held by the government agency. Also, the public is not given greater choice at competitive prices.[333] As such, the drafters of the privatisation policy did not give sufficient thought to preventing or limiting the abuse of monopoly power,

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[327] Ibid.

[328] 11% is held by the government agency, General Organisation for Social Insurance.

[329] However, the chairperson of ITC is a member of the House of Saud or Royal family, implying that ITC may also be considered a quasi-state actor.

[330] However, the chairperson of Zain is a member of the Royal family, implying that Zain may also be considered a quasi-state actor.

[331] See Kylie Wansink, 'Saudi Arabia – Telecoms, Mobile and Broadband – Statistics and Analyses' (2018) < https://www.budde.com.au/Research/Saudi-Arabia-Telecoms-Mobile-and-Broadband-Statistics-and-Analyses> 05 January 2019.

[332] See George Yarrow et al, 'Privatization in Theory and Practice' (1986) 1(2) Economic Policy 323, 323-324; S Kikeri and J Nellis, *Privatization in Competitive Sectors: The Record to Date* (The World Bank 2002) 20.

[333] Min Z Carter, 'Privatization: A Multi-Theory Perspective' (2013) 14(2) Journal of Management Policy and Practice 108, 108-109.

increasing share ownership and redistributing wealth. The next section also shows that the regulatory environment is still tailored to the needs of state-owned companies or quasi-state investors in the industry.

3.3 THE REGULATIONS AND LEGAL FRAMEWORK

3.3.1 THE REGULATORS

3.3.1.1 THE MINISTRY OF COMMUNICATIONS AND INFORMATION TECHNOLOGY

The Ministry of Post, Telegraph and Telephone laid the foundation in this area for the effective regulation of the industry. The Ministry was put in place in 1976. It was previously a Directorate in the Ministry of Communications.[334] It was mandated with taking over responsibility for all forms of communications in the KSA from the Ministry of Communications that had come into being when the current system was in its infancy. The reason for this is that it was recognised that the Ministry of Post, Telegraph and Telephone was seeking to establish what is now understood as a telecommunications service. The Saudi Arabian public, government and industry have all benefited from this in the ensuing years.[335] Also, at the time, the third basic strategic principle of the Fifth Development Plan for the KSA (1410-1415 AH) required the government to reconsider some policies and regulations in order to give private undertakings more flexibility and freedom and ensure fairness to investors and consumers alike.[336]

In order to regulate the telecommunications service industry in the KSA, the Ministry of Communications and Information Technology was put in place in 2003 to streamline the government's responsibility for supervising the operation and use of modern telecommunications technology. It therefore replaced the Ministry of Post, Telegraph and Telephone. This followed from the establishment of the Standing Committee on e-Commerce in 1999 that was tasked with harnessing IT applications for the benefit of the Kingdom's economy, and the approval of the national policy paper on science

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[334] Saeed Abdullah Al-Gahtani, *An Overview of the Saudi Arabian Telecommunications System* (Unpublished Dissertation, Naval Postgraduate School California 1990) 12.

[335] See Anthony Cordesman and Nawaf Obaid, *National Security in Saudi Arabia: Threats, Responses, and Challenges* (Center for Strategic and International Studies 2007).

[336] See Al-Gahtani (n 335) 61.

and technology in 2002 by the Council of Ministers.[337] The paper lists ten strategic principles guiding the implementation of the science and technology policy.[338]

The ICT sector was looked upon as a key aspect of the KSA's ongoing development in the future due to its potentially positive impact upon both individual citizens and enterprises.[339] Thus, it became apparent that a certain degree of government intervention and regulation was necessary.[340] Regulation in this context was motivated by the public interest theory which is to the effect that markets often fail when they are unhindered because of negative externalities and monopoly; and government intervention is benign and can rectify these failures.[341] The government agency tasked with regulation is deemed to represent the interests of the society rather than the interests of special groups.[342] This contrasts with the Chicago theory or economic theory of regulation that is to the effect that regulation protects special interests rather than the interests of the public at large.[343] An assessment of the regulatory instruments adopted in the KSA must therefore require the determination of whether the instruments have protected the public at large or at least a large subclass or whether they are part of a political process that allows special interest groups to maximise their benefits.

3.3.1.2 THE CITC

3.3.1.2.1 Overview

The CITC also plays an important role in the regulation of the ICT sector. As noted above, the CITC Ordinance established the CITC as an independent (financially and

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[337] See Ministry of Communications and Information Technology (n 312) 4, 12-16.

[338] Ibid, 4-5.

[339] See Abdulaziz Alshuaibi, 'Technology as an Important Role in the Implementation of Saudi Arabia's Vision 2030' (2017) 7(2) International Journal of Business, Humanities and Technology 52, 52-53.

[340] RB Sharma, 'Customers Satisfaction in Telecom Sector in Saudi Arabia: An Empirical Investigation' (2014) 10(13) European Scientific Journal 354, 354.

[341] See Andrei Shleifer, 'Understanding Regulation' (2005) 11(4) European Financial Management 439, 440.

[342] Richard A Posner, 'Theories of Economic Regulation' (1974) 5(2) The Bell Journal of Economics and Management Science 335, 335-336.

[343] The idea was first developed by Stigler who presented an alternative conception of regulation. See George J Stigler, 'The Theory of Economic Regulation' (1971) 2(1) The Bell Journal of Economics and Management Science 3, 3-4. It was subsequently fully developed by two renowned scholars: Sam Peltzman, 'Toward a More General Theory of Regulation' (1976) 19 Journal of Law and Economics 211, 211-240; Gary Becker, 'A Theory of Competition Among Pressure Groups for Political Influence' (1983) 98 Quarterly Journal of Economics 371, 371-400.

administratively) regulator during the second phase of the implementation of the privatisation strategy: policy and regulatory reform. As the regulator of the wider ICT sector, the CITC took over the regulatory functions of the ISU, a department of KACST, which managed the internet infrastructure in the KSA and regulated the activities of ISPs.[344] The OTC Ordinance was issued under the Council of Ministers Resolution No 74 dated 05/03/1422H[345] with a view to then defining the regulatory body's mandate, functions, governance and financing as the regulator in this industry. The CITC Ordinance was therefore put in place by the Saudi Arabian government to specify its tasks and responsibilities so that it could support the further development of the telecommunications industry in the KSA.[346]

3.3.1.2.2 Functions of the CITC

The establishment of the CITC was geared towards opening the Saudi telecommunications market and creating a favourable environment for fair competition. As an independent regulator, the CITC is required to protect the interests of the public and rights of employees in the industry by securing the right to access the public network at reasonable prices, as well as the confidentiality of communications.[347] The telecommunications bylaws of 2002 provide that the CITC must ensure the provision of quality telecommunications services and develop the appropriate regulatory tools for an efficient and competitive market. In this light, the CITC put in place an interconnection system that facilitates the interface between service providers. It also developed national coding and frequency plans based on international standards to safeguard the process of liberalizing the telecommunications industry.[348] The CITC therefore opened the Saudi data and mobile market to competition in the third and fourth stages discussed above. It granted licenses for mobile services, including VSAT services, to public companies such as Etihad Etisalat and Zain as shown above.

The CITC regulations have granted the agency oversight of the KSA's

[344] Freedom House, 'Saudi Arabia' in Freedom on the Net 2011 (Freedom House 2011) 287.

[345] This was amended by the Council of Ministers Resolution No 133 dated 21/05/1424H.

[346] K Al Rowaily and A Al Sadhan, 'Integration of Knowledge Management System in Telecommunication: A Case Study of Saudi Telecom' (2012) 12(11) International Journal of Computer Science and Network Security 42.

[347] Ministry of Communications and Information Technology (n 312) 6-7.

[348] Ibid.

telecommunications sector and make it primarily responsible for regulating ICT-based products and services offered by all the telecommunications service providers in the KSA. The CITC as the regulator is primarily known for maintaining fairness and transparency along with conserving adequate openness and equality among the relevant parties involved in the telecommunications sector of the nation.[349] In this regard, the principles generally guide service operators, the government, suppliers and investors, and each individual or groups of public and commercial users. In order to bring major insight on the development of the sector, the CITC further strives to implement relevant and effective strategies of the Ministry of Communications and Information Technology of the KSA.

Although the CITC enjoys administrative and financial independence, it remains a governmental agency. Thus, just like the Ministry of Communications and Information Technology, the CITC is essentially an instrument that ensures government intervention in the market to rectify failures and ensure open and fair competition. That is why it is stated above that the regulation of the telecommunications industry in the KSA is based on the public interest theory. The CITC is held to be responsible for streamlining and advancing telecommunications services in the Kingdom.[350] It has also successfully managed and controlled tariffs associated with telecommunications and technology-based services; protected interests and relevant rights of the telecommunications service users by enforcing appropriate quality standards for the telecommunications and technology-based services; and increased and enforced strong security awareness of the information in the sector.[351]

The fact that the CITC took over the regulatory role of the ISU with regard to the internet shows that the government of the KSA is averse to the idea of private orderings taking care of market failures. However, it is uncertain whether the CITC and Ministry of Communications and Information Technology are more effective in rectifying market failures than private orderings, thereby justifying government intervention. This is because these government-controlled regulators have not always

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[349] Communication and Information Technology Commission, 'CITC Roles and Responsibilities' (2015) <http://www.citc.gov.sa/English/AboutUs/AreasOfwork/Pages/default.aspx> accessed 26 February 2015.

[350] Ibid.

[351] Ibid.

prioritised the interests of the public, which may motivate the claim that the regulation is captured. The CITC has, for example, filtered and prevented access to websites that it considers ‘offensive’, which include sites that advocate for social and political reforms.[352] Also, the websites of some human rights organisations such as October 26 Women’s Driving Campaign have been blocked, as well as the sites of dissidents based outside of the KSA such as Ali Al-Demainy.[353] Then, in February 2015, the CITC blocked the websites of 41 local news agencies for failure to obtain the relevant licenses and permissions from the Ministry of Communications and Information.[354]

It may be argued that the CITC has been captured by a few political leaders who consider dissent to be offensive, as well as the promotion of certain freedoms and rights. In this light, regulation by the government actually increases the imperfection in the market. There is no doubt that regulatory instruments that are market-based and regulators that are completely independent would reduce the scope of such capture.[355] However, the decisions of the CITC to filter and block access to certain websites do not necessarily impose costs on the economy that are greater than the costs of allowing unfettered access to all websites. The bone of contention here is what constitutes ‘public interest’ and whether there is actually a public interest theory exists in reality.[356] The CITC receives about 200 requests each day to block sites considered to be offensive by members of the public.[357] It has blocked sites with adult content and also coordinated with the Saudi Arabian Monetary Agency to block phishing sites that are set up to obtain confidential financial or personal information from unwitting members of the public.[358] In this regard, it cannot be argued that regulation by the CITC and Ministry of Communication and Information Technology has been captured by a few political leaders or that the latter have monopolised the coercive power of these government agencies to exploit it for their exclusive benefit. The sites of

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[352] US Department of State, *Saudi Arabia: Country Report on Human Rights Practices* (US Department of State 2015) 22.

[353] Ibid.

[354] Ibid.

[355] Dieter Helm, ‘Regulatory Reform, Capture, and The Regulatory Burden’ (2006) 22(2) Oxford Review of Economic Policy 169, 169.

[356] See Michael Hantke-Domas, ‘The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?’ (2003) 15(2) European Journal of Law and Economics 165, 165-194.

[357] US Department of State (n 71) 23.

[358] Ibid.

dissenters that were blocked constitute a minority of sites blocked by the CITC. Thus, the CITC's actions largely promote public interest.

If we were to discard the public interest theory, which is not recommended here, it should be noted that there is no 'meta-theory' that explains in what sectors regulation should be put in place or dismantled and when.[359] Thus, different theories may be used to justify the use of regulation. In this instance, given the uncertainty regarding what constitutes 'public interest' (as used within the purview of the public interest theory), it may be argued that the theory that best justifies regulation by the Saudi government in the telecommunications sector is the social choice theory. This theory was developed by Arrow to emphasise the indeterminacy or instability of political systems.[360] It is therefore related to the chaos theory developed by McKelvey[361] and Cohen and Matthews[362] amongst others, which sees that any outcome can be obtained from any given agenda in a simple democratic process. Thus, policies are generally transitory. This is equally related to the theory of structure-induced equilibrium, developed by Shepsle and Weingast, amongst others, which sees the effect that given the importance of stability, participants in the political process generally impose constraints on policy that increase the cost of upsetting the status quo.[363] It follows that given the propensity for chaotic behaviour in society, the CITC and Ministry of Communication and Information Technology interpret the relevant laws and impose constraints to make it more difficult to upset the status quo. Hence, they have adopted measures that make it difficult for undertakings and individuals to benefit from IT services or content that may upset the status quo in the KSA. Given the conservative nature of Saudi society, it may be argued that under certain circumstances censorship by the CITC is the efficient choice. This argument does not hold as regards tailoring the regulatory environment to the needs of state-owned

[359] Sam Peltzman, 'The Economic Theory of Regulation after a Decade of Deregulation' (1989) Brookings Papers: Macroeconomics 1, 58-59.

[360] Kenneth J Arrow, *Social Choice and Individual Values* (2nd edn, Wiley 1963). See also, John S Dryzek and Christian List, 'Social Choice Theory and Deliberative Democracy: A Reconciliation' (2003) 33(1) British Journal of Political Science 1, 1-28.

[361] Richard D McKelvey, 'Intransitivities in Multidimensional Voting Models and Some Implications for Agenda Control' (1976) 12 Journal of Economic Theory 472, 472-482.

[362] Linda Cohen and Steven Matthews, 'Constrained Plot Equilibria, Directional Equilibria and Global Cycling Sets' (1980) 47 Review Economic Studies 975, 975-986.

[363] Kenneth A Shepsle and Barry R Weingast, 'Structure-Induced Equilibrium and Legislative Choice' (1981) 37(3) Public Choice 503, 503-519.

companies or quasi-state investors in the industry. This is because all participants in the industry are compelled to rely on the government's arbitrary determination of what upsets the status quo. Thus, regulation by government agencies, whether in accordance with the public interest theory or social choice theory, has simply reinforced the process of pseudo-privatisation and sustained the monopoly of state-owned companies which regulation ought to suppress.

3.3.2 THE LEGISLATION

3.3.2.1 THE TELECOMMUNICATIONS ACT

The Telecommunications Act sets out the basis for regulating the telecommunications sector in the KSA. It was enacted under the Council of Ministers Resolution No 74 of 27 May 2001 and approved following the Royal Decree No. (M/12) of 3 June 2001. There are a number of key provisions of the Telecommunications Act that merit attention in regard to the regulation of the telecommunications sector. For example, Article 2 vests the Ministry of Communication and Information Technology with the sole right to make any necessary changes or amend the policies, as well as plan required developments for the KSA's telecommunications sector. The CITC is also accountable for performing the functions and which duties deliberated and that underpin the Act. Article 3 sets out the key objectives of the Telecommunications Act, which will be discussed in greater detail later in this study. Article 5 addresses licenses for fixed and mobile telephone services, and states that operators must get legal approval from the Council of Ministers. Article 6 contains the required fees that must be paid to the General Treasury for the commercial provision of telecommunications services.

Article 4 restricts the provisions of fixed and mobile telephone services to joint stock operators. It also provides that 'no operator may be dominant or prevent, restrict or distort competition.' Article outlines the reasons why the telecommunications sector should be regulated which include to ensure the provision of access to the public networks and services at affordable prices, safeguard the public interest, and ensure clarity and transparency of procedures, as well as equality and non-discrimination. Thus, this supports the above contention that regulation in the KSA is based on the public interest theory. However, the Telecommunications Act seeks to prevent monopoly which may often result from regulation that is primarily geared towards

protecting the interests of the public at large.

The bylaws of the Telecommunications Act were issued in 2002 by Ministerial resolution. They support the Act and provide specific procedures for the regulation by the CITC. For example, Chapter Two of the Bylaws outlines the procedures and rules for licensing telecommunications services. The Telecommunications Act and its bylaws therefore provide the foundation for the telecommunications sector's regulatory framework through the work of the CITC. The enactment of these statutes was also part of the third phase of the implementation of the privatisation strategy (partial privatisation) discussed above. The Telecommunications Act therefore seeks to ensure that telecommunications services are not only advanced, adequate and affordable in the circumstances, but also that there is an effective climate within the industry for encouraging fair and significant competition. Hence, the legislation acknowledges the importance of competition in the market but unfortunately, it does not recognise the importance of empowering private orderings to tackle market failure. This is because it designates a government agency, albeit financially and administratively independent, as the sole regulator. It is this regulator, the CITC, that must also ensure that communication frequencies are used efficiently to reach a wide range of customers, advanced telecommunications technologies are transferred and increased efficiently, adequate transparency and clarity in different communication processes are realised, and valuable interests of the public are protected along with those of valuable stakeholders ranging from communications service users to investors of the companies.[364]

3.3.2.1.1 The Primacy of Public Interests

The provisions discussed above clearly demonstrate the primacy of public interests. The goals of the Act are to reconcile the needs of citizen consumers with a regulatory framework that would permit economic sustainability within the market sector and prohibit anti-competitive practices that could have widespread detrimental effects. However, the above discussion also shows that the drafters of the Act did not perceive

[364] See K Al Rowaily and A Al Sadhan, 'Integration of Knowledge Management System in Telecommunication: A Case Study of Saudi Telecom' (2012) 12(11) International Journal of Computer Science and Network Security 42; Robert Horwitz and Willie Currie, 'Another Instance Where Privatization Trumped Liberalization: The Politics of Telecommunication Reform in South Africa - A Ten-year Retrospective' (2007) 31 Telecommunication Policy 445, 445.

any major risk of monopoly in the sector since the Act made the sector subject to potential entry and competition. This may explain why following the enactment of the Act and its bylaws, the shareholding of the STC was diversified. As noted above, 30 per cent of its shares was divested to the public. Nonetheless, it is uncertain why the drafters did not think that market failures would be better controlled by the forces of competition rather than a government agency. In this light, it is uncertain how the CITC ensures that service providers efficiently use all available frequencies and provide for telecommunications technologies transfer as soon as they arise. Also, it is uncertain how the CITC ensures the achievement of equality.

Djankov et al argued that the strategies of control of private businesses by the state include public enforcement through regulation, state ownership, market discipline and private litigation.[365] They also noted that these strategies are not mutually exclusive and may operate in the same market. They may be said to have aptly described the telecommunications market in the KSA where all four strategies operate: the regulator is a government agency; the majority of shares of the STC (the largest operator) are owned by the government and the 30 per cent stake divested in the public was actually given to two state-owned pension funds, namely the General Organisation for Social Insurance and the Retirement Pension Directorate, which already held over 65 per cent of the total government debt; market discipline or market-based management of risk and promotion of transparency[366] in the sector operates in accordance with the wishes of the government since it owns and directs the activities of the STC; and private litigation in Sharia courts would no doubt reinforce the idea of social control of business.

3.3.2.1.2 The Effectiveness of the Regulation by the State

As such, it may be contended that the rules and procedures contained in the Telecommunications Act and its bylaws impose strategies of social control of businesses in the telecommunications sector and provide guidance to the service providers themselves and all other parties considered to be relevant in the industry to

[365] S Djankov et al, 'The New Comparative Economics' (2003) 31 Journal of Comparative Economics 595, 596.

[366] For a critical analysis of the market discipline theory, see David Min, 'Understanding the Failures of Market Discipline' (2015) 92 Washington University Law Review 1421, 1421-1501.

make the process of regulation by the state as efficient as possible.[367] Nonetheless, what is important is whether the regulation by the state is efficient. Shleifer argues that the premise of the enforcement theory of regulation (that favours public intervention in the market) is that all of the four strategies for social control of businesses discussed above are imperfect, and the government must choose between the imperfect alternatives.[368] Hence, there must be a trade-off between disorder (caused by private undertakings cheating, overcharging or imposing external costs) and dictatorship by the government that imposes the costs on the dishonest private agents. However, the government should choose the strategies for social control only when it is established that market discipline is unable to enforce good conduct in the market. This is important because the cost of market discipline is very low for the public regulator. In the KSA, the CITC has been assessed as being effective in enforcing a number of different principles including openness, transparency, fairness and equality between the different stakeholders involved.[369] It achieves these goals through its functions of maintaining transparency in telecommunication practices, ensuring the providers are compliant, protecting consumers and the public interest by enforcing the law's anti-competitive provisions, and subjecting all providers to the same compliance rules and standards. Furthermore, the CITC is also successfully playing the role of bringing about the effective implementation of the Saudi Arabian government's strategies for regulating the telecommunications industry so as to benefit the country as a whole.[370]

Thus, it may be argued that public intervention and 'dictatorship' seem to be effective in the KSA. However, it is uncertain why this approach (including the social control of business) was adopted without prior thought to the question of how effective market discipline would be in the telecommunications industry of the KSA. Surely, this question is important since the cost of efficient market discipline is very low for the state. Nonetheless, it may be said that the strategy of pseudo-privatisation and the public interest theory are aligned with the public enforcement of regulation that was

[367] MD Alsuraihi and HO Bashraheel, 'Information and Communication Technologies, ICTS in the Saudi Household' (2013) 3(3) Journal of Asian Scientific Research 286, 286.

[368] Andrei Shleifer and Robert W Vishny, 'Politicians and Firms' (1994) 109(4) Quarterly Journal of Economics 995, 995-1025.

[369] See Rayed Al-Ghamdi, Steve Drew and Osama Al-Faraj, 'Issues Influencing Saudi Customers' Decisions to Purchase from Online Retailers in the KSA: A Qualitative Analysis' (2011) 55(4) European Journal of Scientific Research 580.

[370] Ibid.

established by the Telecommunications Act and its bylaws. This is because after opening the market through pseudo-privatisation, the government indirectly remains in control of the STC, and after liberalisation by issuing licenses to quasi-state investors such as Mobily (Saudi Telecom Company) and Etihad Etisalat the government remains indirectly in control of the telecommunications market.

3.3.2.2 THE COMPETITION LAW OF 2004

The Competition Law of the KSA can be duly regarded as a major influence on the continuous pace of the nation's telecommunications business sector growth. Promulgated in June 2004 through Royal Decree No M/25 and becoming effective from January 2005, the Competition Law along with its regulatory norms and competition-related rules created a strong regulatory regime for the Kingdom. The regulatory guidelines and rules contained in the 21 articles of this law are governed by the GAC. They are applicable to all business entities irrespective of whether they are domestic and global subsidiaries in the Kingdom. However, the Competition Law is not applicable to state-owned companies, although the regulatory norms in the regime restrict domination of any company governed by a public agency or organisation of the nation.[371]

The Competition Law consolidates some important decrees that prohibit some activities for certain persons.[372] The Law applies together with many laws that have had a major influence on the telecommunications sector in the KSA particularly those that aim at enhancing the quality and reliability of telecommunications services offered by both domestic and global service providers including the STC, Integrated Telecom Company, Bayanat Al Oula for Network Services and Etihad Etisalat/Mobily service operators. The most important of these laws is the Telecommunications Act. Given that the Competition Law was promulgated after the Telecommunications Act, the majority of its provisions are not included within the Act. As such, the Competition Law serves as an overarching regulation and plays a gap-filling role in regard to matters on

[371] Al Tamimi & Co, 'Saudi Arabia: The Competition Law Regime, Who Does the Competition Law Apply to?' (Al Tamimi & Co, 2013) <http://www.tamimi.com/en/magazine/law-update/section-5/november-4/saudi-arabia- the-competition-law-regime.html> accessed 10 October 2017.

[372] See for example, The Civil Service Act enacted by Royal Decree Number (M/49), dated 27 June1977; the Law of Judiciary enacted by Royal Decree Number (M/78), dated 1 October 2007; and the Implementing Regulations of The Code of Lawyers Practice enacted by Minister of Justice Decree Number (4649), dated 17 August 2002.

which the Telecommunications Act is silent. Nonetheless, it is uncertain which law should apply to govern competition issues in the telecommunications industry. Both laws were promulgated through a royal decree.

In relation to the primary roles of the Competition Law, its regulatory policies include a strong set of core provisions that prohibit any type of agreements between organisations that are subject to the law that would result in a negative impact on commerce or reduce the business operations of other organisations in the nation. Restricting the ability of a large organisation to achieve a dominant position in the telecommunications sector can also be regarded as a key role of both the Telecommunications Act and the Competition Law. In this regard, by confining the ability of the considerably larger telecommunications operators to play a dominant role and undermine the services of other operators, the Competition Law may be said to be important in ensuring fairness and equality in the market. The provision underpinning the regulation plays a pervasive role for each marketer, ranging from small-to-medium-sized companies to get equal opportunity. With regard to the telecommunications sector, it is uncertain whether the above applies to the STC. It is also uncertain whether the Competition Law applies together with the Telecommunications Act to achieve the above goals or it is a question of which regulator is enforcing good conduct. Thus, where the CITC seeks to issue sanctions to ensure fairness and equality, the Telecommunications Act will apply, and where it is the GAC, the Competition Law will apply.

3.3.2.2.1 Obstacles to the Implementation of the Competition Law

The implementation of the Competition Law in the telecommunications sector faces some important obstacles. First, government agencies are exempt. Secondly, the Commercial Agencies Law adopted by Royal Decree No M/11 of 23 July 1962 allows private undertakings to monopolise goods through 'exclusive agents'. Thirdly, the government is the majority shareholder in many dominant companies as shown above. Given that it is the GAC that is tasked with enforcing the law, there is a problem of conflict of interests since the GAC is also run by the government.

The KSA is an example of a country whose government has implemented a wide privatisation programme but retains a large presence in the market. The umbilical cord between the state and market has not been cut, leaving sufficient room for several

complex problems. Some of the problems include regulatory capture, less competition, and inefficiency. Shleifer and Vishny noted that partial privatisation sometimes provides little incentive to restructure since it is easier for the state-owned company to extract rents from the government than carry out difficult reforms.[373] Also, the government is under pressure to keep such companies afloat by providing subsidies which then shield the companies from competition. As noted above, in the KSA, it is more appropriate to talk of pseudo-privatisation rather than partial privatisation. This has led to a suboptimal level of competition where the state-owned companies that dominate the market are not compelled to share their gains with consumers. Moreover, it is shown in this section that the regulatory framework is not set up to prevent the dominant companies in the market from colluding with bureaucrats to serve interests other than those of consumers and taxpayers.

The above problems may be said to be linked to the strategy of pseudo-privatisation, rather than privatisation, the public interest theory governing regulation and the public enforcement of regulation established both by the Telecommunications Act and the Competition Law. Thus, after opening the telecommunications market through pseudo-privatisation, the government indirectly remains in control of the market. The Competition Law, as well as the Telecommunications Act, has created a pseudo-independent regulator and helped the Saudi government to privatise monopoly since the government has reduced its direct participation in the industry but increased the role of quasi-state investors in the management of the largest providers in the industry.[374] Although it may be argued that the telecommunications market is actually an oligopoly since the fixed broadband and mobile services market is dominated by three large companies, the STC, Mobily and Zain, it is more appropriate to talk of monopoly since the state largely owns the three companies and retains such control in the market that makes possible the manipulation of prices. It follows that the main shortcoming of the Telecommunications Act and Competition laws is that they have perpetuated the problem of state and quasi-state monopoly. This is especially the case

[373] Andrei Shleifer and Robert W Vishny, 'Politicians and Firms' (1994) 109(4) Quarterly Journal of Economics 995, 995-1025.

[374] See also the discussion on pseudo-privatisation in European countries where the governments are said to use legal tricks to keep the market under control: Kirill Razoglov, 'The Conflicts between Profits and Politics: Cultural Industries in Europe' in Peter B Boorsma, Annemoon van Hemel and Nikki van den Wielen (eds), *Privatization and Culture: Experiences in the Arts, Heritage and Cultural Industries in Europe* (Kluwer Academic Publishers 1998) 166-167.

in the fixed broadband market where the STC is favoured with infusions of capital that guarantees its monopoly status.[375] With regard to the mobile services market, although the quasi-state investors, the STC, Mobily and Zain, have competitors such as Virgin Mobile and Lebara, the government still controls a large enough share of the market through the quasi-state investors.[376]

3.4 CONCLUSION

The telecommunications sector was the first to be privatised in the KSA with the objectives of increasing the efficiency of and ensuring fair competition among private undertakings in the industry. However, it was shown above that what actually happened was that the telecommunications activity was corporatized, but also kept wholly under full public ownership. Hence, it was pseudo-privatisation given that assets were de facto transferred to state-owned undertakings or quasi-state investors, thereby expanding state entrepreneurship. For example, one-third of the STC's shares were sold to two state-owned pension funds which already held over 65 per cent of the total government debt. Also, Etihad Etisalat obtained a GSM licence for 25 years. In 2005, it launched its GSM mobile services, Mobily, which effectively broke the monopoly in wireless business held by the STC. Mobily then gained over 30 per cent of the market in just three years. However, 72 per cent of the shares of Etihad Etisalat are held by the government of the KSA. Then subsequent mobile licensees, ITC and Zain, launched their commercial services in 2005 and the third quarter of 2008. However, the chairpersons of ITC and Zain are members of the Royal family. As such, the drafters of the privatisation policy did not give sufficient thought to the questions of preventing or limiting the abuse of public monopoly power, encouraging diverse share ownership and redistributing wealth.

In the same vein, it was shown that the ICT sector was looked upon as a key aspect of the KSA's ongoing development due to its potentially positive impact upon both individual citizens and enterprises. Thus, it became apparent that a certain degree of government intervention and regulation was necessary. Public enforcement of

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[375] For an analysis of different ways in which the state can perpetuate monopolies and oligopolies, see Wolfgang Hoeschele, *The Economics of Abundance: A Political Economy of Freedom, Equity and Sustainability* (Gower 2010) 41-43.

[376] For the definition of monopoly based on control of market share, see Michael L Benson and Sally S Simpson, *White Collar Crime: An Opportunity Perspective* (Routledge 2009) 113.

regulation was therefore established by the Telecommunications Act and the Competition Law. It is suggested that this is based on the public interest theory, and to a lesser extent on the social choice theory. Hence, what is important is prioritising the interests of the public at large. The state largely owns the three companies that dominate the market and therefore retains such control that makes possible the manipulation of prices to ensure that they are affordable to all customers. It also ensures that customers acquire their desired product or service in accordance with their quality expectations. However, the researcher was unable to find any evidence that the drafters of the relevant statutes and policies have given sufficient thought to the question of market discipline or whether private orderings may be more efficient in rectifying market failures. Also, the fact that the state maintains a large presence in the market and controls the regulators still leaves room for complex problems such as conflict of interests and regulatory capture. As such, it is contended that with the continuous expansion of the telecommunications market and the entry of companies with no ties to the state, the government should consider empowering private orderings to tackle market failure.

CHAPTER 4

DIFFERENT TYPES OF ABUSE BY DOMINANT PLAYERS IN THE SAUDI TELECOMMUNICATIONS SECTOR

4.1 INTRODUCTION

Free markets are characterized by competition between firms and products. This kind of competition is in theory beneficial to the consumers and the entire market because each company will strive to produce the best products so as to attract more customers. Consumers in turn have a wide range of high-quality products to choose from. This competition may also in theory lead to improved efficiency among firms and the better utilization of resources, hence avoiding unnecessary wastage. Despite these advantages, pure free markets rarely exist. This is because the government intervenes in some situations so as to regulate the distribution of goods and services.[377] This intervention is necessary and healthy in a free market as it aims to help both the consumers and producers. Thus, government may regulate the objectives of firms. Since maximization of profits is the main objective for producers, some of them may feel compelled to use unscrupulous means to meet this objective. They may, for instance, exploit their workers and consumers by charging high prices or restricting competition. The government has to step in to ensure there is a level playing field for all producers as well as promoting and protecting the rights of consumers and workers.[378]

In the Saudi telecommunications sector prior to the enactment of the Competition Law, such unsavoury practices were employed by the major market players in an attempt to retain their dominance and eliminate threats from competitors. In this chapter, emphasis will be placed on the anti-competitive practices perpetrated by the largely

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[377] See Wan Yusoff, *The Role of Ethics, Maqasid Al-Shari'ah, Morality and Altruism in Economic Life* (Unpublished PhD thesis, Kolej Universiti Insaniah 2010). For the justification of government intervention, see Philip Bond and Italy Goldstein, 'Government Intervention and Information Aggregation by Prices' (2015) LXX(6) *The Journal of Finance* 2777, 2777-2782; Salvatore Schiavo-Campo and Hazel M McFerson, *Public Management in Global Perspective* (ME Sharpe 2008) 35-36; Jeffrey M Lacker, 'Does Adverse Selection Justify Government Intervention in Loan Markets?' (1994) 80(1) *FRB Richmond Economic Quarterly* 61, 61-64.

[378] See Glynn S Lunney, Jr, 'Atari Games v. Nintendo: Does a Closed System Violate the Antitrust Laws?' (1990) 5(1) Berkeley Technology Law Journal 15, 16.

state- owned STC, which consistently took advantage of its dominant market position in the Saudi Arabian telecommunications sector.

It will be shown that the Telecommunications Act (TA) was an attempt to open up the Saudi market to greater privatisation[379] and encourage competition within the sector,[380] given the benefits of a free market. The statute sought 'to ensure the creation of [a] favourable atmosphere to promote and encourage fair competition in all fields of telecommunication'. which also included providing 'advanced and adequate telecommunication services at affordable prices' and safeguarding 'the public interest and user interest',[381] However, the persistence of these abusive practices by the STC limited the effectiveness of the Act within the Kingdom.

This chapter therefore seeks to establish that although associating the telecommunications sector with the free market economy may be beneficial to society, government intervention is necessary, especially in a developing society such as the KSA. It explores the different ways in which undertakings could abuse their dominant power in a free market and then describes what occurred in the Saudi telecommunications sector prior to the introduction of an explicit competition law.[382] It then seeks to determines whether the coming into force of the competition provisions of the Telecommunications Act resulted in any significant changes. In this light, it assesses the effects-based approach adopted by the Saudi legislator.

4.2 PRE-COMPETITION LAW TELECOMMUNICATIONS MARKET

Prior to the enactment of the Saudi Competition Law, there were two important phases of the telecommunications sector's history, namely the period prior to the enactment of the Telecommunications Act, and the period after the Telecommunications Act came into force and prior to the enactment of the Competition Law. The first phase may generally be described as one of public monopoly in the telecommunications sector as shown in Chapter Three. During this period, there were no laws regulating anti-competitive conduct or promoting market competition. Also, there were no

[379] See Articles 12 to 23 of the Telecommunications Act.
[380] Ibid, Articles 24 to 27.
[381] Ibid, Article 3.
[382] See Jonathan Fiske, *E.C. Competition Law in the Era of Modern Telecommunication* (Unpublished PhD thesis, Hull University 1998)

licensure provisions in place to allow new service providers to easily enter the market.[383] Given that the state owned the STC, which had been granted the exclusive ownership and control of telecommunications activity, potential competitors were excluded from the sector. The introduction of the Telecommunications Act was an attempt to open the market up to private players and establish guidelines under which licenses could be granted. However, it was noted in Chapter Three that this attempt resulted only in partial privatisation. Nonetheless, it was important to address the practices adopted by the STC to restrict competition and maintain its relative market position. It is argued in this section that the most effective way of addressing anti-competitive conduct by a state-owned enterprise is to align the telecommunications sector more closely with a free market economy.

4.2.1 THE IMPACT OF THE FREE MARKET ECONOMY

Free market economies have for a long time been associated with capitalism.[384] However, recent years have also seen socialists adopt this market structure.[385] A free market economy is one which primarily functions according to the market forces of demand and supply, with little or no government control.[386] Goods and services in a free market are distributed based on the principle that their prices should be determined entirely by market forces. Hence, the price of goods and services changes depending on the changes in supply and demand. Generally, when the supply of goods is high, the prices will be low.[387] On the other hand, when the demand is high the prices of goods and services will shoot up. Proponents of the free market argue that the distribution of goods and services in a free market as well as the hierarchy

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[383] See Chapter Three.

[384] See Martin Rhonhemer, 'Capitalism, Free Market Economy, and the Common Good: The Role of the State in the Economy' in M Schlag and J Mercado (eds) *Free Markets and the Culture of Common Good: Ethical Economy* (Vol 41, Springer 2012) 3-5; Robert Boyer, 'Capitalism Strikes Back: Why and What Consequences for Social Science?' (2007) *Revue de la Regulation* 1, 1-5.

[385] It must be noted that the concept of capitalism as a socio-economic system is much broader than the concept of free market, since capitalism is based on the private ownership of capital. Also, free markets may exist in societies where the ownership of capital is organized in a different way, hence the talk of market socialism. See Karl Polanyi, *The Great Transformation* (Beacon Press 1944) 57; Frank Cunningham, 'Market Economies and Market Societies' (2005) 36(2) *Journal of Social Philosophy* 129, 129-133. See generally, Bruce R Scott, *Capitalism: Its Origins and Evolution as a System of Governance* (Springer 2011).

[386] Mark Anthony Martinez, *The Myth of the Free Market: The Role of the State in a Capitalist Economy* (Kumarian Press 2009) 4-5.

[387] Gary M Anderson and Robert D Tollison, 'Morality and Monopoly: The Constitutional Political Economy of Religious Rules' (1992) 12(2) Cato Journal 373, 374.

between consumers and capital are adversely affected by external factors such as government regulations and monopolies.[388]

Free market economies are beneficial in a number of ways. Since prices are determined by the forces of demand and supply, they are likely to be affordable to the majority of consumers.[389] When the prices go higher than what most consumers can afford, they are likely to shift their demand to other competing products. This will force producers to increase their supply so as to lower prices and attract more customers. This is advantageous because consumers can control prices so that they within affordable ranges.[390]

The other advantage of a free market economy is the creation of employment opportunities. When demand for a product goes up, businesses have to employ more people so as to produce more goods to meet the demand. This demand may create employment opportunities such as bookkeeping, marketing agents and vendors.

In such economies, consumers in theory have the freedom to either buy or reject products because of the wide variety of products to choose from. Also, producers benefit because they only need to focus on producing those goods and services which are in demand.[391] This enables them to make maximum profits since they will only be producing goods and services that have a ready market. This also helps them to use their resources effectively.

Free markets are also characterized by competition between firms and products.[392] This kind of competition is beneficial to consumers and the entire market because each company will strive to produce the best products so as to attract more customers. The latter in turn have a wide range of products to choose from. This competition will

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[388] See Maurice E Stucke, 'Is Competition Always Good?' (2013) 1(1) *Journal of Antitrust Enforcement* 162, 163; James W McKie, 'Regulation and the Free Market: The Problem of Boundaries' (1970) 1(1) *The Bell Journal of Economics and Management Science* 6, 6-8.

[389] See Anthony Boardman et al, *Cost-Benefit Analysis: Concepts and Practice* (5th edn, Cambridge University Press 2018) 113; Michael W Clune, *American Literature and the Free Market, 1945-2000* (Cambridge University Press 2010) 166.

[390] Richard B McKenzie, 'In Defense of Monopoly: How Market Power Fosters Competition' (*Cato*, 2010) <http://object.cato.org/sites/cato.org/files/serials/files/regulation/2009/11/v32n4-3.pdf> accessed 10 October 2017.

[391] See Andrew Gillepsie, *Foundations of Economics* (Oxford University Press 2007) 85-88; Susan Grant and Chris Vilder, *Economics in Context* (Heinemann 2000) 85.

[392] Andrew Gillepsie, ibid, 85-88.

also lead to improved efficiency among firms leading to better utilization of resources, hence avoiding unnecessary wastage.

It follows from the above that associating ICT with the free market economy may be beneficial to society.[393] This may have a positive effect on the distribution of existing information. Older means of distributing information are replaced by faster and more effective means due to competition between producers.[394] However, it must be noted the development of ICT is a process that is often punctuated by disruptive inventions or infringements of intellectual property rights.[395] In this light, Crowe notes that the policymaker must seek to achieve a balance between promoting competition in a free market and regulating the behaviour of producers and distributors.[396] With regard to the promotion of competition, the policymaker must note that ICT is not a utility industry as well as a natural monopoly. It is 'a leg whose development has lagged due to central planning, embraced and encouraged by entrenched incumbents."[397] The policymaker must also note that innovation is largely due to competition. Companies that dominate an ICT era seldom break new ground with innovative developments. Thus, de facto monopolies are counterproductive in the industry.[398] It follows that the fact that the free market may be beneficial to society does not imply that the government must simply cut off all the fetters of regulation and let the free market work without any form of government supervision and control. The next section shows why regulation is required, even if it is in a limited form.

4.2.1.1 GOVERNMENT INTERVENTION IN THE FREE MARKET

There are a number of reasons why the government may need to intervene in an otherwise free market. A primary reason is to regulate the objectives of firms acting within the market sector.[399] Given that firms wish to maximise their profits, they may

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[393] See Eric M Swedenburg, 'Promoting Competition in the Telecommunications Markets: Why the FCC Should Adopt a Less Stringent Approach to Its Review of Section 271 Applications' (1999) 84 *Cornell Law Review* 1418, 1466-1474.

[394] See Fargundes Perez, 'The Case for a Deregulated Free Market Telecommunications Industry' (1994) 32(12) *IEE Communications Magazine* 63, 63-70.

[395] Valerio Torti, Intellectual Property Rights and Competition in Standard Setting: Objectives and Tension (Routledge 2016) 116-118.

[396] James Crowe, 'Regulation and Free Markets: How to Regulate the Telecommunications Industry in the New Economy' (2003) 2 *Journal on Telecommunications and High Tech Law* 429, 435.

[397] Ibid.

[398] Ibid.

[399] See José A Gómez-Ibáñez, *Regulating Infrastructure: Monopoly, Contracts, and Discretion* (Harvard

oten be tempted to engage in anti-competitive practices to achieve these goals. As a result, these practices can taint the economic sector and have both business and societal impacts. In such circumstances, the government can intervene to assess the objectives of the company as well as the means through which they will achieve those objectives in order to protect the health of the economy, other businesses and the company's employees.

A free market may also lead to strict production of only those goods that are in demand.[400] Certain goods and services that are necessary but not in demand at certain points in the market may not be produced. This will lead to the destabilization of the economy as well as the lives of poor people who may not be able to afford the goods that are in high demand. The government therefore steps in to regulate the market so as to ensure that both highly demanded and necessary goods and services are produced at the same time.

The government can also step in to advance and promote the rights of disadvantaged members of society such as the elderly and disabled.[401] These people may be avoided by companies who may not feel their skills will enable their businesses to maximize their profits. The government aims at ensuring these people have a role to play in the production of goods and services. In some cases, consumers may prefer to increase demand for not so good products such as alcohol, cigarettes and other drugs or demerit goods at the expense of merit goods such as legal and healthy products. The government has a duty to step in to regulate supply and demand for the demerit goods and protect the citizens' welfare.[13]

Thus, while a free market may be ideal for promoting competition and enhancing efficiency, there are instances where government intervention is important to ensure a level playing field for all producers, as well as the protection of the rights of consumers and workers.[402] The need for government intervention in the sector market is reflected by the objectives and competition provisions of the Telecommunications

University Press, 2009).

[400] McKenzie (n 391) 3.

[401] Ibid.

[402] L Waverman, D Coyle and D Souter, *ICT in Saudi Arabia: A Socio-economic Impact Review* (STC 2011) 11-12.

Act as shown below.

4.2.1.2 GOVERNMENT INTERVENTION IN SAUDI ARABIA

As mentioned in Chapter Three, the primary objective of the Telecommunications Act is to provide advanced and adequate services at affordable prices that would be easily accessible to Saudi citizens.[403] The legislature sought to do this by creating an environment that would encourage fair competition in the telecommunications sector and protect the public interest. One of the primary ways that it sought to achieve these objectives was through the Competition Rules set out in Chapter Six of the Telecommunications Act.[404]

The Competition Rules provide that operators are prohibited from abusing their positions in the market to obtain a dominant position.[405] Further, operators are explicitly prohibited from entering into agreements that might assist an operator in obtaining a dominant position or otherwise prevent, restrict or distort competition in the sector. In an attempt to use the government's position to prevent anti-competitive behaviour on an ex ante basis, the Act requires operators to obtain the board's approval for mergers or for purchasing more than 5 per cent of the ownership of another operator or a percentage that creates a dominant position in the sector.[406] Most importantly, the law restricts operators from undertaking any activities or actions that would constitute an abuse of a dominant position.[407] Despite the law's express condemnation of such practices, and the fact that these practices fall foul of intrinsic Sharia principles applicable to all businesses operating within the Kingdom, the telecommunications sector in the Kingdom has still witnessed significant instances of dominance by market players and the abuse of those dominant positions. The next section discusses how these dominant practices manifest themselves within the telecommunications sector.

[403] See Article 3 of the Act.
[404] The rules are contained in Articles 24 to 27.
[405] See Article 24.
[406] See Article 25.
[407] See Article 27.

4.3 Dominance

Dominant power in this context refers to a position of economic strength, acquired by an institution or individual, which is enjoyed via the implementation of undertakings that enable them to thwart effective competition from being maintained in the relevant market.[408] While Saudi law did not provide a definition of dominance prior to the enactment of the Competition Law,[409] the Sharia principles that apply in the Kingdom prohibit monopoly which may lead to the abuse of a dominant position.[410] As per Article 2 of the Competition Law, dominance is defined as a state where one company assumes a superior role which allows it to benefit from all the advantages that are evident in that specific market. As such, it may be argued that when a company is able to dominate a market through its brand, products and/or services, as well as through incorporating its strategies, the company may abuse the dominant position by acquiring an even bigger market share.[411] Article seeks to prevent this from happening.

Further, Article 5 of the Competition Law provides that a company that dominates the market with its products and/or services should not influence consumers to adopt their beliefs. Nonetheless, having a dominant position is legal but abusing that power is strictly prohibited by the Competition Law. This aims to ensure the promotion of fair trade. Abuse, and the forms that it can take, will be explored in further detail in the next sections. Before that, the difference between simply obtaining a dominant position and abusing that position will be elaborated. If a company is popular among consumers either due to its longstanding history in the market or the particular level of service it provides but has not engaged in anti-competitive behaviour then this would be a permissible position of dominance. However, if a company sells its products at a lower cost than its production cost in order to reduce competition, this could be considered obtaining a position of dominance through impermissible and exploitative means.

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[408] David I Rosenbaum, *Market Dominance: How Firms Gain, Hold, or Lose It and the Impact on Economic Performance* (Praeger 1998) 3.

[409] Article 1 of the TA simply defines a 'dominant operator' as one 'whose service covers at least 40% of specific telecommunications market in the Kingdom, unless the Commission decides to change this share according to the market situation.' Article 24 further provides that 'operators are prohibited to enter into agreements with each other to undertake practices that would create a dominant operator for a certain telecommunications market or prevent, restrict or distort competition.' Chapter 5 of this thesis discusses the definition under the Competition Law.

[410] Safinaz M Hussein, 'Is Fair Market Competition Regulated under Syariah Law?' (2014) 5(23) *Mediterranean Journal of Social Sciences* 152, 156.

[411] Nelson (n 131) 6.

Further, if the company creates a situation of artificial shortage or introduces conditions on selling and purchasing, such as tying,[412] then the company would be guilty of abusing its dominant position. In other words, when a company occupies a dominant position in the market, it also has a duty not to exploit that position to the detriment of competitors or consumers. The next subsections discuss the different ways (primary and secondary) in which dominance may become an issue within the telecommunications sector.

4.3.1 PRIMARY TYPES OF ABUSE OF DOMINANCE

Abuse generally refers to a form of maltreatment or an attempt by the abuser to control the behaviour of individuals so as to maintain power and control over them.[413] It incorporates the manipulation of the situation by those with the capability to influence the rest, thus making the latter vulnerable. In most instances, those engaging in abusive deeds do so for their own ends, either to maintain their authority or to maximise personal wealth.[414] The types of abuse at issue in the telecommunications sector encompass omissions, financial abuse, discriminatory abuse in the availability of products and monopoly abuse regarding businesses.[26] Therefore, abuse refers to a wide variety of actions that involve the adoption of manipulative acts by those in power in a bid to maintain their power or rule over the inferior factions for their own benefit.[415] What is important in this context is that the manipulative acts have a detrimental effect on competition.[416] This is called the 'effects-based approach' and helps to narrow down the concept of abuse to anti-competitive behaviour that harms consumers.[417] This implies that abuse is an objective concept and it is not important to establish subjective intent to restrict competition and cause detriment to

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[412] This is the conditioning of the sale of one product on the purchase of another. Where it is not justified by the commercial usage of the products, it may restrict competition in the market. See Alison Jones and Brenda Suffrin, *EU Competition Law: Texts, Cases and Materials* (5th edn, Oxford University Press 2014) 393; Erik Osterud, *Identifying Exclusionary Abuses by Dominant Undertakings under EU Competition Law* (Wolters Kluwer 2010) 84. This is discussed further below.

[413] IBP, *Vietnam Telecommunication Industry Business Opportunities Handbook* (IBP 2015).

[414] IBP, *Saudi Arabia Company Laws and Regulations Handbook* (IBP 2008).

[415] See the definition provided by the Court of Justice of the European Union in Case 85/76 Hoffmann-La Roche v Commission [1979] ECR 461, para 91.

[416] Ibid. See also, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings [2009] OJ C 45/7, para 6.

[417] Case C-209/10 Post Danmark v Konkurrenceradet (Post Danmark I), EU:C:2012:172, para 24. See also, Vivien Rose and David Bailey, *Bellamy and Child: European Union Law of Competition* (7th edn, Oxford University Press 2013) 788.

consumers.[418]

Regarding the telecommunications market, exclusionary conduct is common in the form of exclusive purchasing obligations or exclusivity rebates whereby buyers are required to buy all or most of their products from the dominant supplier.[419] There is also abuse when a monopoly company influences the markets of the product as well as the prices so as to discourage potential investors from venturing into a similar business, thus evading competition.[420] As noted above, abuse can manifest itself in numerous forms, for example, taking advantage of others or accessing confidential information regarding a person or industry and using it as a weapon to blackmail them.[421] The discussion below focuses on two major ways in which a dominant company in the telecommunications sector can exploit its position in an abusive manner.

4.3.1.1 OPERATING INDEPENDENTLY OF COMPETITORS

A company's capability to influence market prices is frequently constrained by its rivals as well as customers because they seek alternative suppliers. However, if a company has full control over the prices without losing its clients or facing challenges from competitors, the company is deemed to have market power. In the case of *United Brands v Commission*, the Court of Justice of the European Union (CJEU) ruled that dominance implies a position of economic strength whereby an undertaking is able 'to prevent effective competition being maintained on the relevant market' because it has 'the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers'.[422]

Significant or substantial market power may constitute a monopoly or dominant power by the company that has no competitive constraints.[423] For example, if the competitor

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[418] Rose and Bailey, ibid, 787.

[419] Richard Whish and David Bailey, *Competition Law* (8th edn, Oxford University Press 2015) 722-723.

[420] OECD, *Private Sector Development in the Middle East and North Africa Making Reforms Succeed Moving Forward with the MENA Investment Policy Agenda* (OECD 2008) 111.

[421] See Anthony Cordesman, *Saudi Arabia Enters the Twenty-First Century: The Political, Foreign Policy, Economic, and Energy Dimensions* (Greenwood 2003).

[422] [1978] ECR 207, para 65. Although neither the TA nor the Competition Law of the KSA provides a definition of dominance, it may be assumed that Articles 1, 24, 25 and 26 of the TA seek the minimise the incidence of similar acts.

[423] Guidance on the Commission's Enforcement Priorities (n 417) para 10.

is offering low quality products as compared to what the dominant one is offering, the dominant company can easily manipulate the prices because it knows that its customers will continue to use its products. This power is typically abused if the company uses it to weaken the competition, restrict potential investors from initiating a similar business venture by setting high standards, interfering with prices by setting unfavourable ones and, above all, contributing to an unconducive environment for rivals.[424] Abuse of dominant power by dominating companies could contribute to adverse economic effects in a country. Thus, it is important that competition law which facilitates the fair running of businesses should be enforced in all markets.[425] It will be argued in this thesis that the Telecommunication Act alone is insufficient to force dominant companies (mostly state-owned) from creating an inhospitable environment for competitors.

4.3.1.2 LACK OF SUBSTITUTE PRODUCTS

Another way in which telecommunications service providers engage in abuse of their dominant positions is by exploiting the absence of substitute products and a reduced level of competition in the market. This is because when a market only has minimal players, any company that offers advanced technology or services can automatically assume a position of dominance with regard to that particular technology or service. When this situation arises, any company that attempts to follow suit may be viewed as disadvantaged because it will be forced to compete with the prices and market set by the dominant company. In this regard, it could be argued that a company that has a dominant position directly or indirectly discourages new entrants in the same market, thus having a negative impact on the market situation. Nevertheless, these practices are prohibited within Sharia principles as they hamper the prosperity of mankind by affecting the overall development of society.[426] When a company becomes successful, which is reflected in their market share, chances are high that the company can manipulate the market and engage in unfair business practices just to increase their profits. Once, the company's actions stop serving economic and social purposes while promoting excesses and arbitrariness, they may be said to be in violation of

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[424] Ibid.

[425] Ibid.

[426] See See Mourad Greiss, 'Enforcing Abuse of Dominance under a Sharia-Compliant Competition Law: A Consumer-Welfare Approach? Implications for MENA Competition Authorities' (2017) 3 Global Competition Litigation Review 145, 145-154.

Sharia.[427]

It will be shown here that this is an issue that the Telecommunications Act broadly, and inefficiently, attempts to address. The statute aims to prohibit companies from taking part in unfair practices and forces them to ensure the sustainability of competition. However, such provisions are difficult to enforce in practice when firms use secondary types of abuse whereb, they reduce competition within the market by manipulating both the prices of products as well as their flow in the market. This takes the benefits away from society and creates an artificial scarcity of products which in turn negatively affects the economic condition of the country. The next subsection discusses these methods of abuse. It distinguishes between exclusionary and exploitative abuse.

4.3.2 THE TWO MAIN CATEGORIES OF ABUSE OF DOMINANCE

Abuse of market dominance can be categorized into two secondary types of practices—exclusionary abuse and exploitative abuse. They represent individual, strategic tactics used by operators in the market to affect competition and secure their position of dominance in the sector. This subsection discusses both categories and the extent to which they are applicable in the Saudi telecommunications sector.

4.3.2.1 EXCLUSIONARY ABUSE

Exclusionary abuse occurs when the dominating firm has the objective to influence or exclude competitors from the market sector.[428] To accomplish this exclusion, the dominant firm deploys various strategies that, once executed, ensure their competitors cannot survive, thereby effectively excluding them from participating in the market sector. The dominating firm does this without the consent of its competitors who will later feel the effects when the deployed mechanism begins to function in the market.[429] The goal of utilising an exclusionary abuse tactic is to force a competitor out of the market, thereby allowing the dominant firm to acquire their share or customers. The

[427] See Marcelo Giugale and Hamed Mobarak, Private Sector Development in Egypt (American University in Cairo Press 1996) 58.

[428] Guidance on the Commission's Enforcement Priorities (n 40) para 62. See also, Chiara Fumagalli et al, Exclusionary Practices: The Economics of Monopolisation and Abuse of Dominance (Cambridge University Press 2018) 1-14; Eleanor M Fox, 'What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect' (2002) 70(2) Antitrust Law Journal 371, 371-411.

[429] Simon P Mabon, *Saudi Arabia and Iran: Power and Rivalry in the Middle East* (IB Tauris 2015).

mechanisms that can be deployed under exclusionary abuse mechanisms are explored below.

4.3.2.1.1 Predatory Pricing

In this case, the dominant firm is referred to as a predator if it sets prices for its products or services so low for a particular period of time that the firm's competitors have difficulty matching them.[430] As a result of the competitor's small customer base, its attempts to match the low pricing of the dominant firm will force the competitor to suffer losses until ultimately it decides to leave the market. Further, this practice ensures that those firms that are on the brink of venturing into that industry sector are discouraged from doing so.[431]

For example, in a situation in which the predator and its competitor are all operating at the same level and targeting the same customer base, and where the quality of services are the same and the products provided are also almost the same, or the predator's products may even be of a higher quality, when the predator lowers the prices of its products, its competitor has no choice but to do the same. This implies that both the predator and the competitor will suffer significant losses. The predator has done this strategically, knowing that these losses will be recovered in the future. Meanwhile, its competitor is forced to unexpectedly lower its prices so as to react to the existing situation. The predator knows that it has some reasonable expectation of success if the gamble goes in its favour because by then it will command a large customer base and the profits made during that period would be sufficient to warrant the losses that it is incurring and foregoing the profit that it could have earned.[432] However, one should note that although the STC used this tactic, it was not necessary for this company in the Saudi telecommunications sector because it had already dominated the market and had no strong competitor to force it into engaging in predatory pricing.[433]

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[430] Guidance on the Commission's Enforcement Priorities (n 417) paras 63-64.

[431] Sebastian Miroudot and Alexandros Ragoussis 'Actors in the International Investment Scenario' in Robert Echandi & Pierre Sauvé (eds), *Prospects in International Investment Law and Policy: World Trade Forum* (Cambridge University Press 2013) 61.

[432] Miguel De la Mano, Renato Nazzini and Hans Zenger, 'Article 102' in Jonathan Faull and Ali Nikpay (eds), *The EU Law of Competition* (Oxford University Press 2014) 390.

[433] Predation is always directly linked to highly competitive markets. See Frank H Easterbrook, 'Predatory Strategies and Counterstrategies' (1981) 48 The University of Chicago Law Review 263,

4.3.2.1.2 Margin Squeeze

This is a type of exclusionary abuse of dominance that arises when a vertically-integrated monopolist sells an upstream bottleneck input to its competitors who are competing in a downstream market while the monopolist dominates the supply of downstream products. A margin squeeze is said to occur when the margin between the price at which the monopolist sells the same product offered by its competitor, who used its raw materials to make it (downstream product), and the price at which the monopolist sells the upstream bottleneck products to its rivals, is too small to enable an efficient downstream competitor to compete.[434] This process weakens the position of the rival firm. At the same time, it limits or discourages the entry of new businesses by providing a conducive business environment for the dominant firm to do business to the detriment of those seeking to enter the market to provide similar products.[435]

4.3.2.1.3 Tying

Tying, as noted above, occurs when the supplier of a particular product sells a product (tying product) with the condition that the buyer should also purchase a different, accompanying product (tied product) from the same supplier or from someone with whom the supplier has a material relationship.[436] If the tied product is not included in the agreement between the supplier and the consumer, then the entire process is an abuse of the supplier's dominant position. Dominant firms achieve tying in various ways. For example, if the buyer enters into a contract clause with the supplier, the supplier may inform the customer that he/she should purchase the tied product before any delivery of the tying product is made. The supplier can also refuse to supply the tying product without the tied product. The real negative effect on rivals is that it might bring about the abandonment of the market for the tied product. For example, some machines are only able to function with spare parts from the manufacturer. Additionally, tying attracts economies of scale as both the tied and tying products are supplied just once.[437] In the Saudi telecommunications sector, the STC achieved this

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265-273.

[434] Guidance on the Commission's Enforcement Priorities (n 417) para 76-79.

[435] Ibid

[436] See also, Angus MacCulloch and Barry Rodger, *Competition Law and Policy in the EU and UK* (Routledge 2015).

[437] Osterud (n 413) 84.

by offering its internet services and television signal through a cable. Any individual who wanted internet in his or her home was required to accept installation of the TV signal and vice versa. The internet and broadcasting services provided by the STC were therefore tied because they were included in the agreement with anyone purchasing a TV or internet modem. In the same vein, although Virgin Mobile KSA has been awarded a license to operate as a Mobile Virtual Network Operator, the company's services are tied to the STC's network. Hence, Virgin Mobile KSA's offerings or products may only be received on frequencies on which the STC's network operates.

4.3.2.2 EXPLOITATIVE ABUSE

The second category of abuse is exploitative abuse which is where the dominant firm intentionally abuses its dominance by charging excessive prices and applies other conditions that are unfair to competitors and consumers.[438] The exploitative categories include price discrimination and excessive pricing.

4.3.2.2.1 Price Discrimination

Price discrimination is a method for abusing a dominant position. It involves the treatment of customers in a unique way without a cost-based or legally adequate reason from a competition law perspective.[439] Price discrimination can be experienced when a firm is charging a different price for a particular product or charging the same amount for a variety of products. Such tactics are expressly prohibited by Article 3(7) of the Telecommunications Act which provides that the objective of the law is 'to ensure principles of equality and non-discrimination.' Also, Article 6(1)(f) of the Implementing Regulation of the Competition Law enacted by the CCP (currently, the GAC) via Resolution No. 13/2006 of 16 December 2006[440] provides that 'Any entity of a dominant position in the market is prohibited from exploiting such a position to violate, limit or prevent competition, including discriminating among clients in similar contracts with respect to "commodity" prices, service charges or terms of sale and purchase thereof.'[441]

[438] Rose and Bailey (n 418) 791.

[439] Whish and Bailey (n 419) 724.

[440] As amended by Resolution No. 25/2008 of 9 September 2008.

[441] See also Article 4(4) of the Implementing Regulation.

The GAC is empowered by Article 2 of the Rules Governing Exceptions and Exemptions to apply the rule of reasons approach to the various forms of prohibitions included in the illustrative list. This approach enables the regulator or adjudicator to assess the pro-competitive features of a restrictive agreement or practice against the anticompetitive effects of the agreement or practice and determine whether the agreement or practice should be prohibited.[442] Where the agreement or practice substantially lessens competition and results in the discrimination against certain customers without any cost-based or legally adequate reason, the GAC is empowered to prohibit the agreement or practice. This implies that the GAC is very important in the development of competition law in the KSA. Nonetheless, in the absence of comprehensive guidelines, it is uncertain whether the GAC may prohibit a practice or agreement that substantially lessens competition but confers substantial benefits to low income consumers. This is in line with the principles of Sharia, as well as the consumer welfare approach[443] in competition law.

An example of price discrimination in the Saudi telecommunications sector is the STC's treatment of cable pricing in the regions it served. The STC had laid an internet cable all the way from the KSA through the sea to Sudan. Then the company charged higher prices in Sudan compared to the KSA for internet provision.[444]

4.4.3.2.2.2 Pricing

In addition to refraining from charging discriminatory prices, a dominant firm should not charge an unnecessarily high price for its items. This is also reflected in Article 3(1) of the Telecommunications Act which provides that services are to be provided at 'affordable prices'. As a rule, the ceiling for inordinate valuation has been set as moderately high and it is common that the costs utilized for establishing an appropriate value are included in the price. However, where a firm imposes an excessive price on its product or service, it bears no reasonable relation to the economic value of that particular product or service. Direction inordinate assessing is regularly identified with

[442] See Herbert J Hovenkemp, 'The Rule of Reason' (2018) 70 Florida Law Review 81, 87-96; Maurice Stucke, 'Does the Rule of Reason Violate the Rule of Law?' (2009) 22 Loyola Consumer Law Review 15, 19.

[443] For an analysis of this approach, see Robert H Bork, The Antitrust Paradox: A Policy at War with Itself (Basic Books 1978) 66, 97. See also Alan J Messe, 'Debunking the Purchaser Welfare Account of Section 2 of the Sherman Act' (2010) New York University Law Review 659, 691 (arguing that Bork conflated consumer welfare and social welfare).

[444] IBP *Saudi Arabia Company Laws and Regulations* (n 415)

high passage boundaries or hindrances to expansion since it is typically impractical for undertakings to keep up a preposterously high price level generally.[445]

4.4.3.3 OTHER TYPES OF ABUSE

Despite attempts to curb abusive tactics by dominant firms, the Saudi Arabian telecommunications sector has experienced competition abuse in recent years. Hence, a fine of SAR 10 million was imposed on the STC for abusing its dominant position, namely, for monopolizing some of the services it provided to its customers. The company is believed to have refused to activate a number of portability services, to have withheld various services to its client, and lastly, to have blocked international calls in violation of Article 3 of the Telecommunications Act, among other provisions. The court concluded that the company's act of blocking customers from switching to a competitor's phone service was an abuse of its dominant position.[446] Remarking on the punishment, the then acting executive director of the GAC, Mohammed Abdullah Al-Qassem, told CNBC Arabiya that under the new anti-monopoly rules violators could be fined as much as 10 percent of their turnover.

This is just one example of how a dominant firm has abused its dominant position in the Saudi telecommunications sector. Unfortunately, examples of anti-competitive conduct abound within the Kingdom's telecommunications industry. Other examples of these common tactics will be discussed in turn in the following subsections.

4.3.3.1 RESTRICTING THE ENTRY OF OTHER FIRMS

The telecommunications industry in the country prior to the introduction of the Competition Law was the subject of monopoly abuse whereby the government itself, as the owner of the dominant telecommunications company, set very high standards in the market, thus restricting the entry of other firms that produced similar products. This was reflected in the limited number of licenses that were issued to competing service providers.

As shown in Chapter Three, the STC was the dominating telecommunications company in the KSA and was responsible for providing all public telecommunications

[445] See Helen Jenkins and Beatriz Y Oxera 'Economics at the Heart of Competition Policy' in Peter Willis (ed), *Introduction to EU Competition Law* (CRC Press 2013) 2.3.
[446] Cordesman (n 336).

services in the country. It provided fixed, mobile and data telecommunication services.[447] According to the competition laws of numerous OECD states, the situation in the KSA was tantamount to the exploitation of market power by a single company or adoption of improper means to attain and retain power.[448] This is because the STC in the KSA, which was a state-owned company, dominated the telecommunications industry by fixing markets and influencing prices making it difficult for other investors to penetrate the market. The actions that the government took with regard to the STC's competitors therefore helped the company maintain its dominant position. The government also set the prices that the STC could charge consumers, making it difficult, if not impossible, for other firms to compete.

4.3.3.2 ILLEGAL TRADE AGREEMENTS

Before the introduction of the Competition Law in 2004, the dominant firms in the telecommunications sector of the KSA, particularly the STC, were involved in an extensive abuse of their dominant positions. For example, as shown in Chapter Three, the STC was involved in anti-competitive practices, such as price fixing, market partitioning and client discrimination, that hindered the entry of new entrants into the market or forced competitors out of the market. Also, the STC has been involved in a number of cases in which the company made secret and informal agreements with its fellow competitors such as Mobily in order to set or stabilize the prices of their services such as the price of telephone calls at certain levels. This is particularly illegal as it often results in an undue advantage to dominant companies at the expense of consumers and competitors. In one case, the court upheld a fine imposed on the STC for intentionally blocking international calls and refusing to activate a number portability service and other monopolizing practices.[449] The STC was subject to a fine of SAR 10 million for violating the competition provisions governing the telecommunications sector. The STC appealed against this judgment, but the decision was upheld by the Court of Appeal.

[447] See also, Oliver Castendyk, Egbert Dommering and Alexander Scheuer, *European Media Law* (Kluwer Law International 2008).

[448] OECD (n 421) 111.

[449] See *Competition Council v STC* (23 December 2015). Although this case was decided after the Competition Law was enacted, the judgment was based on the provisions of the TA.

4.4.3.3.3 MARKET SHARING

Market partitioning is an anti-competitive practice that usually involves a company colluding with its competitors in order to divide the market into their respective zones.[450] For example, the STC has regularly been involved in various forms of market partitioning in an attempt to disadvantage some of its competitors and gain market advantage. With regard to client discrimination, the STC has in the past discriminated against the clients of its competitors by refusing to provide access to services. For example, in the case of *Competition Council v STC*,[451] the latter was charged with refusing to activate the number portability service for individuals using the services of its competitors. Vogel points out that refusal to provide essential facilities was the norm in the KSA's telecommunications sector prior to the introduction of the Competition Law in 2004.[452] This practice often puts competitors of the dominant players in a position of weakness. For example, when the STC refused to activate number portability service for individuals, many of the customers were not able to migrate to the competitor networks. This resulted in a competitive disadvantage to some of the company's market rivals. This explains why in case of recurrence of the same offence the fine imposed was multiplied which meant that the company was required to pay SAR 10 million. This is consistent with the KSA's Telecommunications Act which stipulates such penalties for such offences.[453]

4.3.3.4 PREDATORY PRICING

Predatory pricing was another standard policy used by the STC prior to the establishment of the Competition Law in the KSA. The STC would use the prices they charged for their services to influence the market rates, such as by significantly lowering their prices below the market prices in an attempt to drive their competitors out of the market.[454] At other times, the STC would significantly increase its prices as the only company offering a service because there were no laws to prevent them from

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[450] Sami Debbichi and Walid Hichri, 'Market Power and Collusion on Interconnection Phone Market in Tunisia: What Lessons from International Experiences' (2014) Working Paper GATE 2014-11 1, 3-4 < https://halshs.archives-ouvertes.fr/h0alshs-00956638/document> accessed 08 August 2018.

[451] Ibid.

[452] Frank E Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia* (Brill 2000).

[453] See Leonard Waverman et al, Competition Policy in a Global Economy: Modalities for Cooperation (Taylor Francis 1997)11-12.

[454] See A Abd-Alsamee, *The Monopoly in The Balance of Shariah Law* (Dar-AlJameah Al-Jaddedah 2007).

exploiting consumers in this fashion. Before the enactment of the Telecommunications Act, the Saudi Arabian government had not developed relevant laws to regulate pricing in the telecommunications sector that could monitor standard costs to provide evidence of any anticompetitive pricing or reactive pricing being charged by the STC or other dominant firms.

4.3.3.5 CROSS-SUBSIDIZATION

In the KSA, the STC used resources and cross-subsidization to maintain the status quo by discouraging competition in the market. In this way, the dominant firm used the majority of its vast revenues to fend off competition. Dominance was based on the price of the service or product it sold to consumers that was un-conducive for newcomers. Additionally, cross-subsidization impaired competitors and dissuaded newcomers from getting into the business for fear of making losses.[455] Most foreign companies' penetration into the market was fraught with problems. This was attributed to the absence of proper regulatory mechanisms and competition laws governing the telecommunications sector in the KSA. In managing this offence, the CITC imposed a daily fine of not less than SAR 1,000 and not more than SAR 10,000 until the violation was removed.[456]

4.3.3.6 LIMITED CONSUMER OPTIONS

The issue of limited consumer options is also very common among telecommunications companies. Where a particular product was on sale but the customer did not otherwise want to buy the product from that particular provider, the customer may have had no other option but to buy the product due to the limited options available in the market. This form of anti-competitive practice was regularly adopted by the STC within the telecommunications sector. As a result, foreign companies always felt unwelcome and were wary of attempting to compete, thus allowing the STC to remain in a dominant position in the industry.[457]

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[455] Ibid.
[456] Nelson (n 131) 6.
[457] JM El Emary, HA Alsereihy and BA Alyoubi, 'Effectiveness of Knowledge Manangement: Strategies on Business Organizations in KSA: Critical Reviewing Study' (2012) 12(2) *Middle East Journal of Scientific Research* 233, 234.

4.3.3.7 PRICING TACTICS

To increase their dominance, most of the telecommunications companies like the STC and Mobily have used excessive pricing. They have done so by pricing above the level of their competition.[458] As a result, the competitor always pulled off leaving the market. The STC was able to manipulate the country's pricing rates due to the fact that it was the sole operator in the market. When this occurred, the aggrieved competitor sought assistance from the Board of Grievances and the Competition Council, and the latter sometimes punished the dominant company that abused its position in the market by controlling the market price, such as the STC.[459] As shown in Chapter Two, in the KSA, the STC has held a dominant position in the country's fixed broadband internet market since its penetration of the sector in 2001 when it launched DSL services. Ten years later, the STC remained far ahead of any substantial competitor in terms of market share.[460]

4.3.3.8 BRAND POSITIONING

As mentioned above, the Telecommunications Act provides that fixing prices of products in order for a company to make more profit is strictly prohibited. However, the STC still fixed the prices of its products and, because there were few rival companies in the KSA, people had no other option but to buy products from the STC. In this regard, the company used its dominant position to the direct detriment of its customers. Before the introduction of the Competition Law, the STC enjoyed monopolistic freedom and often manipulated the price structures of its products. Moreover, innovative technologies assisted the company to offer communication and internet services more efficiently, which ensured that it could meet the modern needs of consumers. This enhanced its brand image and helped it to maintain its dominant position in the telecommunications sector.[461]

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[458] Mohammad Shalabi, *Introductory in the Shariah Law* (Dar Al-Nahdah Al-Arabia 2005) 11.

[459] See Nelson (n 131) 6.

[460] See Gao Xianrui, 'STC Growing in Scale and Scope' <http://www1.huawei.com/en/static/HW-093232.pdf> accessed 10 October 2017.

[461] See CITC Indicators, ICT in Saudi Arabia: A Socio-economic Impact Review (CITC 2011) 10-15. For an analysis of the effects of brands on competition, see Deven R Desai and Spencer Waller, 'Brands, Competition, and the Law' (2010) 5(1) Brigham Young University Law Review 1425, 1491-1498.

4.4 THE CONSEQUENCES OF THE LACK OF A COMPETITION LAW IN THE TELECOMMUNICATIONS SECTOR

As noted above, the introduction of the Telecommunications Act did little to curb the anti-competitive behaviours of firms and operators in the telecommunications sector despite containing explicit provisions addressing competition. Further, without a general competition law, there was no other way outside of the general Sharia framework to challenge these practices. In order to sanction such behaviour, a comprehensive competition law would be necessary.

However, the effects of unchecked anti-competitive behaviour extend far beyond regulatory formalities. Developing countries, particularly those with weak and small markets, are particularly susceptible to the negative economic effects of monopolization and the abuse of dominant power in comparison to the market sectors of highly-developed countries.[462] The KSA may be described as a developing country given that its economy is still growing and finding its footing.[463] It continues to see various sectors rise to prominence, particularly with an increased focus on FDI, as is the case with the telecommunications sector.[464] However, a major challenge for this sector has been the monopoly exerted by the state-owned firm, the STC, which has both directly and indirectly affected attempts to establish private companies within it. The obstacles to further private investment and development of the sector have inflicted harm on the Kingdom's economy and has notably hampered its telecommunications market and development.[465] The particular negative effects of this anti-competitive environment within the sector will be discussed in the next subsections.

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[462] See Michael Gal and Eleanor M Fox, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' (2014) 374 New York University Law and Economics Working Papers 1, 24. See also, Taimoon Stewart, 'The Functioning of Patent Monopoly Rights in Developing Economies: In Whose Interest?' (2000) 49(1) Social and Economic Studies 1, 2-5. See generally, H Qaqaya and J Lipimille (eds), The Effect of Anti-Competitive Business Practices on Developing Countries and their Development Prospects (UNCTAD 2008).

[463] See See Rodney Wilson, *Economic Development in Saudi Arabia* (RoutledgeCurzon 2004) 116.

[464] See Chapter Two.

[465] See Mackenrodt et al, Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms? (Spring 2005) 12.

4.4.1 RESTRICTION OF FOREIGN COMPETITION AND HINDERED INVESTMENTS

The abuse of power by dominant telecommunications firms in the KSA has hindered investment. Any economy without investment in various sectors is a doomed economy. The abuse of power has blocked potential investors from venturing into the market, thus discouraging foreign investors who were willing to invest in them. For example, in 2003, VSAT wanted to operate on its own since a foreign investor was willing to invest in the venture. However, the investors later became reluctant to invest after realizing that VSAT was not operating on its own but jointly.[466] This problem has contributed to low growth in industrialization in the KSA, including for telecommunications companies.

Abuse of power also affects customers negatively. The dominant player may decide to hike prices, especially after a predatory episode. The KSA is a developing country, implying that when the prices for goods and services are manipulated, most of its citizens are not able to afford them.[467] This means that the distribution of goods within the economy is reduced, which has an impact on the economy. Abuse of power has restricted the free market in the KSA. Free market rustics such as competition and prices are set by the dominating firm. For example, when the STC dominated the market, many competitors were left out and the communication charges did not reflect the nature of the economy but rather were influenced by the STC.[468]

4.4.2 SLOW ECONOMIC GROWTH

There has been an increase in total domestic telecommunications services revenue as operating companies that abused their dominant power increased the prices of their products and services, thereby increasing profit margins. The KSA's telecommunications sector contributed approximately 2.6 per cent of the nation's gross domestic product (GDP) owing to the abuse of dominant power by the operating companies. Besides, as shown in Chapter Three, there was strong growth in the

[466] See OECD (n 421) 111-112.
[467] Ibid.
[468] See Jack W Plunkett, *Plunkett's Sports Industry Almanac 2009* (Plunkett Research 2008) 9.

mobile subscriber base from 2004 when the telecommunications sector was liberalized. This made mobile services inexpensive in the KSA.

The abuse of powers in the KSA's economy led to a decline in economic growth since most operating companies involved in it were fined heavily. This lowered their profit margins and so decreased their financial performance.[469] On the other hand, the government of the KSA obtained funds from the fines imposed on the companies abusing their dominant powers. As shown in Chapter 3, the inability to abuse dominant power also led to stiff competition in the domestic market and commoditization of the mobile voice market. This then encouraged telecommunications operators to decrease tariffs for standard and bundled services such as voice and data services.

4.4.3 INNOVATION AND CREATION OF IDEAS

While the exploitation of a dominant position has negative economic effects, the abuse of power also influences innovation and the creation of new ideas. Every successful economy depends on innovation and ideas creation. When attempts are made to force competitors out of a market, these companies often come up with new products and services, making the economy very active and introducing new available offerings. The abuse of power then has limited opportunities to affect these businesses as they venture into innovative areas. However, until these new areas are protected by law, the economy will continue to depend on the already existing offerings of the dominant firms.[60]

4.4.4 CORRUPTION

Corruption in the Saudi context is associated with a patronage system, the use of middlemen (*wasta*), passive bribery (*baksheeh*) and nepotism, which collectively have a negative effect on GDP growth.[470] It has been argued that an analysis of monetary data is positively interrelated with resource accumulation and production growth.[471]

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[469] Musaed N Alotaibi, 'Does the Saudi Competition Law Guarantee Protection to Fair Competition? A Critical Assessment' (Unpublished PhD thesis, University of Central Lancashire, 2010).

[470] David Cowan, The Coming Economic Implosion of Saudi Arabia: Behavioral Perspective (Palgrave Macmillan 2018) 57-58.

[471] Hunt Janin and Margaret Besheer, Saudi Arabia (Marshall Cavendish 2003) 12-34.

Thus, given that the issue of corruption is deep-rooted in the Kingdom, there cannot be fair competition among different companies.[472] Corruption in the country has a large degree of influence over government institutions. Thus, although the Civil Service Law and Combating Bribery Law criminalise corruption and abuse of functions, the laws are enforced selectively.[473] Moreover, there is no law regulating conflicts of interest. This level of corruption came about in the telecommunications industry as a result of dominance and the abuse of power, which in turn promoted institutionalized bribery. Unfair market practices committed by the dominant players in the market like the STC meant that many foreign investors shied away from the KSA due to increased risk of losses. As a result of shying away, the economy of the country stagnated, and few jobs were created, leaving many youths unemployed.[474]

In previous years, the large Saudi Telecom project was involved in a huge corruption deal between a government official and the STC. Johani, who was then Telecommunications Minister, abused his power by promoting corrupt deals. Based on a lawsuit filed in 1997, it was alleged that Lucent and his partners and agents paid Johani between USD $15 million and $21 million in order to secure the Saudi Telecom project.[475] This indicated the issue of corruption was rampant, and it dissuaded many potential investors which led to economic stagnation. According to Alotaibi, the abuse of a company's dominant power especially when it is utilized to reduce competition through excluding rivals necessitates the intervention of the competition authority.[476]

4.5 CONCLUSION

This chapter has established that although associating the telecommunications sector with the free market economy may be beneficial to Saudi society, government intervention is necessary. It has shown that there are a number of anti-competitive practices that the government sought to explicitly prohibit by including competition

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[472] However, the analysis of the concept of 'corruption' is outside the scope of this study. It is only discussed here as an example of a type of abuse of a dominant position in the Saudi telecommunications sector.

[473] Cowan (n 471) 58.

[474] See NA Kadash, 'An Evaluation of Service Quality of Mobily and STC Telecommunication Companies in Saudi Arabia' (2014) 4(1) British Journal of Economics, Management and Trade 1599, 1600.

[475] Ibid.

[476] Alotaibi (n 93).

provisions within the Telecommunications Act. However, these anti-competitive practices continued unabated despite the enforcement of the statute together with the Sharia principles that prohibit the abuse of power in the market.

It was shown that the legislator in the Kingdom has been unable to achieve a balance between promoting competition in a free market and regulating the behaviour of producers and distributors. Although the telecommunications industry is not a natural monopoly, it has been dominated by the STC, a state-owned company that has consistently adopted anti-competitive practices that underminine the free market ideal. This de facto monopoly has been counterproductive. It also justifies government intervention given that letting the free market work without any form of government supervision and control, would allows the STC to continue to adopt practices to restrict competition in the market. Notwithstanding, there is no guidance for the enforcers of Sharia and the competition provisions of the Telecommunications Act, as well as the business community on how the legislator articulates the regulatory approach to exclusionary and exploitative conduct in the Kingdom.

It may be contended that the Kingdom has equally adopted the ‘effects-based approach’, whereby the concept of abuse is narrowed down to anti-competitive behaviour that harms consumers. This is a reasonable approach given that the concept of abuse is broad and the Telecommunications Act and Competition Law do not cover all categories of possible abuse.[477] The effects-based approach has largely been used to prevent dominant companies, which are also state-owned, from restricting competition unduly to the detriment of consumers. Thus, in the KSA, the existence of a dominant position of a business is not in itself prohibited.

However, there is no comprehensive guidance to the enforcers of the Telecommunications Act and Competition Law, as well as the business community on how the legislator articulates the regulatory approach to exclusionary and exploitative conduct under the competition regime. Also, it has been difficult for the government regulator to supervise, control and sanction the state-owned STC, has which

[477] See Luc Peeperkorn and Katja Viertio, ‘Implementing an Effects-based Approach to Article 82’ (2009) 1 *Competition Policy Newsletter* 17, 20. See also, Giorgio Monti, ‘Article 82 EC: What Future for the Effects-Based Approach? (2010) 1(1) *Journal of European Competition Law and Practice* 2, 3-4.

undermined efforts to promote effective competition in a free market. It follows that the new regulatory framework is necessary. The next chapter discusses the importance of this framework and shows how a new regime that complies with international standards has been established in this regard.

In its current legislative state, the likelihood of dominant position abuse should be much lower now than it was prior to the enactment of the Competition Law. Under Sharia principles, every firm in any particular business should compete fairly with its competitors, and the Competition Law further embodies these principles. Stiff and fair competition in an economy are indicators of growth and competition remains an essential tool for all market players. However, despite these developments, issues related to abuse of dominance are still being reported. The following section examines in greater detail the development of the Competition Law within the KSA,[69] with the aim of ultimately identifying where additional improvements can be made to further strengthen the Kingdom's competition regime.

CHAPTER 5

THE DEVELOPMENT OF A REGULATORY FRAMEWORK IN THE TELECOMMUNICATIONS SECTOR

5.1 INTRODUCTION

This chapter investigates the development of the regulatory framework in the telecommunications sector of the KSA. This framework comprises the Competition Law, the related regulations and competition rules, the Telecommunications Act of 2001 and the relevant principles of Sharia. This chapter focuses on the importance of the competition legislation in the framework. As noted in Chapter Three, the introduction of the Competition Law significantly impacted the Kingdom's telecommunications market, particularly with regard to the abuse of power by the dominant players in the market, such as the STC. However, it is shown here that the Competition Law advances goals beyond the competitive process as understood by local undertakings. It is also shown that the Law is susceptible to a multitude of considerations that impact on the transparency and certainty of the process of implementation, and it is unclear what role the Law plays in the KSA's competition policy given that it overlaps with Sharia and sector-specific legislation such as the Telecommunications Act.

It is then argued that although there was no specific competition legislation, the Sharia, the Telecommunications Act and the competition policy of the GCC provided different levels of protection to investors and the public, especially consumers. Hence, what was needed was more clarity regarding the regulatory framework rather than a competition legislation.

5.2 HISTORICAL BACKGROUND

Although the focus of this chapter is the regulatory framework that comprises the Competition Law, the Telecommunications Act and relevant principles of Sharia, it is important to note that there are other statutes in the KSA which sought to eliminate or minimise anti-competitive behaviour. Article 5 of the Commercial Court Law of 1931, for example states that all commercial practices should be carried out honestly and in

good faith, and no activity should be such that the principles of honesty are breached the parties' duty of good faith is contravened. Alotaibi argues that these provisions prevented behaviour that had a negative effect within the commercial and business sectors, such as fraud and unfair competition, and imprisonment was one of the recommended punishments.[478] Other examples include the Law of Trademarks[479] that was enacted to ensure that competitors could not use registered trademarks unfairly, that is without the permission of the rightful owners of the trademarks.[480] Also, they could not use imitations of the registered trademarks on goods of the same class, and comparative advertising of goods or services of the same class was prohibited.[481] As such, the laws governing patents and tradenames enable the government of the KSA to ensure that businesses are not harmed by competitors. Nonetheless, these laws are not sufficient to undergird an efficient regulatory framework in the telecommunications sector.

One of the most important ways in which the KSA sought to regulate its telecommunications market and protect foreign competitors was by acceding to the WTO. [482] This is because the WTO guarantees, at least theoretically, a fair and equitable opportunity for access by undertakings of one Member State into the markets of all other Member States.[483] The KSA began negotiating its membership in

[478] Musaed N Alotaibi, Does the Saudi Competition Law Guarantee Protection to Fair Competition? A Critical Assessment (Unpublished PhD thesis, University of Central Lancashire 2010) 51.

[479] Promulgated by Royal Decree No M/21 of 7 August 2002. It applies together with the Council of Ministers Decree No 140 of 6 August 2002 and replaced the Law promulgated by Royal Decree No M/5 of 6 February 1984. The implementing regulations of the 2002 Law were issued by Ministerial Decree No 1723 of 5 October 2002.

[480] Amir H Khoury, 'The Development of Modern Trademark Legislation and Protection in Arab Countries of the Middle East' (2002) 16 Global Business and Development Law Journal 249, 283. See also, John R Olsen and Spyros M Maniatis, Trade Marks, Trade Names and Unfair Competition: World Law and Practice (Sweet & Maxwell 1998) paras 4-5.

[481] Khoury, ibid, 284. The 2002 Law applies together with the Gulf Cooperation Council (GCC) Trademark Law, promulgated by Royal Decree No 51 of 25 May 2014. It entered into force in the KSA on 27 September 2016. Under the new law, infringement actions may be initiated at the Administrative Action before the Anti-Commercial Fraud Department in Riyadh or the Board of Grievances. The public prosecutor may initiate criminal prosecution upon the recommendation of the Fraud Department.

[482] The main objective of joining the WTO was to protect the Kingdom against the discriminatory policies of WTO Member States. Exports from the KSA to WTO Member States struggled to compete with those of other Member States given that the latter were given Most Favoured Nation status. See MA Ramady and Mourad Mansour, 'The Impact of Saudi Arabia's WTO Accession on Selected Economic Sectors and Domestic Economic Reforms' (2006) 2(3) World Review of Entrepreneurship, Management and Sustainable Development 189, 191-192.

[483] See Mitsuo Matsushita, 'Competition Law and Policy in the Context of the WTO System' (1995) 44 De Paul Law Review 1097, 1103-1104. The objective was that the WTO would all Member States toward a globalised economy. See Alberto Bernabe-Riefkohl, 'To Dream the Impossible Dream:

July 1993,[484] and between that date and 2005 it took part in various negotiations aimed at liberalising its trade regime and offering a transparent environment for foreign investment in accordance with the WTO rules. Given that competition is the logical consequence of the liberalisation of a trade regime,[485] it was only natural that the regulations governing trade in the KSA were modified in regard to the commitments undertaken by the KSA. These commitments included, inter alia, allowing up to seventy per cent of foreign equity ownership in the telecommunications sector (including both basic and value-added services) within three years from accession, and the provision of public telecommunications services through a joint stock company. The next section demonstrates how accession to the WTO strengthened the KSA's regulatory framework.

5.2.1 THE JOURNEY TO THE WORLD TRADE ORGANIZATION

The WTO is an organisation that regulates or ought to regulate international trade.[486] It began in 2005 under the Marrakesh Agreement that was signed by 124 nations[487] and has since provided a framework for Member States to negotiate trade agreements and enforce the terms of the agreements.[488] In order to enhance trade in goods, services and intellectual property across the globe, it prohibits discrimination between trading partners except where the prohibiting state seeks to protect the environment or has justifiable national security concerns.[489] The fact that it allows tariffs and other forms of protection in certain limited circumstances implies that it is not entirely a free

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Globalisation and Harmonisation of Environmental Laws' (1995) 20 North Carolina Journal of International Law and Company Regulation 205, 207-208.

[484] WTO, 'General Council Successfully Adopts Saudi Arabia's Terms of Accession' (2005) WTO Press Release < https://www.wto.org/english/news_e/pres05_e/pr420_e.htm> accessed 15 October 2018.

[485] See Neeti Shikha, 'Competition and the WTO – A Dead End' (2010) 7(2) Ankara Law Review 91, 92-93. Shikha then argues that the exclusion of competition policies from the WTO's purview is contradictory since it undermines efforts at harmonising rules that seek to eliminate unfair trade practices.

[486] WTO, 'Understanding the WTO' (*WTO*, 2016) <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm> accessed 10 October 2017.

[487] There were 164 Member States as of July 2018. See WIPO, 'States Party to the PCT and the Paris Convention and Members of the World Trade Organization' (2018) < https://www.wipo.int/export/sites/www/pct/en/texts/pdf/pct_paris_wto.pdf> accessed 08 January 2019.

[488] Judith Goldstein, Douglas Rivers and Michael Tomz, 'Institutions in International Relations: Understanding the Effects of the GATT and the WTO on World Trade' (2007) 61(1) International Organization 37, 38-39.

[489] Robert Howse, 'The World Trade Organisation 20 Years On: Global Governance by Judiciary' (2016) 27(1) European Journal of International Law 9, 10-12; Steve Charnovitz, 'A New WTO Paradigm for Trade and the Environment' (2007) 11 Singapore Yearbook of International Law 15, 16-20

trade organisation.[490] Thus, the WTO understands that the competition laws of Member States may be susceptible to a multitude of considerations[491] that may in turn impact on the transparency and certainty of these laws. Nonetheless, since 2005, the influence of the WTO has been such that it is referenced in nearly all preferential trade agreements or parts of the WTO agreement are simply copied verbatim in trade agreements.[492] Thus, it complements international trade agreements and has substantially increased trade for the states with institutional standing.[493]

These must be the reasons that attracted the KSA to the General Agreement on Tariffs and Trade (GATT) (and subsequently, the WTO). Through the Council of Ministers' Decision No 18154 of 29 April 1993, the government of the KSA applied for full accession to GATT by noting that it had been an observer for many years and had examined and applied GATT rules and principles.[494] It also argued that the Saudi economy was among the most open in the world, with no quantitative restrictions and very low custom duties.[495] It was particularly pleased with the GATT's success in liberalising and strengthening the multilateral trading system and believed that the KSA could contribute towards achieving this objective. Thus, it believed that the KSA's accession would benefit both the KSA and its existing and potential trading partners. The GATT Council took note of the statement made by the government of the KSA and established a working party that was tasked with examining the KSA's application under Article XXXIII of the GATT.[496]

The KSA submitted a memorandum on its foreign trade regime to the GATT Working Party in 1993. When the WTO replaced the GATT in 1995, the WTO General Council

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[490] See William R Cline, *Trade Policy and Global Poverty* (Peterson Institute 2004) 264.

[491] Although the WTO emphasises only national security and the environment, these considerations may be interpreted broadly to include other concepts. See Maria Weimar, 'Reconciling Regulatory Space with External Accountability through WTO Adjudication – Trade, Environment and Development' (2017) 30(4) Leiden Journal of International Law 901, 901-902.

[492] Todd Allee, Manfred Elsig and Andrew Lugg, 'The Ties between the World Trade Organisation and Preferential Trade Agreements: A Textual Analysis' (2017) 20(2) Journal of International Economic Law 333, 334.

[493] See also, Michael Tomz, Judith Goldstein and Douglas Rivers, 'Do We Really Know That the WTO Increases Trade? Comment' (2007) 97(5) American Economic Review 2005, 2005-2018.

[494] See GATT, Council: Minutes of Meeting C/M/265 (21 July 1993) < https://docs.wto.org/gattdocs/q/GG/C/M265.PDF> accessed 10 October 2018.

[495] Ibid, 4.

[496] Article XXXIII of the GATT authorised a government not party to the agreement to accede to the agreement on the terms agreed between the government and the contracting parties (or a two-thirds majority of contracting parties)

decided that the WTO Accession Working Party would continue the process began by the GATT working party and the KSA would have an observer status in the WTO General Council. Hence, in 1995, the KSA applied to accede to the WTO under Article XII of the Marrakech Agreement. In 1996, the KSA submitted another memorandum on its foreign trade regime that emphasised that the government of the KSA had demonstrated its preference for a free market economy in light of the Islamic values that it sought to preserve, and it strongly supported the participation of the private sector in the development process.[497]

The Working Party invited Member States to submit questions concerning the KSA's foreign trade regime. With regard to the telecommunications sector, some of the pertinent questions included whether there was a body responsible for regulating the sector, whether market entry was licensed, whether foreign undertakings were permitted to supply enhanced telecommunications services, whether the services could be supplied through the cross-border mode of supply, and whether there were any restrictions on foreign investment in the supply of enhanced services in the KSA.[498]

The government of the KSA noted in response that the Ministry of Post, Telephone and Telegraph was the main regulatory body of the telecommunications sector and it was also responsible for issuing licenses to operators and service providers.[499] The government also noted that foreign entities were permitted to supply enhanced services including database retrieval, electronic mail, fax and telex messaging, voice mail, file transfer, online information and conferencing.[500] However, the government stated that all users were required to use the public telecommunications network and they had to be authorised by the relevant agency.[501] The government then noted that foreign investment in the supply of enhanced services was governed by the same regulations that applied to foreign investment in general. It pointed out that the KSA

[497] WTO, Accession of the Kingdom of Saudi Arabia: Memorandum on the Foreign Trade Regime (13 May 1996) < https://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm> accessed 10 October 2018.

[498] GATT, Accession of Saudi Arabia: Questions and Replies to the Memorandum on the Foreign Trade Regime (15 November 1995) < https://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm> accessed 10 October 2018.

[499] Ibid.

[500] Ibid.

[501] Ibid.

had been a participating member of the International Telecommunications Union and the Consultative Committee for International Telephones and Telegraphy and had therefore adopted best international standards in order to ensure interoperability and non-discrimination. It also noted that the government had no plans to privatise basic telecommunications services.[502]

After a drawn out process of ten years, the WTO General Council issued a Protocol in November 2005 which noted that, following the report of the Working Party, the KSA could accede to the WTO.[503] Attached to the report of the Working Party were schedules of specific commitments made by the KSA in regard to goods and services.[504] Regarding the commitments to services, the schedule provided that foreign service suppliers had to obtain the approval of the Saudi Arabian General Investment Authority (SAGIA) before establishing a commercial presence in the KSA in accordance with Foreign Investment Law of 2000 and Article 5(3) of the Regulation of the Foreign Investment Law.[505] Regarding the telecommunications sector, the commitments taken by the KSA were based on the Basic Telecom Service Commitments (S/GBT/W/2/Rev 1) and the Market Access Limitations on Spectrum Availability (S/GBT/W/3). They provided that the KSA undertook to authorise cross-border supply, subject to a commercial agreement between the foreign undertaking and an entity licensed or authorised by the CITC. The KSA also undertook to permit foreign equity of an undertaking to go from forty-nine per cent upon accession to seventy per cent after three years.[506] This includes undertakings providing basic as well as enhanced telecommunications services.

As such, accession to the WTO helped to ensure that the KSA effectively liberalised markets and removed protectionist barriers to trade. One of the conditions set by the WTO, as pointed out by Ramady, was the phasing in of telecommunications agreements to open up and allow competition in the telecommunications services

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[502] Ibid.

[503] WTO, Accession of the Kingdom of Saudi Arabia (11 November 2005) < https://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm> accessed 12 October 2018.

[504] WTO, Report of the Working Party on the Accession of the Kingdom of Saudi Arabia (1 November 2005) < https://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm> accessed 12 October 2018.

[505] Ibid.

[506] Ibid.

market and provide antitrust protection and consumer protection in accordance with the policies of the WTO.[507] Despite some concerns about the compatibility of the WTO policies and the principles of Sharia,[508] the Saudi government initially argued that most Islamic principles seek to prevent anti-competitive practices and, since Islamic law was the main law of the Kingdom, there was hardly any need for the specific promulgation of a competition law that complied with the WTO policies.[509] However, the WTO set the enactment of competition law in the Kingdom as one of the conditions for it to join the WTO[510] because there was no legislation to that effect and neither was there a public awareness of the prohibition against anti-competitive behaviour, both of which were much needed to enhance legal certainty.

As such, between the KSA's application in 1995 and its accession to the WTO in 2005, there were substantial changes to its legal landscape that involved the enactment of ninety-four basic laws, regulations and decrees; 314 rounds of bilateral market access negotiations, the responses to 3,400 questions on its trade regime; and thirty-eight bilateral agreements with influential countries, including the US.[511] It may therefore be argued that competition law in the KSA was tilted in favour of the wider WTO agenda, which was understood by Saudi officials to imply a suitable means of attracting foreign investment.[512] Hence, the Competition Law that was enacted in 2004 simply represented the measure put in place in the KSA to provide anti-trust protections to foreign investors as recommended by the WTO. In this light, the Competition Law advances goals beyond the competitive process as understood by local businesses.

The next subsection examines the laws that regulated anti-competitive conduct and maintained market competition prior to the Competition Law and the KSA's accession

[507] Mohamed A Ramady, *The Saudi Arabian Economy: Policies, Achievements and Challenges* (Springer 2005) 318-319.

[508] These concerns are largely related to opening Saudi markets to products prohibited by the Sharia and the imposition of the Zakat tax. See Raj Bhala and Shannon B Keating, 'Diversity within Unity: Import Laws of Islamic Countries on Haram (Forbidden) Products' (2013) 47(3) International Lawyer 343, 344-346; Raj Bhala, 'The Intersection of Islam and the WTO: Three Shari'a Issues in the WTO Accession of Saudi Arabia' (2003) 21 Law Context: A Socio-Legal Journal 152, 152-153.

[509] Ramady (n 508) 319.

[510] See Steffen Hertog, 'Two-level Negotiations in a Fragmented System: Saudi Arabia's WTO Accession' (2008) 15(4) Review of International Political Economy 650, 650.

[511] Ramady (n 508) 300.

[512] Anthony H Cordesman, Saudi Arabia Enters the Twenty-first Century: The Political, Foreign Policy, Economic and Energy Dimensions (Vol 2, Greenwood Publishing 2003) 338.

to the WTO. The objective is to determine whether the KSA already had an effective regulatory framework and what made it effective.

5.2.2 PRE-ACCESSION REGULATION IN THE KSA

Prior to its accession to the WTO, there was no specific competition legislation. However, there were laws and policies providing different levels of protection to the public, especially consumers. Some of these protections were also available for international businesses seeking to invest in the Kingdom as shown below. As such, it is argued here that the widespread criticisms directed at the KSA[513] failed to take these protections into account.

5.2.2.1 THE GULF COOPERATION COUNCIL UNIFIED POLICY

The Gulf Cooperation Council (GCC) was created based on the EU model, with the aim of bringing together the Gulf states of Bahrain, Kuwait, Oman, Qatar, the KSA and the UAE.[514] In 2001, an agreement was signed between these states so as to establish a customs union and harmonise economic, financial and monetary policies and to provide a wider integration of the policies within the region.[515] Since the aim of the GCC was to formulate policies for harmonisation and cooperation, it was also imperative to implement anti-competitive policies so as to ensure that trade liberalisation was promoted, and market operators were protected outside of their national boundaries.[516] Thus, it was contended that the enforcement of pro-competitive laws in a common regional market would enhance cooperation between the signatory countries.[517]

In this light, the GCC countries worked towards easing licensing restrictions for domestic and international firms, making sure that competition was promoted widely so as to increase the efficiency of the providers and the harmonisation of regulatory practices, as well as reduce or eliminate restrictions on the movement of foreign

[513] See for example, Steffen Hertog (n 511) 650-679.

[514] See Henner Furtig, 'GCC-EU Political Cooperation: Myth or Reality' (2004) 31(1) British Journal of Middle Eastern Studies 25, 26. See also Houcine Boughanmi, 'The Trade Potential of the Arab Gulf Cooperation Countries (GCC): A Gravity Model Approach' (2008) 23(1) Journal of Economic Integration 42, 43-44.

[515] Maher Dabbah, Competition Law and Policy in the Middle East (University Press 2007) 377.

[516] Maria Casoria, 'Competition Law in the GCC Countries: The Tale of a Blurry Enforcement' (2017) 16(3) Chinese Business Review 141, 142, 148.

[517] Ibid.

workers.[518]

A report by the World Bank clearly highlighted the need for strong competition legislation and effective regulations before the liberalisation of the market and economies could be achieved in the region.[519] This report also appreciated that the creation of regulations relating to competition and their implementation takes time.[520] Further, it noted that continued public ownership in some service sectors represented a hurdle for increased trade potential within the GCC where the concept of privatisation had always been looked upon with suspicion. Thus, in the UAE, rather than opening the telecommunications market to big foreign operators to curb the thirty-year monopoly of the Emirates Telecommunication Corporation, the government instead decided to establish the Emirates Company for Integrated Telecommunication.[521] However, by 1997, the GCC had sufficiently liberalised and reformed its financial sectors.[522] Also, measures were taken to reduce government participation, enhance the supervisory framework and open up the markets to foreign competition by ensuring that transparent rules governed the entry and exit of undertakings.[523] As such, the GCC provided some important protections to foreign undertakings seeking to invest in the KSA.

Notwithstanding, as far as competition law was concerned, there was no clear guidance within the GCC policies or documents and neither was there a need expressed by any Member State of the GCC to enact regional laws to regulate anti-competitive practices. Dabbah noted that without any commitment to the implementation of a competition legislation and appropriate policies, it was hard to predict if any competition regime would emerge within the GCC despite the fact that the model of the GCC was inspired by the EU model.[524] EU competition law largely derives from Articles 101 to 109 of the Treaty on the Functioning of the European

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[518] World Bank for Middle East and North Africa, 'Economic Integration in the GCC' (*WorldBank*, 2010) <http://siteresources.worldbank.org/INTMENA/Resources/GCCStudyweb.pdf> accessed 10 October 2017.

[519] Ibid.

[520] Ibid.

[521] Ibid.

[522] See IMF (Middle Eastern Department), Financial Systems and Labour Markets in the Gulf Cooperation Council Countries (IMF 1997) 18-19.

[523] Ibid.

[524] Dabbah (n 516) 377-378.

Union (TFEU) and some relevant secondary[525] and primary legislation.[526] These instruments regulate anti-competitive conduct and maintain competition within the EU single market.[527]

Although the policies of the GCC are not as advanced as those of the EU, in December 2002 a commercial and economics law policy was agreed between the Members which stipulated a unified commercial policy for the GCC countries. This set the foundation of the economic relations between the Members and the outside world with the focus on the promotion of the GCC Member States' economies and the strengthening of competitiveness.[528]

Another objective of this policy was the promotion of the existing markets. The aims included the promotion of competitiveness of exports and national products in the markets and the adoption of a policy on a domestic front which would unify the commercial and economic laws and facilitate the flow of citizens, goods, services and transportation. The policy highlighted the need to regulate anti-competitive behaviour athough the term 'anti-competition' was not mentioned.[529]

Furthermore, the GCC sought to act as a single bloc for the outside world.[530] It intended to form a single market for the facilitation of goods, services and workers, very similar to the model of the TFEU. Similarly, the policy also sought to ensure that efforts were made to encourage the national products in the GCC Member States and to protect them collectively in the markets.[531] A unified law was important because it protected national industry in the GCC states and prevented unfair competition.

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[525] See for example, Directive 2014/104/EU of 26 November 2014 on antitrust damages actions.

[526] See for example, Council Regulation (EC) No. 1/2003 of 16 December 2002 governing the implementation of the rules on competition law laid down in Articles 81 and 82 of the treaty establishing the European Community. The rules in Articles 81 and 82 are now enshrined in Articles 101 and 102 of the TFEU. See also Council Regulation (EC) No. 139/2004 of 20 January 2004 governing the concentration between undertakings,

[527] See Michele Cini and Lee McGowan, Competition Policy in the European Union (2nd edn, Palgrave Macmillan 2009) 11-38; Eleanor M Fox and Damien Gerard, EU Competition Law: Cases

, Texts and Content (Edward Elgar 2017) chapter 7.

[528] GCC, 'Unified Commercial Policy'

<http://www.mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/StandardTradePolicySystemOfGCC/Pag es/15-2.aspx> accessed 10 October 2017.

[529] Ibid.

[530] Ibid.

[531] Ibid.

What is important to note here is that the GCC policy strengthened the private sector, which involved opening the sector to foreign undertakings. Nonetheless, there was more concern about 'injurious practices in international trade that cause or threaten material injury to an established GCC industry or retard the establishment of such an industry'.[532] This concern was more about aggressive international competition that involved practices such as dumping, unjustifiable increases in imports and subsidies.[533] Foreign competition that did not cause material injury to an established GCC industry was therefore welcome and protected. In the absence of specific competition legislation in a GCC country, foreign investors were therefore protected under the unified commercial policy. This was a better reflection of the competitive process as understood by local undertakings. However, it must be noted that the implementation of the policy was not very effective given that there were still serious questions about the extent to which the competition laws of GCC countries had been harmonised.[534]

5.2.2.2 THE TELECOMMUNICATIONS ACT

Prior to the enactment of the Competition Law, competition was maintained in the telecommunications sector through the implementation of the Telecommunications Act of 2001. With the advancement of innovative technologies, telecommunications networks expanded, including a wide range of services which satisfied the needs and requirements of customers within the global domain. At the same time, this called for the need to regulate them through appropriate legislation, hence the reason for the Telecommunications Act. It entered into force in 2002 and provides the foundation for the framework of regulation by the CITC.

The Telecommunications Act sought to ensure that the provision of advanced communications services was sufficient and affordable. Thus, the legislation compelled participants in the telecommunications industry to adopt and implement

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[532] See Article 1 of the GCC Common Law

[533] See Habib Kazzi, 'GCC States and Trade Remedies: Between Benefits and Challenges' (2014) 1(2) European Law and Politics Journal 10, 14-16.

[534] See Raza Rizvi and Adil Hammad, 'Competition Law in the Middle East – A Perspective from Saudi Arabia and the United Arab Emirates – Analysis of the Introduction and Reform of Competition Laws in Various Jurisdictions Across the Gulf Cooperation Council' (Simmons & Simmons, 29 October 2013) <http://www.elexica.com/en/legal-topics/antitrust-and-merger-control/29-competition-law-in-the-middle-east> accessed 10 October 2017.

modern best practices. As discussed in Chapter Three, this involved ensuring that there was no monopoly and the prices charged for services were competitive.[535] Further to the Telecommunications Act's bylaws, the CITC was authorised to regulate the telecommunications sector. The Act also sought to promote and encourage fair competition in all fields of telecommunications and ensure that everything was done with the utmost clarity and transparency by following the procedures to guarantee equality and non-discrimination.[536]

Additionally, it was necessary to provide for the creation of an effective climate within the telecommunications industry for the purpose of encouraging fair competition that the Telecommunications Act aimed to achieve. There was also a need for service providers to look at the efficient use of all available frequencies and provide for telecommunications technologies transfer where the need arose in practice.[537]

The Act emphasised the importance of equality in the market and the protection of the public interest along with that of individual users and those investing in the industry. That is why it may be said that the Telecommunications Act laid the foundations for what would later on be enacted as the Competition Law.[538] Rizvi and Hammad contend that these statutes were necessary to alleviate the uncertainties faced by businesses as to the regulations with which they must abide and the potential enforcement penalties.[539] Thus, the Telecommunications Act was also influenced by the KSA's bid to accede to the WTO. It follows that the competition analysis conducted by the legislator was mainly economic in nature.

In the lead up to the enactment of the Telecommunications Act, the government decided to privatise 20 state-owned companies including the market leader, the

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[535] See Article 3 of the TA.

[536] CITC, 'Licensing of Data Telecommunication Services' (CITC, 11 November 2003) <https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0ahUKEwjkie2Gl7vNAhXLDsAKHf55BhMQFgg9MAY&url=http%3A%2F%2Fwww.ictregulationtoolkit.org%2FDocuments%2FDocument%2FDocument%2F817&usg=AFQjCNEVHLzDCv9Di4KlNCWj-ajEO3URGw> accessed 10 October 2017.

[537] Ibid.

[538] See Article 2(1) of the TA. See also, Robert Horwitz and Willie Currie, 'Another Instance Where Privatization Trumped Liberalization: The Politics of Telecommunication Reform in South Africa - A Ten-year Retrospective' (2007) 31 Telecommunications Policy 445, 445.

[539] Rizvi and Hammad (n 535) 3.

STC. A number of shares were open to ownership within the telecommunications industry. The key reasons for this restructuring of the telecommunications sector were the growing and high demand (by potential foreign investors and the WTO), the need for liberalisation, efficiency, productivity and the promotion of fair competition and a reduction in the monopoly of the government-owned STC. The privatisation was done through the sectorial legislation under the supervision of the CITC.[540] With this in mind, the CITC Ordinance issued by the Saudi Arabian government specified its tasks and responsibilities which were geared towards the further development of the telecommunications industry. This would not only catered to the domestic companies but also opened the doors to international companies to enter the Kingdom, as they knew that there existed regulation to protect them against anti-competitive conduct.[541]

Comprising more than 26 million inhabitants, the Kingdom has emerged as a prominent telecommunications market with significant potential for investors in this area.[542] New players have entered the market to achieve a higher degree of penetration regarding the provision of internet and data services to local people.[543] Since the Kingdom adopted a more liberal approach and new licenses have been granted for the establishment of fixed line and wireless telecommunications services, competition has increased and has continued to grow with the enactment of the Competition Law and accession to the WTO.[544]

5.2.3 THE NEED FOR A COMPETITION LAW IN SAUDI ARABIA

Despite the protections provided by Sharia, the GCC policy and the Telecommunications Act, there was still no specific statute regulating anti-competitive behaviour in the KSA. It is uncertain whether one was needed. However, as noted above, the WTO required more clarity. Perceiving the potential for foreign investment,

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[540] OECD, *Making Reforms Succeed – Moving Forward with MENA Investment Policy Agenda* (OECD 2008) 279-283.

[541] Anthony Cordesman and Nawaf Obaid, *National Security in Saudi Arabia: Threats, Responses, and Challenges* (Center for Strategic and International Studies 2007).

[542] See Mohammed T Simsim, 'Internet Usage and User Preferences in Saudi Arabia' (2011) 23(2) Journal of King Saud University – Engineering Sciences 101, 104-105.

[543] Reem Alebaikan and Salah Troudi, 'Blended Learning in Saudi Universities: Challenges and Perspectives' (2010) 18(1) ALT-J: Research in Learning Technology 49, 51. For an assessment of the policy prior to the enactment of the TA, see Khalid Al-Tawil, 'The Internet in Saudi Arabia' (2001) 25(8) Telecommunications Policy 625, 625-634.

[544] Badr Alharbi, 'Customer Choice in Mobile Service Providers in Saudi Arabia' (2012) 3(18) International Journal of Business and Social Science 283, 284.

the government slashed the minimum capital requirements or regulatory capital to attract small foreign firms and also ensure that there was always sufficient capital to buffer financial institutions against losses. This was done through the Foreign Capital Investment Regulations of 2000.[545] Also, the start-up procedures for all businesses were simplified, which made it considerably easier for the investor companies to enter into Saudi markets.[546]

However, for the market to thrive, consumers should be able to benefit from the price competition between stakeholders, greater product development and better quality of service between competitors.[547] To this end, the law regulating anti-competitive practices should extend to agreements or practices which have the potential to undermine or destroy competition which may then affect the consumer adversely. Also, as noted above, KSA ownership of businesses was required, which constituted a disincentive to foreign investors because they were compelled to find a suitable Saudi partner before investing in the Kingdom. This continued in the telecommunications industry even after the KSA's accession to the WTO given that the KSA committed to allowing up to seventy per cent of foreign equity, requiring local ownership of at least thirty per cent. Nonetheless, SAGIA announced in 2015 that non-KSA nationals would be permitted to hold 100 per cent ownership. The Council of Ministers has since ratified the decision made by SAGIA. However, the telecommunications sector still does not have the desired autonomy as it must have 100 per cent local employees and by the end of 2017 a foreign telecommunications retail company was yet to be granted a license for 100 per cent ownership.[548]

Despite the above, the Competition Law has given a strong impetus to the increase in competition in the telecommunications sector has been the Competition Law of 2004. This statute seeks to prohibit barriers to trade with a view to making sure that the

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[545] Anthony Shoult, *Doing Business with Saudi Arabia* (3rd edn, GMB Publishing 2006) 100-101.

[546] Karim Ouled Belayachi and Jamal Ibrahim Haidar, 'Competitiveness from Innovation, Not Inheritance' (2008) 16 <http://www.parisschoolofeconomics.eu/docs/haidar-jamal-ibrahim/db08-cs-saudiarabia.pdf>
accessed 10 October 2017.

[547] See Maurice E Stucke, 'Is Competition Always Good?' (2013) 1(1) Journal of Antitrust Enforcement 162, 162-164.

[548] See United States Department of Commerce, 'Doing Business in Saudi Arabia: Country Commercial Guide for US Companies' (2017) <https://sa.usembassy.gov/wp-content/uploads/sites/60/CCG-2017-Saudi-Arabia.pdf> accessed 10 January 2019.

goods and services are available at affordable prices within a designated market without any restrictions. Research has shown that the enforcement of pro-competitive rules does not only serves the objectives of fairness and efficiency but also induces foreign direct investment and increases consumer surplus and welfare.[549] Hence, competition law ensures that the elimination or reduction of barriers to trade by the government is not undermined or negated by the anti-competitive conduct of local firms which may abuse their market power. Kennedy therefore noted that 'by exploiting the law of comparative advantage, liberal trade policies permit the unrestricted cross-border flow of the best goods and services at the lowest prices, thereby increasing [welfare]'.[550] A law regulating competition is therefore likely to improve the working conditions and relationships between businesses and their consumers,[551] which is the main reason why there was a great need for a specific competition statute in the Kingdom, especially in the telecommunications sector. Nonetheless, it is debatable whether the GCC policy, Telecommunications Act and the Sharia (if properly implemented) were not sufficient to improve the working conditions and relationships between businesses and their consumers.

Saleem observes that the last two decades have seen a number of developing and transitional economies that have either enacted competition legislation or have been a signatory to one of the global organisations seeking to enforce anti-competitive measures and in principle agreeing to ensure that there are fewer barriers to trade.[552] The rapid growth of competition law has been the result of the liberalisation of developing economies together with individual country commitments to the agreements with these global organisations such as the WTO, as well as the need to protect the rights of businesses and consumers.[553]

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[549] See Arijit Mukherjee and Uday Bhanu Sinha, 'Competition, Foreign Direct Investment and Welfare' (2016) 139 Economic Letters 43, 43-45; John O Haley and Hiroshi Iyori, *Antitrust: A New Trade Remedy?* (Pacific Rim Law and Policy Association 1995); Eleanor M Fox, 'Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade' (1995) 4 Pacific Rim Law and Policy Journal 1, 10-13.

[550] Kevin C Kennedy, 'Foreign Direct Investment and Competition Policy at the World Trade Organization' (2000-2001) 33 George Washington International Law Review 585, 586.

[551] Elspeth Berry, Matthew J Homewood & Barbara Bogusz, *EU Law Text, Cases and Materials* (Oxford University Press 2013) 460.

[552] Muhammad Anum Saleem, 'Saudi Arabia: Overview' (2016) 77 African and Middle Eastern Antitrust Review 290, 291.

[553] Ibid.

Similarly, the KSA's Competition Law seeks to achieve the above goals. The KSA's telecommunications industry is considered one of the leading service sectors in the country and one that has gained great prominence over the past few years as shown in Chapters Three and Four. Based on the high spending capacity of the people of the KSA, the use of telecommunications services and devices has evolved, allowing the sector to attract many consumers and global technological undertakings. The latter have invested in the telecommunications infrastructure of the country, although there has been a growing call for legislation to combat specific anti-competitive practices by those within the market.

With the promulgation of the Royal Decree No M/25 dated 22 June 2004, the Competition Law was approved and brought into force with the main aim of regulating competition within the Kingdom. This applies to all firms including partnerships and companies conducting business in the KSA. It also includes non-Saudi entities which can be classified as firms. However, the Competition Law does not apply to government agencies and fully state-owned enterprises.[554] The Competition Law specifically aims to protect and promote fair competition and anti-monopolistic practices so as to ensure that the balance in the market and the improvement of the competitive environment in all economic activities (conducted by private undertakings) are promoted and achieved. The intention is to confer benefits on the consumers through lower prices of products, thriving competition and excellent quality of products and services. At the same time, it also seeks to increase the efficiency, productivity and competitiveness of the economy, although its scope is limited to private undertakings.

Alotaibi argues that the effectiveness of competition law depends on the imposition of penalties which are harsh and can act as a deterrent.[555] This motivates potential businesses that wish to violate the competition law to refrain from doing so and represents a system of checks and balances in the furtherance of the objectives of the statute.[556] However, whether this argument applies to sectors dominated by state-

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[554] Nelson (n 131).

[555] Musaed N Alotaibi, 'Saudi Arabia: Council of Competition' (GCR, 18 November 2015) <http://globalcompetitionreview.com/reviews/77/sections/290/chapters/3137/saudi-arabia-council-competition/> accessed 10 October 2017.

[556] Ibid.

owned enterprises that are beyond the reach of the regulator. The Competition Law of the KSA was largely modelled on the EU competition regime, although there are some differences between the scope and application within the two jurisdictions mainly due to the fact that the Competition Law in the KSA does not apply to state-owned enterprises.[557] Given the influence of the WTO and the objective of the government of the KSA to attract foreign investment, it may be argued that the Competition Law is largely driven by the competition process as understood by foreign investors.

The Competition Law requires the CITC to oversee the foreign investment, review competition policies and ensure that the law is correctly implemented. This requires the approval of any proposed businesses which may be in a dominant position in the market. This law applies to all businesses operating in the Kingdom, which assures foreign investors that no dominant (private) firm in the KSA would abuse its position. In terms of dominant position, the Law requires a business not to be in a position to influence the prevailing prices within the market which may be a potential danger for good competition within the market. Therefore, a business influencing the price is required to seek approval from the CITC at least sixty days prior to effecting such changes, failing which it will be liable for fines and other sanctions.

Also, the Competition Law has largely followed global competition law trends since it was brought into force to combat and prohibit price manipulation, including the practices of lowering prices and creating artificial shortages within the market to obtain a dominant position and eradicate competition. Similarly, it is also illegal to impose special conditions on the purchases of commodities and services which may have a negative impact on a business compared to others or puts them in an unequal position. Nonetheless, given that the Competition Law does not apply to undertakings fully-owned by the state and government agencies, it is uncertain whether it can be argued that the Law has had a major impact on the telecommunications market. This is because this market has been shaped and dominated by a company whose shares are owned by the state (seventy per cent) and by other state-owned undertakings

[557] See Sahin Ardiyok and Dilara Yesilyaprak, 'Saudi Arabia: Spotlight on Saudi Arabia's Competition Rules' (*Mondaq*, 19 June 2015) <http://www.mondaq.com/x/406002/Trade+Regulation+Practices/Spotlight+On +Saudi+Arabias+Competition+Rules> accessed 10 October 2017.

(thirty per cent).

5.3 THE COMPETITION LAW

Having enacted a competition legislation, both to meet WTO requirements and complement the various sector-specific legislations in place to regulate market sectors, it is also important to determine whether the legislation can meet its objectives within the Saudi context.

5.3.1 ENFORCEMENT OF THE LAW

The CITC was created as a regulatory body with the passage of the Telecommunications Act. With the passage of the Competition Law, a comparable body was needed to enforce the provisions of the Competition Law within the various economic sectors. The GAC, created under the Competition Law, has a wide range of powers, particularly over the regulation and control of entities. It is therefore in place to ensure that the Competition Law is adhered to. The GAC is independent and charged with supervising and implementing the Competition Law with the aim of specifically encouraging fair competition and ensuring that all monopolistic practices are kept out of the market.

The GAC was created specifically pursuant to Article 8 of the Competition Law which provides for the number of members of the organ and their respective time periods. The mandate given to the GAC includes jurisdiction over the following tasks relating to the administration of fair competition:

1. Approving the mergers and acquisitions which may also overlap, and which may result in a dominant position in the market;
2. Administration of complaints and the review of the same and overseeing the action for violation of such complaints including the enquiry, evidence, investigation and prosecution of complaints based upon the merit of such complaints.[558]

The goals of the GAC are stated in Article 9. It aims to achieve such things as the approval of mergers and acquisitions, including the joining of management of two entities into one which may put them in a position of dominance; collection of evidence

[558] For a brief analysis of GAC's mandate, see Kathryn Mcneece, 'Spotlight on Saudi Council of Competition' (April 2016) 3(1) Legal Newsletter 1, 8.

including complaints and practices; commencement of criminal cases against violators of the law; and making suggestions for any changes to the variables present within the market so as to keep abreast with developments and to ensure that adequate amendments are done to achieve the desired goals keeping in mind the economic changes and developments so as to also cater for the future.

In light of the above powers, the GAC fined Riyadh Oxygen Plant in excess of SAR one million for price fixing in respect of the supply of medical gas. The GAC conducted an investigation following a complaint by the Ministry of Health and held that Riyadh Oxygen Plant had engaged in anti-competitive behaviour. The GAC's decision was upheld by the Honourable Court of Appeal in the KSA.[559]

The Preamble of the Competition Law states that based upon the economic policies in the Kingdom, to keep in line with economic achievements and developments and to enhance competition in business, the Competition Law was brought in force with the main aim of protecting and promoting competition and fighting monopolistic practices which have been affecting the legitimate competition within the Kingdom.[560] The is reiterated in Article 1 of the Competition Law which succinctly states that: 'This Law aims to protect and encourage fair competition and combat monopolistic practices that affect lawful competition.'

This demonstrates the centrality of economic analysis in the Competition Law of the Kingdom.[561] Thus, the effects of international pressure (WTO) and the domestic environment constitute an integral part of the KSA's competition law, which as will be shown below shields arbitrary decision making by the GAC. Although the above

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[559] Sonya Lalli, 'Saudi Cartel Penalty Upheld' (Gibson Dunn, 27 August 2015) <http://www.gibsondunn.com/publications/documents/2015-Year-End-Criminal-Antitrust-and-Competition-Law-Update.pdf> accessed 10 October 2017.

[560] The Preamble to the Competition Law 2004 states as follows: 'In harmony with the economic policy built on the principle of competition followed by the Kingdom of Saudi Arabia and the great developments in the economic field. And wishing to enhance and ensure the competition climate in the business sector, the Royal Decree No. (M/25) dated 4/5/1425H was issued to approve the competition law. This law aims at protecting and promoting fair competition and fighting monopolistic practices affecting the legitimate competition.'

[561] For a critical discussion on the centrality of economic analysis in competition law, see Roger D Blair and D Daniel Sokol, 'Introduction' in Roger D Blair and D Daniel Sokol (eds), *The Oxford Handbook of Antitrust Economics* (Vol 1, Oxford University Press 2015) xiii. See also, William E Kovacic, 'The Influence of Economics on Antitrust Law' (1992) 30 Economic Inquiry 294; and William E Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking' (2000) 14 Journal of Economic Perspectives 43.

section (as well as Chapter Four) acknowledges the importance of competition law and an efficient regulatory framework,[562] it is shown here that competition law is susceptible to a multitude of considerations which collectively undermine the transparency of the regulatory framework. These considerations may be described as 'external peripheral bypasses' because they divert the subject matter away from competition analysis and also limit its scope.[563] Thus, although the bypasses may enable the state to promote public interest or certain industrial policies, they undermine the transparency of the regulatory process. Emphasis is placed here on the fairness consideration and the difficulty of delineating the scope of the law due to the external peripheral bypasses confronted by the regulator in the KSA.

5.3.1.1 THE FAIRNESS CONSIDERATION

From a basic reading of the Preamble, it is clear that the government brought the Competition Law into force to restrict the monopolistic policies of organisations, including small-and-medium-sized enterprises, so as to ensure that economic development targets and goals are achieved and that the country develops in line with the other developed countries that have such a law. The text of the Preamble reflects the fact that the Kingdom wanted to initiate steps to keep in line with global developments. As noted above, one of the main reasons why foreign investors are attracted to economies is the existence of effective regulations and a good framework for an efficient competition law that ensures that a balance is achieved between the different factors present within the market. However, the broad aim of the Competition Law is the protection and encouragement of fair competition. The legislator believed that this could be achieved by prohibiting agreements between businesses whose object or effect is the restriction of the trade and commerce and the elimination of competition. Thus, the Competition Law prohibits any practices, agreements, and verbal or oral contracts between competing firms which result in the restriction, violation or for that matter the prevention of competition.

It is uncertain why emphasis is placed on the concept of fairness. This is because fairness has a multifaceted nature. Despite the emphasis, the legislator is silent on the

[562] For a critique of the essence of competition law, see Edwin S Rockefeller, *The Antitrust Religion* (KATO Institute 2007).

[563] For an analysis of the concept of external peripheral bypasses in competition law, see Ariel Ezrachi, 'Sponge' (2015) 42 The Oxford Centre for Competition Law and Policy 1, 21-22.

role fairness considerations should play and it was difficult to find any study that examines the question in the KSA. However, Trebilcock and Ducci disentangle the concept of fairness in competition law in general by assessing distinct notions of fairness that are relevant to the market.[564] They show that arguments in favour of and arguments dismissing any scope of fairness fail to clarify the type of fairness that should be relevant to any given market. In light of their analysis, it is argued here the types of fairness relevant to the Saudi context are what Trebilcock and Ducci called 'vertical fairness' and 'horizontal fairness'.[565] This is because all laws in the KSA must comply with Sharia, and it has been noted that fairness is the most important rule under Sharia regarding business activities.[566] Hence, fairness generally presupposes the fulfilment of the good faith obligation imposed by the Sharia. The vertical dimension of fairness relates to the concept of consumer welfare. Although it is not the predominant objective of the Competition Law,[567] it is one of the objectives. Thus, the Saudi legislator had some distributional equity concerns for consumers. However, the standard actually adopted is a consumer welfare standard. In regard to the latter concept, Bork noted as follows:

> Consumer welfare is greatest when society's economic resources are allocated so that consumers are able to satisfy their wants as fully as technological constraints permit. Consumer welfare, in this sense, is merely another term for the wealth of nations. [Competition law] has a built-in preference for material prosperity, but it has nothing to say about the way prosperity is distributed or used.[568]

This statement is reflective of the Competition Law in the KSA because the Law allows certain restrictive agreements or conduct insofar as they create efficiencies that are passed onto consumers in a fair manner. Also, the GAC is authorised not to apply the prohibitions contained in Article 4 of the Competition Law where the interests of

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[564] Michael Trebilcock and Francesco Ducci, 'The Multifaceted Nature of Fairness in Competition Policy' (2017) CPI Antitrust Chronicle 1, 3-5.

[565] Ibid.

[566] Rahel Schomaker, 'Sharia Law and the Transition Towards More Democracy and a Market Economy – Restrictions and Opportunities' (2016) 18(1) Topics in Middle Eastern and African Economies 156, 165.

[567] As noted above, the main objective was to attract foreign investment.

[568] Trebilcock and Ducci (n 565) 4. See also, Douglas H Ginsburg, 'Judge Bork, Consumer Welfare and Antitrust Law' (2008) 31 Harvard Law Journal and Public Policy 449, 450.

consumers are concerned. It suffices that the benefits realised to consumers outweigh the anti-competitive effect of the prohibited practice or agreement. This is equally the case in the EU regarding Article 101(3) of the TFEU, which as noted above, was influential on the formulation of competition policy in the KSA. These exceptions reflect a fairness concern for consumers even though the main objective of the Competition Law is to maintain competition in Saudi markets and attract foreign investment, which would grow the economy. Thus, the concern for consumers is only incidental to the desire to grow the wealth of the nation.

However, unlike Trebilcock and Ducci,[569] it is argued here that the vertical dimension of fairness is also relevant to competition law despite the adoption of the consumer welfare standard.[570] Also, it is possible to recognise narrow dimensions of horizontal fairness in the Competition Law on both the demand side (different consumers ought to be treated fairly) and the supply side (undertakings should have equal access to the market). This explains why barriers to entry (such as predatory pricings, quota allocations and merger control) and exclusionary forms of conduct have been reduced or eliminated as shown in Chapter Four.

As such, both vertical and horizontal fairness constitute the normative basis of the Competition Law in the KSA. In other words, there are normative reasons for considering notions of fairness regarding consumers, producers and society as a whole. The GAC is therefore required to consider the impact of the agreement or conduct on consumers, producers and society, in order to determine whether the conduct or agreement should be prohibited, regardless of whether the conduct or agreement complies with Article 4 of the Law. Given that it is uncertain what measure GAC uses to determine whether the benefits realised to consumers outweigh the anti-competitive effect of the prohibited practice or agreement, it may be argued there is no difference between the requirement of the Competition Law and that of Sharia which emphasises good faith and fairness. This is further evidence that the Competition Law was enacted to assuage the fears of some (Western) influential

[569] See also Louis Kaplov and Steven Shavell, 'Fairness versus Welfare' (2001) 114 Harvard Law Review 961, 966.

[570] The commentators cited above did not consider the relevance of the dimensions of fairness to markets in Islamic countries where the Sharia applies. Members of the WTO did not also examine the relevant principles of the Sharia when assessing the laws in the KSA.

Member States of the WTO rather than address the competitive process in the KSA. A more reasonable approach would have been to clarify the principles of Sharia regarding issues of fairness and distributional justice.[571]

5.3.1.2 DELINEATING THE SCOPE OF THE LAW

The Competition Law applies to all firms operating within the Kingdom. Article 2 of the Law defines the term 'firm' as including factories, partnerships, companies and all similar undertakings which fall under the ambit of this law. Further, Article 2 defines the 'market' as including any place where current or prospective vendors meet.[50] According to Article 4 of the Competition Law and Article 6 of the Competition Law Regulations, dominance may arise through sales of at least forty per cent of total sales within a continuous period of twelve months or where a company or group of companies is in a position to influence the prevailing price in the market. Hence, the undertaking must not be directly engaged in the Saudi market through the sales of goods or services. However, it is uncertain whether domination in terms of sales for a period of ten months would qualify as domination under the Law. There is no reason given why twelve months is used as the reference period.[572] It is also problematic that the Law uses a seller specific test of domination without regard to the buyer's perspective. There are instances where the consumers may benefit from lower prices set by the dominant firm. Hence, this test of abuse contradicts the consumer welfare standard that the Law also adopts as shown above.

It must also be noted that the existence of a dominant position is not prohibited by the Competition Law. The scope is limited to instances where the dominant position is abused. This may require evidence that the dominant undertaking has carried out an act of the kind described in Article 4 of the Law or Article 6 of the Regulations. However, the examples provided in these articles do not constitute an exhaustive list. Also, Article 2 gives the authority to the GAC to determine the percentage required to show the dominance of the market which could also include the availability of such a commodity within the market and any other criteria as determined by the GAC. For

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[571] The role of the Sharia is discussed in greater detail in Chapters Two and Six.

[572] See the criticisms of the reference period in Case 322/81 Nederlandsche Banden-Industrie Michelin NV v Commission [1983] ECR 3461, and Case T-203/01 Manufacture Francais des Pneumatiques Michelin v Commission [2003] ECRII-4071: Claus-Dieter Ehlermann and Isabela Atanasiu (eds), European Competition Law Annual 2003: What is an Abuse of a Dominant Position? (Hart Publishing 2006) 166.

example, it is up to the GAC to determine whether a merger or acquisition has resulted in the acquisition of a dominant position in the market. The GAC has therefore been tasked with determining any illegalities and preventing the imposition of any conditions, special or ordinary, on the purchase of goods or services which may also negatively impact other competitors in the market. The concept of abuse of dominance is not defined in the Competition Law so it may be useful to refer to the definition in *Hoffman-La Roche v Commission*, given the influence of EU law on the formulation of the competition policy in the KSA. It was defined as follows:

> 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 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.[573]

Given that the concept ought to be objective, the reliance on the subjective assessment by the GAC raises questions about the fairness of the process seeing as the STC is still the dominant undertaking in the telecommunications sector. The fact that the chairperson of the GAC is a member of the government, the Minister of Commerce and Industry, logically raises questions about the impartiality of the government in regulating undertakings in which the government owns shares.

However, the Royal Decree No M/24 of 11 February 2014 amended the Competition Law (in particular, Article 15) in order to reinforce the GAC's independent status and streamline the decision-making process. Also, by the end of 2015, the GAC had held forty-four ordinary meetings and rendered 178 decisions based on detailed memos,[574] and there is no evidence on record to show that it has not been impartial in dealing

[573] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 para 91.

[574] See Musaed N Alotaibi, 'Saudi Arabia: Council of Competition' (2016) The African and Middle Eastern Antitrust Review <https://globalcompetitionreview.com/insight/the-african-and-middle-eastern-antitrust-review-2016/1066977/saudi-arabia-council-of-competition> accessed 05 October 2018.

with reports and complaints about undertakings in which the government has shares. Nonetheless, the Royal Decree No M/24 does not address the problems of transparency which are related to the reliance on the GAC's subjective assessment of facts. The lack of clear guidance makes it difficult to delineate the scope of the Law. The next subsection demonstrates this problem with regard to what constitutes an anti-competitive agreement.

5.3.1.3 ANTI-COMPETITIVE AGREEMENTS

Article 4 of the Competition Law may be compared to Article 101 of the TFEU which prohibits agreement between undertakings and decisions by associations of undertakings that have as their object or effect the prevention, distortion or restriction of competition within the internal market.[575] Article 4 covers any practice, agreements or contract that restricts commerce or distorts competition between firms. Article 4 prohibits such practices and goes on to ban any such conduct which would control prices by increasing or decreasing them, restrict the freedom and flow of goods and deprive the market of certain commodities.

From a basic reading, Article 4's scope covers a bulk of anti-competitive practices. It is clear that Article 4 envisages all those practices which may be harmful to competition. However, the application of the provision is limited to restrictions based on a horizontal relationship, ie between competitor firms as opposed to EU law which also imposes restrictions on vertical relationships (between buyers and sellers of goods or services).[576] Thus, the prohibitions under Article 4 relate to any agreements and contracts between competing or potentially competing companies which have as their aim to restrict, violate or prevent competition, with a particular focus on those which:

1. Increase, decrease or fix prices, service charges or terms of sale and similar activities;
2. Set limitations to the production of goods or such provision of services;

[575] For an analysis of Article 101 of the TFEU, see Christa Tobler and Jacques Beglinger, *Essential EU Law in Charts* (4th edn, Leiden University 2018) chapter 9; Chris Townley, *Article 101 TFEU and Public Policy* (Hart Publishing 2009).

[576] See Murilo Lubambo, 'Vertical Restraints Facilitating Horizontal Collusion: Stretching Agreements in a Comparative Approach' (2015) UCL Journal of Law and Jurisprudence 135, 138-139.

3. Attempt to divide markets based upon geographical territories together with the sale or purchase quantities, customers, or any other basis adversely affecting competition, and which could also adversely affect consumers;
4. Discriminate within a group of similar clients and consumers by price, service provisions and the facilities afforded to such consumers;
5. Take any steps and measures which may or can hinder the entry of another company into the market or trying to force it out of the market by monopolizing the products and services;
6. Complicate bidding processes and tenders which would ensure that the competitors do not get a fair chance and as a result of which monopoly will be enhanced; and
7. Set prices differently depending on where goods are sold and selling at less than cost so as to force competitors out of the market.

Article 4 therefore covers the main kinds of practices, agreements and contracts between companies whose aim is to affect commercial activities in the market.[577] Thus, although Article 4 has different dimensions and components so as to cater to these anti-competitive practices, it generally addresses three main types of action which are held to be prohibitive, including discriminations of price, agreements between two or more firms which may aim to violate the competition law, and any contracts between companies which may aim to violate the competition law.[578] Nonetheless, it is noted above that the list in Article 4 is not exhaustive and the GAC has extensive powers to determine whether any particular agreement or conduct is anti-competitive noted above, the scope and nature of the Competition Law is affected by wider policy attributes, including the encouragement of FDI through the Foreign Investment Law, and the application of the privatisation policy which has as main aim the enhancement of participation of the private sector in the domestic economy. As such, in assessing a complaint or report, the GAC takes note of the positive effect of the agreement or conduct of a foreign investor on employment and infrastructure in the KSA.[579] GAC may also take note of the effect on the privatisation policy. However, the encouragement of foreign investment creates challenges for local companies attempting to obtain market access. Further, attempts at privatisation may also be problematic given that the government is a key stakeholder in the dominant companies

[577] Alotaibi (n 508) 74.
[578] Ibid.
[579] A similar approach is adopted in the EU. See *Ford/Volkswagen* (Case IV/33.814) Commission Decision no. 93/49/EEC [1993] OJ L 20/1993, 14-22, 19.

such as the STC, thereby creating irreconcilable conflicts of interest to the detriment of newly entering firms.[580] Nonetheless, the fact that the Competition Law is susceptible to the international reality (especially that of the WTO) implies that it has been instrumentalised by the government to achieve objectives beyond the competitive process in the KSA.

5.3.2 LIMITATIONS OF THE LAW

Despite the broad scope of the Competition Law, it has certain crucial limitations that must be addressed to understand the relationship between the Law and the telecommunications sector. These limitations are discussed in this section.

5.3.2.1 VERTICAL AGREEMENTS

Ardiyok and Yuksel argue that particular consideration needs to be given to vertical agreements under the Competition Law in general.[581] Hence, Article 4 is much narrower as it only prohibits agreements between actual and potential competitors. Although it covers these horizontal agreements between competitors, it fails to provide any provisions for the vertical agreements involving the range of buyers and sellers of goods and services at different levels of the chain. This is very clear from a recent ruling of the GAC which shows that the approach towards vertical restraints is not very wide so as to bring a lot of potentially illegal acts and agreements under its ambit. In *Abdel Hadi Abdullah Al-Qahtani and Sons Beverage Industry Ltd*, the Court imposed a fine on a Pepsi Cola bottler of roughly SAR 15 million for abusing its market position under Article 4.[582] GAC had investigated the bottler and concluded that it had not engaged in anticompetitive conduct through the vertical agreements. However, the Court held that the bottler's conduct and agreements amounted to price-fixing, abuse of dominance and the sharing of regional markets.

Another example is the merger involving Al Azizia Panda United Giant Stores. Despite

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[580] This is discussed in Chapter Three.

[581] Sahin Ardiyok and Bans Yuksel, 'Saudi Arabia: Vertical Restraints in the Saudi Competition Law in Light of the New Rulings of the CCP and the Administrative Court' (*Mondaq*, 7 January 2016) <http://www.mondaq.com/saudiarabia/x/456448/Trade+Regulation+Practices/Vertical+Restraints+In+The+Saudi+Competition+Law+In+Light+Of+The+New+Rulings+Of+The+CCP+And+The+Administrative+Court> accessed 10 October 2017.

[582] See Saud Al-Ammari, 'International Agreements Regulating Free Competition' (April 2016) 3(1) Legal Newsletter 1, 7.

the GAC's study concluding that the merger would constitute more than 40 per cent of the Saudi market for commodity retail trade, the merger was determined to be in the best interests of consumers and allowed by the GAC.[583]

The GAC is less likely to apply the same standards to a 'horizontal' cooperation that includes agreements and arrangements between different businesses who operate at the same level of the supply chain and so are the actual or potential competitors of each other, such as joint research and development projects between competing firms or sales and marketing joint ventures between two or more competing firms.[584] In contrast, vertical arrangements are not treated the same way because they cover businesses which operate at different levels of the supply chain such as contracts between suppliers and manufacturers or distribution agreements between manufacturers and retailers. This raises the question of what approach to use when vertical arrangements are entered into between competitors and one manufacturer agrees to distribute on behalf of another. This could also be held to be a vertical agreement although, technically speaking, it is horizontal. However, the current approach, which is not unique to the KSA, is to be less formalistic and enforce rules in a purposive manner in light of the requirements of policy and economics.[585] Thus, the GAC conducts an economic analysis to determine whether the relevant conduct or agreement is illegal.

5.3.2.2 CONCERTED PRACTICES

Compared to Article 4 of the Competition Law, Article 101 of the TFEU has a broader potential for arrangements between competitors to engage in vertical or horizontal agreements to be held as illegal. This may be attributed to the fact that there is limited information available on the actual scope of Article 4 and the Saudi regulator deals with more external peripheral bypasses than the EU regulator. The latter explains why the GAC has extensive powers and may decide to expand or limit the scope of the Competition Law by not applying the prohibitions contained in Article 4 of the Law to problematic practices and agreements that are deemed to improve efficiency and

[583] Ibid, 5-6.
[584] See Louis Kaplow, 'On the Meaning of Horizontal Agreements in Competition Law' (2011) 99 California Law Review 683, 685-686.
[585] Ibid.

realise benefits to consumers, and thus outweigh their anti-competitive effect.

Similarly, it may be argued that Article 4 does not cover as much ground as Article 101 TFEU given that Article 4 does not regulate concerted practices which may aim to determine the prices of products. In the CJEU case of *ICI Ltd v Commission*, it was held that concerted practices include coordination between companies and firms which have not yet achieved a contractual form but actually in practice substitute cooperation for the purposes of competition and may risk falling within anti-competitive practices.[586] This is not covered by Article 4 as it only extends to agreements and contracts and any pre-contractual cooperation between the undertakings. However, it is noted above that the GAC is empowered to determine whether a particular conduct or agreement is anti-competitive. Given that it is allowed to use external peripheral bypasses, its assessment takes into account the interests of the public as well as the relevant industrial policies.

5.3.2.3 ABUSE OF DOMINANCE

Article 5 of the Competition Law states that any undertaking which has a dominant position or enjoys the same is prohibited from selling goods and services below the market price with the object or effect of forcing competitors out of the market due to this cost reduction. It also prohibits putting any restrictions which hinder the supply of goods or services, creating artificial shortages so as to raise prices and in so doing puting another firm on a weak footing, and refusing to deal with another competing firm without justification

It may be argued that unlike Article 4, there is a precise definition of dominance in Article 5, thereby restricting the GAC in determining whether an undertaking is dominating in the market. Thus, any entity with a market share which exceeds the forty per cent market threshold within a continuous period of twelve months or which is in a position to influence the price may be assumed to be in a dominant position if it cannot be challenged . However, what is important is whether the undertaking has abused its dominant position. It was shown above that the GAC does not rely solely on the market share or ability to influence the price in order to determine whether an undertaking has abused its dominating position. Hence, the measure provided by

[586] Case 48/69 *ICI Ltd v Commission* [1972] ECR 619 para 6

Article 5 is not conclusive.

5.3.2.4 MERGER CONTROL

Article 6 deals with undertakings which are undergoing mergers in order to acquire assets or some other proprietary rights, which causes them to be in a dominant market position. These undertakings are required by Article 6 to inform the GAC at least sixty days before the completion of the merger or acquisition.

Article 6 states that after notifying the GAC, the undertakings will be at the behest of the organ if the merger or acquisition is accepted or rejected. The GAC is then given the power to decide whether the coming together of two companies or partnerships results in them being in a dominant position, and whether the position has been abused. Generally, the new undertaking will be in a dominant position if its market share exceeds forty per cent after the merger or acquisition for a period of twelve months or it has been thrust into a position where it can influence the price in the market.[587] However, the GAC is allowed to take into consideration the percentage of affected consumers and suppliers, the time period during which such practice has taken place, the volume of goods and services in question and the impact of the merger and acquisition on consumers. It follows that Article 6 also allows the GAC to use external peripheral bypasses.

It is therefore clear from Articles 4 and 6 that the abuses of dominant positions are those acts as described within these articles and which, broadly speaking, target any practices which have as their aim or effect the restriction of competition between undertakings in the market based upon the broad areas of price control, restriction of free flow of goods and services, barriers to entering the market and barriers to leaving the market. This also includes attempting to force out the competitors, separation of markets, compelling a client to refrain from dealing with other similar companies and other acts of discrimination which fall within the scope of these articles. Nelson also argues that intellectual property rights, which are inherently monopolistic, have the potential to create a dominant position and competition laws have a legitimate objective to ensure that such rights are not abused[588] Nonetheless, these are simply

[587] See Article 2 of the Competition Law.
[588] Nelson (n 131).

guidelines since it is up to the GAC to determine whether in the circumstances a dominant position created by a merger or acquisition is acceptable under the Competition Law.

5.4 REGULATING THE TELECOMMUNICATIONS MARKET

The Competition Law was intended to be a turning point for curbing anti-competitive behaviour within the telecommunications sector. As discussed above, competition is fundamental for the growth of organisations as well as the professional development of individuals in the organisation. Competition enables individuals to bring their best to their roles in order to help organisations to reach their full potential and remain ahead of their competitors. If not properly managed, however, competition can be a major source of conflict. As individuals and organisations strive to emerge as the best in the course of competition, some may resort to unfair methods such as sabotaging the efforts of their competitors. This act of sabotage is closely linked to power struggles since the more one wins a competition, the more powerful one becomes over competitors.[589] Competition can therefore be very unhealthy if it is not managed properly and can create many organisational conflicts.

The KSA adopted the Competition Law in 2004 and it entered into force in January 2005, with immediate applicability to the telecommunications sector, thus functioning as an overarching, gap-filling legislation that was required to work in coordination with the pre-existing Telecommunications Act. The Competition Law's focus is similar to that of the Telecommunications Act, namely ensuring fair competition in the market, thus protecting consumers and emerging competitors who are discouraged by those with dominant power in the market. As noted above, this law prohibits three kinds of practices: anti-competitive agreements, which entail fixing of prices; abuse of a firm's dominant position, which may include the imposition of unfavourable prices that hinder interested investors from venturing into the market; and finally, merger operations, which create dominant positions and so affect fair competition. These restrictions are applicable to all sectors of the Saudi economy, including the telecommunications

[589] Norah Dunbar and Judee Burgoon, 'Perceptions of Power and Interactional Dominance in Interpersonal Relationships' (2005) 22(2) Journal of Social and Personal Relationships 207, 208.

sector.

It is not difficult to see some of the immediate impacts of the Competition Law within the telecommunications sector. For example, the STC used to enjoy the benefits of monopoly prior to the adoption of the Competition Law.[82] Its position was arguably contrary to Sharia but there was no codified law prohibiting it. The Competition Law has clarified the issue and also provided guidelines for fair competition in the telecommunications market. In this light, it must be noted that a dominant position in the KSA telecommunications industry is not:

> prohibited as long as the dominating firm is not abusing the power it poses. The intellectual property rights are inherently monopolistic, have the capability of providing job opportunities. The firm that dominates any particular market enjoys a large market that earns it a lot of profit and hence it should provide employment opportunities.[590]

The regulator in the KSA is therefore required to conduct an economic analysis using what are described above as 'external peripheral bypasses' in order to ensure fair competition. However, it was shown above that they divert the subject matter away from competition analysis and unduly limit the scope of the Competition Law. This raises questions about the importance of the centrality of economics and whether fair competition can be achieved in the KSA.

5.4.1 THE CENTRALITY OF ECONOMICS

As noted above, economics is central to the analysis of the Competition Law. In Chapter Three, it was stated that the KSA's ICT market accounts for more than seventy per cent of all ICT markets in the GCC. Capital value and volume spending have made the market the largest in the Middle East. Due to increased demand for smartphones and high-speed networks, there is a projection that growth in ICT spending will increase. such future development is supported by the legislature that sees the ICT industry improvement as a national need. It was also shown in Chapter Three that the mobile market, fixed line and the internet in the KSA have all been liberalised. In September 2014, Virgin Mobile Saudi Arabia started MVNO services.

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[590] Robert Echandi and Pierre Sauvé, Prospects in International Investment Law and Policy: World Trade Forum (Cambridge University Press 2013).

The following December, Jawraa Lebara did the same. Since then, MVNO has become firmly established. By October 2015, Virgin Mobile Saudi Arabia hit its highest record of one million subscribers. Lebara KSA was not been left behind as in the same year it announced its partnership with Huawei to provide MVNO services to various telecommunications operators.

The introduction of MVNO services and reduction in mobile termination rates has led to increased competition in the KSA mobile market. The telecommunications market of the KSA in the Middle East has therefore created fierce competition among various market players. Before the introduction of the Competition Law, the market was dominated by unfair practices among MVNO providers. Due to the dominance of the STC, the company manipulated market prices and even discouraged other firms such as VSAT from entering the market. In the end, VSAT was forced to enter into a collaboration with the STC. Before the Competition Law came into force, every firm wanted to win the large customer base of the Middle East and would often become involved in abuses of dominant power to gain a competitive advantage over competitors.[591] At the time, the KSA market was largely unregulated and the main player in the industry was the STC, a state-owned undertaking that was in a position to manipulate market prices.

In 1998, the STC was converted into a corporate entity. In 2000, plans were put in place to sell an equity stake of the STC to a foreign investor. However, this deal never materialized. In 2003, the company's ownership was restructured through the selling of a thirty per cent stake to Saudi investors and state pension fund. This step as shown in Chapter Three constituted pseudo or partial privatisation and did not reduce the prospect of market dominance or influence of market prices by Etisalat and the STC. Companies that wanted to venture into the telecommunications sector such as VSAT service providers had to use the STC networks and thus did not work independently because the STC had a large customer base and venturing into the business was very expensive. Since the STC was owned by the state, it easily convinced the government to tighten rules governing entry into the telecommunications sector.

As shown in Chapter Four, prior to the introduction of the Competition Law, the STC

[591] See AS Al Aklabi and B Al-Allak, 'Saudi Telecommunication Company: A Strategy for Sustainable Competitive Advantage' (2011) Journal of Advanced Social Research 1, 76.

had taken advantage of its market dominance to engage in unfair market practices. With its dominance, the company was able to increase the popularity of broadband, which drove fixed-line growth. The STC also enjoyed annual growth in excess of ten per cent. Also, it was able to control usage. The company's ownership of more than 80% of telecommunications gave it the ability to own shares in foreign countries and so control the communication platform of the KSA.

The Competition Law was aimed at reducing the occurrence of anti-competitive practices in the telecommunications sector. It therefore provides the ground for appropriate regulation of competition as well as the imposition of penalties for any breach of the provisions of the law. Through its implementation, the entry of new players into the telecommunications industry was boosted. This also encouraged companies operating in the sector to ramp up scale and adopt new technologies. In fact, between 2008 and 2011, telecommunications operators invested SAR thirty-one billion, thus boosting efficiency in the communications sector.

However, the STC has not been fined or sanctioned despite the fact that it was the dominant undertaking and abused its position on more than one occasion. This may be attributed to the economic importance of the STC. The regulatory framework also includes policies and legislative reforms by the SAMA (Saudi Arabian Monetary Agency) that ensure a strong legal framework for financial services and has enabled free trade and open markets for new investors to invest in the sector. With its dominance, the STC has also been able to extend its market share in the KSA. However, rather than sanctions, the SAMA has constantly worked to provide the STC with tools and processes which has enabled it to take control of the international sharing platform and has accelerated creativity and development in the telecommunications sector.[592] Thus, at each step of the way, the regulator has deemed it important to support rather than sanction the STC because of the undertaking's importance to the telecommunications sector and the economy of the KSA.

In light of the above, it is uncertain whether it may be said that the main goal of the

[592] Zain, 'The Socioeconomic Impact of Mobile Telecommunication in the MENA Region' (*Zain*, 2014) <http://www.zain.com/media/images/resumes/Zain_PWC_Report_2014.pdf> accessed 10 October 2017.

Competition Law is to promote and protect fair competition and fight unfair practices. As with the case of the STC, emphasis is placed on the effects of the practices rather than their unfairness regarding other competitors in the market. It must be noted that before the Telecommunications Act and the Competition Law, Sharia was already in force. Sharia restricts the ability of a company to obtain a dominant position in the market. Article 4 of the Competition Law reinforces this rule by stating that agreements and practices among the current communication firms, either written or verbal, with an aim of creating unl Telecommunications Act awful practices are prohibited. The GAC may take appropriate measures to prohibit dominant firms from further exploiting the market. However, this has not been done regarding the STC because of the centrality of economics in competition analysis.

5.4.2 THE COMPETITION LAW ALONE IS NOT SUFFICIENT

Concerns about anti-competitive practices and the need for a competition law are relatively new to the KSA, coming into play over the last few decades with the application to accede to the WTO. While these issues have long been addressed by the principles of Sharia, as the KSA sought to accede to the WTO and attract foreign investment and become a more respected player in the global market, its codified laws needed to reflect generally accepted competition principles. As such, the Competition Law that was enacted does not reflect the competitive process as understood by local undertakings. The fact that the Competition Law was enacted to assuage the fears of foreign investors explains why the role that statute plays in the KSA's competition policy has been less clear than the Kingdom's broad understanding of the need for its enactment.

Thus, the existing Telecommunications Act, the Competition Law, and the Sharia principles upon which all Saudi laws are based find themselves within a muddled framework for the regulation of anti-competitive practices within the Kingdom's telecommunications sector. A primary challenge with the dual governing legislations and Sharia is the issue of overlapping jurisdiction.

5.4.2.1 THE PROBLEM OF OVERLAPPING JURISDICTION

One of the difficulties with introducing formal, broad competition laws into an area that is already addressed by sector-specific regulation, as well as common law (in this

case, Sharia), is the overlap of jurisdiction between the competition authority and the sector's regulatory authority. Indeed, it would be difficult, if not impossible, to do away with the existing institutions and replace them with an ideally harmonised, singular entity.[593] The following sections consider some of the issues the Kingdom has encountered as a result of having two pieces of legislation with jurisdiction over the same procedural and substantive issues within the telecommunications sector.

5.4.2.2 RESOLVING JURISDICTIONAL CONFLICTS

When one is faced with multiple pieces of legislation that have jurisdiction over the same matters, the adage 'too many cooks in the kitchen' becomes applicable. What becomes problematic is determining what the relationship between the two laws is, including the hierarchy of application, enforcement and authority. As Singh quips, trying to harmonise two pieces of competition legislation is like trying to determine who is the 'chief chef' in the competition regulation kitchen.[594] What may have been simply overlooked by legislators when drafting a subsequent, broad competition law, poses problems for the day-to-day operations of competition regulators in the telecommunications industry who are actively trying to encourage a competitor environment. Thus, without some guidance as to how jurisdictional conflicts are to be resolved, regulators at both the broad economic level and the sector-specific level are faced with resolving what the legislatures failed to address.

Singh suggests that there are essentially three options available for resolving jurisdictional conflicts.[595] First, the sector-specific legislation and regulator must supersede the broad competition law and the competition authority. However, in practice in the KSA, the Telecommunications Act is insufficient on its own to regulate the sector, thus mandating the need for additional regulation. Second, the competition legislation and authority could replace the sector-specific legislation and regulator. Yet, this also does not appear to be ideal as it lacks provisions that address the nuances of the sector's development. Finally, a third option would be to create a system in

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[593] See International Competition Network, 'Antitrust Enforcement in Regulated Sectors Working Group, Subgroup 2L Interrelations Between Antitrust and Regulatory Authorities' (Fourth ICN Annual Conference, Bonn, June 2004) 9.

[594] Rahul Singh, 'The Teeter-Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators' (2009) 8 Washington University Global Studies Law Review 71, 93.

[595] Ibid, 94.

which the broad competition law system and the sector-specific system can coexist. While this was not the explicit intention of the KSA in enacting the Telecommunications Act and the Competition Law, this is where it is left based on what has come to pass. Thus, the government must take the necessary steps to reconcile these systems so that they act in concert as opposed to providing two parallel systems for addressing the same concerns within the telecommunications sector.

5.4.3 COMPETITION POLICY COHERENCE

As mentioned above, there needs to be efforts to bring the two parallel sets of competition provisions that apply to the telecommunications sector into coordinated action. The failure to have a certain level of coherence often results in sporadic competition enforcement.[596] Remedying these overlapping and unstable provisions means creating a certain level of coherence in the competition model from a legal context. There is no doubt that both a general competition authority and a sector-specific regulator each have unique characteristics and attributes that can contribute to the model's success, but ultimately some reconciliation needs to happen to allow each of these entities to fulfil their purposes within the system. The problem here seems to be the fact that the government instrumentalised the Competition Law whereby its goals go beyond the competitive process as understood by local undertakings.

It is therefore important to ensure that the enforcement of the Competition Law takes into account the goals of local participants in the telecommunications market. This would require 'a fluent interplay between both agencies [in order to] properly take advantage of double control over the sector'.[597] However, double control may lead to duplicative efforts rather than two agencies acting together in harmony to provide adequate regulation of a specific economic market sector. By creating competition policy coherence, the KSA can reduce duplicative efforts, increase efficiency, improve market stability and create consistent enforcement results to preserve the competition environment.[99]

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[596] International Competition Network, 'Report of the ICN Working Group on Telecommunication Services' (Fifth Annual Conference, Cape Town 2006) 22.

[597] Paloma Szerman, 'Telecommunication Regulators and Competition Agencies: Their Institutional Setting in Spain, the UK and France' (2015) European Networks Law & Regulation Quarterly 243, 244.

5.4.3.1 STREAMLINED ENFORCEMENT

There are numerous reasons why streamlined enforcement of competition issues is important. The first is so that the firms within the market are aware of which authority they are subject to and what measures of enforcement they are able to impose. Second, streamlining enforcement prevents the duplication of efforts by multiple regulatory entities within the Kingdom, creating operational efficiencies within the telecommunications sector. Further, as Singh notes, competition law is a specialized field and leaving the enforcement of competition matters to the specific competition authority can reduce transaction costs and enhance efficiency.[598] Similarly, when it comes to matters of substantive enforcement, as opposed to competition enforcement, the sector-specific regulator's expertise in the subject matter would position it more suitably to enforce any violations of the Telecommunications Act. However, the exclusion of the sector from the realm of competition law constitutes an external peripheral bypass which diverts the subject matter away from the competition analysis, making it more likely that undertakings in that sector would engage in anti-competitive practices.

5.7 POTENTIAL SOLUTIONS

The question then becomes – how can the issue of overlapping jurisdiction be addressed? It is apparent that some action needs to be taken to improve the overall effectiveness of competition regulation within the telecommunications sector, but it must be determined what that model looks like before the legislature can take effective action toward reconciling these pieces of legislation. In addressing the issues of overlapping jurisdiction, it is important to consider the various models used by countries to resolve the interplay between competition law and sector-specific regulation. The telecommunications sector may simply be excluded from the purview of the broad competition law, leaving regulation to the sector-specific legislation. Nonetheless, as noted above, this is likely to increase the incidence of anti-competitive practices in the sector. The telecommunications sector may also be specifically included within the scope of the competition law's applicability. In this instance, the sector-specific regulation may take precedence over the competition legislation, and a policy document may be used to reconcile the applicability of the two laws. Finally,

[598] Singh (n 595) 94.

a third approach involves developing the broad competition law and then promulgating sector-specific laws subject to the competition law's applicability. This presents an option for a harmonised approach in the form of amending or replacing the Telecommunications Act in light of the nation's development of its competition policy to create a harmonised framework. However, steps must be taken to ensure that the competition policy does not simply advance goals that are beyond the competitive process as understood by Saudi manufacturers and buyers.

5.5 CONCLUSION

The scope and nature of the Competition Law is affected by wide policy attributes, including the encouragement of FDI through the Foreign Investment Law, and the application of the privatisation policy which has as its main aim the enhancement of participation of the private sector in the domestic economy. Thus, in assessing a complaint or report, the GAC may take note of the positive effect of the anti-competitive agreement or conduct of a foreign investor on employment and infrastructure in the KSA. The GAC may also take note of the effect on the privatisation policy. However, the encouragement of foreign investment via such means creates challenges for local companies attempting to obtain market access. Also, from a legal perspective, it is objectionable that the GAC is required to prioritise economics in the competition analysis in such a subjective manner that makes it difficult to predict how the Law will be applied in any given circumstance.

It may be contended that the Competition Law has much room for improvement and will develop with time as it is going through a teething phase at present.[599] However, from the above analysis, it is uncertain what support this specific legislation actually provides to the regulatory framework in the telecommunications sector given that it largely overlaps with the Telecommunications Act and principles of Sharia.

Nonetheless, research has shown that the enforcement of pro-competitive rules serves the objectives of fairness and efficiency and increases consumer surplus and welfare. Also, it ensures that the elimination or reduction of barriers to trade by the government is not undermined or negated by the anti-competitive conduct of local firms which may abuse their market power. The main problems with the Competition

[599] See Saleem (n 553) 290-291.

Law include the centrality of economic analysis which shields arbitrary decision making by the GAC, the fact that the Law is susceptible to a multitude of considerations which collectively undermine the transparency of the regulatory framework, and a poor delineation of the scope of the Law. Addressing the latter problem will help to solve that of overlapping jurisdiction and will also determine the suitable approach for developing a coherent competition policy in the telecommunications sector. The next chapter demonstrates how this can be achieved.

CHAPTER 6

UNDERSTANDING THE RELATIONSHIP BETWEEN THE COMPETITION LAW AND THE TELECOMMUNICATIONS ACT: A COMPARATIVE ANALYSIS OF SELECTED JURISDICTIONS

6.1 INTRODUCTION

As evidenced by the discussion in Chapter Five, competition law may promote consumer welfare on a large-scale or detrimentally harm that same welfare and inter-societal relations if abused. Competition laws, while they go by different names,[600] embody the same underlying objectives in the countries in which they are enacted—to combat monopolistic practices and ensure fair competition in the market.[601] The KSA is no different. As shown in Chapter Five, the purpose of the competition law regime in the KSA is to prevent a single entity from acquiring a dominant market position or from entering into arrangements with the intention of restricting competition. However, through a lack of coherence in the laws and their implementing regulations, the competition regime currently falls short of its intended goals. The current efforts within the KSA have been moving toward codification of substantive laws and procedural regulations.[602] For these codification efforts to be successful and ensure clarity and legal certainty for market participants and consumers, the separate pieces of legislation must function in harmony to create a unified framework for addressing anti-competitive practices.

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[600] Also referred to as antitrust or anti-monopoly laws. The genesis of the term ‘antitrust’ may be traced to the adoption of the Sherman Act of 1890 in the United States (US) that was primarily aimed at regulating the expansion of ‘trusts’ that business competitors used to coordinate their activities and run entire industries as monopolies. See Edward Biester, ‘Understanding Antitrust Laws, Competition, the Economy, and Their Impact on Our Everyday Lives’ (2011) 72(2) Social Education 68, 68. Diane Wood contended that the name ‘antitrust’ used in the US is ‘a quaint name, evocative of long-dead robber barons and swashbuckling Presidents. Other countries with more recently enacted laws give them the more straightforward label of "competition" laws-laws designed to protect competition and consumers.’ However, she noted that the competition laws in the US and Western Europe have common roots in the American experience of the first half of the twentieth century and the deeper common law traditions. See Diane P Wood, ‘The US Antitrust Laws in a Global Context’ (2004) Columbia Business Law Review 265, 265-266.

[601] See Nelson (131).

[602] Sebghatullah Qazi Zada and Mohd Ziaolhaq Qazi Zada, ‘Codification of Islamic Law in the Muslim World: Trends and Practices’ (2016) 6(12) Journal of Applied Environmental and Biological Sciences 160, 160.

This chapter attempts to formulate the suitable framework for encouraging competition in and regulation of, the telecommunications sector of the KSA. It conducts a comparative analysis of three jurisdictional models, namely the UAE, Qatar and the US. The goal of this analysis is to identify ways in which the Saudi legislative structure can be improved through a balance of the cultural considerations specific to the geographic region in which the KSA is situated while also learning from the experience of more sophisticated competition law systems that have withstood the challenges of time and technological advancements. It begins by discussing the criteria used to select the three jurisdictions. This is followed by an assessment of the models used in the countries and the suitability of the models to the KSA.

The comparison achieves two objectives. First, it explores the relationship between competition law and sector-specific regulation. The jurisdictional models examined serve an instructive purpose by demonstrating ways in which the KSA can continue to advance its competition regime through legislative harmonisation. Second, it helps to understand where the current Saudi competition law regime (as applied in the telecommunications sector) is in relation to the global trends in competition culture. The analysis of the approaches of different jurisdictions helps to identify the similarities and differences between the given jurisdictions and the KSA and points to what can be avoided or achieved in the Kingdom through a competition policy.

6.2 COMPARATIVE SELECTION CRITERIA

At a global level, competition law has become a highly topical and debated issue because of the consensus on the fact that efficient competition is an important driver of productivity.[603] When effectively managed, competition allows for the achievement of consumer and economic welfare on a large scale, but when left unchecked and when anti-competitive practices become prevalent, local welfare and relations between societies may be destroyed.

[603] See Jarig van Sinderen and Ron Kemp, 'The Economic Effect of Competition Law Enforcement: The Case of the Netherlands' (2008) 156(4) De Economist 365, 365-385; John S Metcalfe and Ronald Ramolgan, 'Competition and the Regulation of Economic Development' in Paul Cook, Raul Fabella and Cassey Lee (eds), *Competitive Advantage and Competition Policy in Developing Countries* (Edward Elgar 2007) 21, 26; Yiuchiro Uchida and Paul Cook, 'Domestic Competition and Technological and Trade Competitiveness' in Paul Cook, Raul Fabella and Cassey Lee (eds), *Competitive Advantage and Competition Policy in Developing Countries* (Edward Elgar 2007) 311; William W Lewis, The Power of Productivity (University of Chicago Press 2004) 288.

In light of the importance of the competition regime in the KSA as shown in Chapters Four and Five, this chapter analyses the competition regime in three other jurisdictions and contextualizes the regime within the Sharia-based legal systems of two of the three jurisdictions, and specifically within their telecommunications sectors. It identifies the driving policy reasons necessitating competition statutes and attempts to determine whether the statutes are coherent and effective in their current iteration. The objective of the analyses is to make suggestions for enhancing the competition regime of the KSA. The two regimes within Sharia-based legal systems are two GCC nations, the UAE and Qatar. They are examined in order to demonstrate two different approaches to protecting competition in the telecommunications sectors of Muslim-majority countries.[604] The UAE has adopted an approach that expressly excludes telecommunications from the purview of competition law, leaving the regulation of anti-competitive behaviours in the sector solely to the sector-specific regulatory authority. Qatar, for its part, demonstrates an attempt to harmonise sector-specific telecommunications regulations with the overarching competition law regime. Thus, the competition law applies coupled with a complementary set of sector-specific regulations. What makes the UAE and Qatar suitable comparable jurisdictions is that, similar to the KSA, they are both legal systems in which laws are required to comply with the principles of Sharia. As such, they provide two clear examples of attempts to develop a modern competition policy in a Sharia-based society. However, in both countries the development and implementation of the competition law systems are relatively new. Hence, they are not sufficiently developed because they are not based on rules or principles that were established and revisited in landmark decisions or longstanding customs of the communities.[605] In view of this limitation, this chapter

[604] This dissertation takes a state-specific approach to addressing the different structures of competition law frameworks. This is in contrast to the supranational approach taken by the European Union to address competition law issues. See Katalin J Cseres, 'Multijurisdictional Competition Law Enforcement: The Interface between European Competition Law and the Competition Laws of the New Member States' (2007) 3(2) European Competition Journal 465, 465-502; Roger J Van Den Bergh and Peter D Camesasca, *European Competition Law and Economics: A Comparative Perspective* (Intersentia 2001) 125-126. While it could be argued that the GCC is essentially an underdeveloped supranational entity that should follow in the steps of the European Union, such a transformation would need to be coordinated among all the member nations. Thus, at this point, it is purely theoretical. An exploration of a supranational GCC approach, while potentially viable as a distant, long-term solution, is therefore outside the scope of the current analysis. The goal of this chapter is to focus on positive changes that can be immediately adopted and implemented from comparable jurisdictions to assist the Saudi government in the effective regulation of competition in the Telecommunication.

[605] Abhimanyu Singh, 'The Necessity for International Harmonization of Competition Law' (24 September 2015)<https://www.slideshare.net/abhimanyunusrl/the-necessity-for-international-harmonization-of-competition-law- 53139851> accessed 15 May 2017. By the late 1970s, one in nine

examines a third model, that of the US.

To help identify ways in which a harmonised structure can be implemented and improved, the well-established competition law regime of the US is considered. Unlike the UAE and Qatar, competition law in the US is based on well-defined judicial institutions, rules or principles established in landmark decisions and longstanding customs. It was described by Pierce as the oldest system of competition law.[606] Its evaluation here is intended to provide a procedural model framework that can be adopted within the KSA, despite the use of legal precedent in the common law regime in the US, unlike the Sharia/civil law regime of the KSA. The goal of introducing the approach of an old and sophisticated regime is to determine whether an aspirational model may be designed based on notable and desirable features of the US approach. The choice of the US also stems from its harmonised approach that coordinates the application of the competition law framework with the sector-specific regulations of the telecommunications industry. In fact, the US competition law framework was the first to establish a broadly applicable competition law regime that applied to economic sectors.[607] It created a system of antitrust enforcement that was initially untethered to any particular set of sector-specific regulations.[608] However, over time, it became apparent that ex ante regulation was needed in addition to the ex post nature of competition law. Sector-specific regulations were therefore issued to work in harmony with the competition law provisions. Like the US in the past, GCC nations like the KSA and Qatar have found themselves with an unintended duality of legislation as a result of first creating sector-specific regulations. Thus, it is important to determine whether the system ought to be built on competition first, and then followed by tailored regulation.[609] The US is an example of a system that was built to embody the

jurisdictions had a competition law in place and of those nine, only six had a competition authority. By 1990, twenty-three jurisdictions had a competition law and sixteen had a competition authority. However, it was between 1990 and 2013 that the global economy saw an increase of over 500 per cent in the development of jurisdictions with competition law regimes and competition authorities. By October 2013, 127 jurisdictions had a competition law and 120 had a competition authority. Ibid.

[606] Richard J Pierce, 'Comparing the Competition Law Regimes of the United States and India' (2017) GWU Law School Public Law Research Paper No. 2017-27 1, 1. < https://scholarship.law.gwu.edu/cgi/viewcontent.cgi?article=2523&context=faculty_publications> accessed 10 October 2018.

[607] See Wood (n 601) 266.

[608] See Jonida Lamaj, 'The Evolution of Antitrust Law in USA' (2017) 13(4) European Scientific Journal 154, 154-158.

[609] The Sherman Act 1890 began with a resolution introduced by congressman Henry Bacon in the first session of the fiftieth congress in 1888. The resolution directed the House Committee on manufactures

complementary nature of competition law and sector-specific regulation and may serve as a model on how to reconcile the two regimes in a unified policy.[610]

As a preliminary note, it is also important to point out that the comparisons made by this chapter focus on procedural rather than substantive harmonisation. This focus on procedural harmonisation stems from the unique purposes that the two pieces of legislation (competition and sector-specific) serve. As will be further detailed in this chapter, competition laws regulate anti-competitive behaviours at a broad or general level, whereas sector-specific regulations deal with the specific aspects of the market sector, such as the telecommunications industry. As a function of their purposes, there is inherently some overlap between the jurisdictions of the two that must be resolved. However, this is not a conflict of substantive provisions. Rather, this is a situation necessitating a hierarchy of enforcement mechanisms from a procedural level, such that it becomes clear which competition authority has effective jurisdiction over which matters, or whether one may be excluded. Nonetheless, it was shown in Chapter Five that each of the relevant legislations serves a specific substantive function within the telecommunications competition policy and, for the most part, their substantive provisions do not need to be reconciled.

6.2.1 A COMPARATIVE ANALYSIS OF THE RELATIONSHIP BETWEEN COMPETITION LAWS AND THE TELECOMMUNICATIONS REGULATIONS IN SELECTED JURISDICTIONS

This comparative analysis highlights the competition law systems of three nations that have been chosen as instructive models with which to compare the Saudi approach. As noted above, the first two, the UAE and Qatar, were chosen for their role as Sharia -based members of the GCC. While having similar legal systems, the UAE and Qatar take different approaches to the implementation of competition regimes with regard to the telecommunications sector. The UAE specifically excludes telecommunications from the scope of its competition legislation, whereas Qatar employs both a competition law and sector-specific regulations. The US is then used as a third template, representing the longest-standing competition law regime in one of the

to investigate trusts in many industries and make recommendations for an appropriate statute.

[610] Rudolph Peritz, Competition Policy in America: History, Rhetoric, Law (Oxford University Press 1996) 13-19.

world's most developed nations. It reflects an established harmonised approach that mirrors the Qatari and Saudi approaches. For each of these countries, a brief history of their competition law as well as its relationship with the telecommunications sector is provided. Each system will then be compared with the existing regime in the KSA to identify similarities, differences and opportunities for improvement.

For competitive markets to be efficient, there must be some sort of governance in place that prevents the self-destruction of the sector.[611] As pressures increase for the participating actors, competing with natural domestic monopolies and in the realm of international business activities, there must be a way to support these actors, preserve the efficiency of the market and protect the general welfare. While each country's competition law regime will be unique depending on its existing legal framework and objectives, there are certain common characteristics that come up in nearly every regime. The most common characteristic is the prohibition of certain types of behaviour, conduct and transactions.[612] Specifically, most competition laws prohibit collusion, price-fixing cartels or related schemes and the limiting of production by abusing a dominant position.[613] In addition to being similar in substance, many regimes have also come to analyse competition issues in the same way. These similarities in approaches are particularly useful as the number of cross-border transactions increase and the need for bilateral cooperation becomes more prominent.

However, just as these regimes have similarities that unite them, they also have many differences that distinguish them. Often these differences are shaped by a nation's supplementary objectives. Dabbah[614] highlights four primary ways that competition laws differ that will be helpful in this analysis of competing jurisdictional systems. First, nations differ in how they define competition and understand what type of activity the competition law is intended to prevent. Second, the naming conventions applied to the law and how the law fits within the nation's existing regulatory framework differ depending on the jurisdiction. Third, and arguably most important, is how different

[611] Oliver Budzinski, The Governance of Global Competition – Competence Allocation in International Competition Policy (Edward Elgar 2008) 1.

[612] Maher M Dabbah, International and Comparative Competition Law (Cambridge University Press 2012) 13.

[613] Louis Kaplow and Carl Shapiro, 'Antitrust' (2007) Harvard Law School Discussion Paper No. 575. < https://www.nber.org/papers/w12867> accessed 10 October 2018.

[614] Dabah (n 613) 13.

jurisdictions handle enforcement of the competition law. Finally, when assessing the methods and procedures, it is important to consider the meta-institutional approach that is used to achieve the objectives of competition law.

It must be noted that there is no single formula for effectiveness with regard to competition regimes given that each regime has unique features based upon its objectives.[615] Instead of being evaluated on the basis of the regime's adherence to a prescribed model, the effectiveness of the regime may be evaluated with regard to a set of established criteria. As such, the author has established the following criteria for determining a competition regime's effectiveness: ease of implementation; governance and interpretation; and an understanding of society and respect for its culture.[616]

With regard to the first criterion, the ease of implementation, it is important to consider the history, politics and economics of the particular country.[617] Competition law is designed to protect businesses and consumers from anti-competitive behaviour. The purpose of the law is to safeguard effective competition in order to deliver open, dynamic markets along with enhanced productivity, innovation and value for consumers.[618] To achieve these goals, it is imperative that the law is structured in such a way that it fits within the societal landscape of the nation and that businesses operating within the market are able to comply.

Furthermore, despite any differences in views or opinions, the introduction of a competition policy into the market of any country requires the support of enforcement and regulatory bodies as well as the judiciary. Through such enforcement activities,

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[615] See Frederic Jenny, 'The Globalization of Competition Law and Policy' (11 July 2016) <http://www.compcom.co.za/wp-content/uploads/2016/07/11.50-frederic-Competiton-law-An-internzational-perpsective-Lodnon-March-2013.pdf> accessed 12 May 2017.

[616] These are some of the criteria used by previous researchers to compare competition law regimes. See Richard Pierce (n 604); Andreas Polk and Andreja Primec, 'Slovenian and German Competition Policy Regimes: A Comparative Analysis' (2017) 63(2) Our Economy 3, 3-13; Jacqueline Bos, 'Antitrust Treatment of Cartels: A Comparative Survey of Competition Law Exemptions in the United States, the European Union, Australia and Japan' (2002) 1 Washington University Global Studies Law Review 415, 429-439; Eleanor M Fox, 'US and EU Competition Law: A Comparison' in Edward M Graham and J David Richardson (eds), *Global Competition Policy* (Columbia University Press 1997) 339, 340-344.

[617] Jacqueline Bos, ibid, 448. See also, Phillip E Areeda and Herbert Hovenkamp, Antitrust Law: An Analysis of Antitrust Principles and their Application (Wolters Kluwer 1986) 637-642.

[618] Maurice E Stucke, 'Behavioral Economists at the Gate: Antitrust in the 21st Century' (2007) 38(3) Loyola University of Chicago Law Journal 513, 542; Eleanor M Fox, 'The Battle for the Soul of Antitrusts' (1987) 75 California Law Review 917, 919.

procedural, economic and legal rules are developed.[619] In evaluating governance and interpretation, one must consider the applicability to public versus private entities, due process in enforcement, the overall enforcement priorities, and the general political and legal climates informing legislative interpretation.

Finally, in discerning the understanding of society and respect for its culture, one must consider the country's particular characteristics, including underlying societal principles, the level of poverty and potential for abuse, and the ease with which such structures can be integrated into the national economy while minimising the effects on citizens' daily lives.[620] Of particular importance for any competition regime being developed within the KSA is the central role that Sharia principles play in the daily lives of its citizens. It is important that competition regulators understand the extent to which such legislative policies are intrinsically tied to the societal culture.

6.3 LESSONS FROM THE GULF COOPERATION COUNCIL

The GCC comprises six nations—Bahrain, Kuwait, Oman, Qatar, Saudi Arabia, and the UAE.[621] Together, these nations form a regional political and economic alliance. However, despite their commonalities and aligned interests, each has their own independent system of governance that differs in its approaches to the implementation of competition law.[622]

One of the primary factors for the implementation of a regulatory competition framework in the GCC member countries is that it conforms to the requirements of the WTO.[623] Despite some important progress, the GCC still has a number of challenges to face to promote an effective competition culture throughout the region. The GCC members recognise that competition in the telecommunications industry presents an

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[619] Bos (n 618) 418, 450.

[620] Stucke (n 619) 515.

[621] Simona Sikimic, 'Profile: What is the GCC?' (Middle East Eye, 8 April 2014) <http://www.middleeasteye.net/news/profile-what-gcc-18030284> accessed 7 April 2017.

[622] For the dynamics of relations and approaches in the GCC, see M Eyren Tok, Jason J McSparren and Michael Olender, 'The Perpetuation of Regime Security in Gulf Cooperation Council Sites: A Multi-Lens Approach' (2017) 26(1) Digest of Middle East Studies 150, 150-153.

[623] The importance of the WTO is discussed in Chapter Five. See also, Habib Kazzi, 'GCC States and Trade Remedies: Between Benefits and Challenges' (2014) 1(2) European Law and Politics Journal 10, 23-24.

attractive opportunity and this has been one of the motivating factors behind WTO compliance.

Regardless of the issues with existing systems, or in some countries the lack of implementation, there is widespread agreement among the members on the need for some form of regulation that involves a unified trade system, consumer protection laws and an effective competition system.[624] It remains possible that supranational legislation could be enacted within the GCC to serve as a unified competition code applicable to all members.[625] However, until such legislation is enacted, the members must regulate competition within their domestic legal systems.

Of the six GCC countries, this section will review the competition law regimes and their applicability to the telecommunications sector of the UAE and Qatar. The UAE is an example of a system that specifically excludes the telecommunications sector from the scope of competition law, whereas Qatar is an example of a system that explicitly includes the telecommunications sector within the purview of competition law. The systems of both of these countries are heavily influenced by Sharia, likewise the KSA.

6.3.1 UNITED ARAB EMIRATES: EXCLUSION OF THE TELECOMMUNICATIONS SECTOR

The UAE is a rapidly growing country that has become an attractive investment haven. It is governed primarily by Sharia and a federal civil justice system, which includes the use of commercial codes.[626] The Competition Law[627] took effect on 23 February 2013, with the goal of regulating market behaviour and preventing market dominance and restrictive agreements. Prior to the enactment of this statute, the regulation of competition within the UAE was weak at best.[628] Concerns were expressed by

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[624] See Abdulrahman A Alajaji, An Evaluation of E-Commerce Legislation in GCC States: Lessons and Principles from the International Best Practices (Unpublished Dissertation, Lancaster University 2016) 26-56. No progress has been made regarding enacting a supranational legislation on competition in the GCC.

[625] See The World Bank, Middle East and North Africa Region, 'Economic Integration in the GCC' (The World Bank, 2010) <http://siteresources.worldbank.org/INTMENA/Resources/GCCStudyweb.pdf> accessed 16 April 2017; Arab News, 'GCC States to Unify 6 Commercial Laws' (*Arab News*, 25 May 2015) <http://www.arabnews.com/saudi-arabia/news/751771> accessed 16 April 2017.

[626] Alisha Ansari, What is the Scope of Competition Law in the UAE? – A Comparative Study with Developed and Developing Nations (Unpublished Dissertation, Western University, 2013) 101.

[627] UAE Federal Law No 4 of 2012.

[628] See Waldo Steyn, 'New Competition Law in the UAE' (Al Tamimi & Co, December 2013) <http://www.tamimi.com/en/magazine/law-update/section-5/january-2/new-competition-law-in-the-

businesses about the inconsistencies between the treatment of undertakings owned by the state and private businesses, and the domestic encumbrances that were in place within the UAE as a result of the lack of a consolidated competition law.[629] Ultimately, these concerns along with the policies of the GCC and WTO led to the promulgation of UAE Federal Law No 4 of 2012 that regulates competition.

When this law went into effect in early 2013, businesses were given a transitional period of six months to bring their agreements and operations into compliance with its provisions.[630] During this six-month period, additional implementing measures were adopted to provide further guidance on the implications of the new Competition Law in practice.[631] Although there had been anti-competitive provisions in previous legislations, the enactment of the Competition Law coupled with the creation of implementing regulations represented the first comprehensive competition regime within the UAE.

6.3.1.1 SCOPE OF THE UAE COMPETITION LAW

In line with the foundational objectives of nearly all competition regimes, the UAE's Competition Law primarily concerns itself with limiting abuses of power within the market to protect consumers. Among its provisions are prohibitions on restrictive agreements,[632] abuse of dominant positions within the market,[633] and mergers that would threaten the market. The Competition Law was enacted with broad applicability, governing both domestic businesses and foreign businesses operating within the UAE. It is enforced by the Ministry of the Economy in conjunction with a special Competition Committee that acts as advisor to the Minister.[634]

However, the Competition Law's scope of application was narrowed by a list of

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uae.html> accessed 16 April 2017.

[629] Ibid.

[630] Zubair Mir et al, 'The New UAE Federal Competition Law Federal Law No 4 of 2012 Concerning Regulating Competition' (Herbert Smith Freehills LLP, 12 February 2013) <http://www.lexology.com/library/detail.aspx?g=de938446-ade9-4266-af28-a90bb5b37bbf> accessed 16 April 2017.

[631] See also, the Resolution of the Council of Ministers No 37 of 2014.

[632] See Article 5 of the UAE Federal Law No 4 of 2012.

[633] Article 6, ibid.

[634] Maria Casoria, 'Competition Law in the GCC Countries: The Tale of a Blurry Enforcement' (2017) 16(3) Chinese Business Review 141, 145.

exclusions including state-owned entities and undertakings operating in some sectors including oil and gas, financial services, pharmaceutical products, cultural activities, postal services, water and electricity, transportation, and the telecommunications sector.[635] The rationale for the exclusion of the telecommunications sector is that it was already regulated by the Telecommunications Regulatory Authority.[636] What remains unclear is what role the Competition Law then plays where sector-specific regulations are in force.

6.3.1.2 UAE TELECOMMUNICATIONS REGULATIONS

Having defined the scope of the Competition Law and its exclusion of the telecommunications sector, the next step is to look at the applicable regulations in place that govern this sector. The UAE Telecommunications Law[637] was enacted in 2003, nearly a decade before the Competition Law came into effect. The Telecommunications Law created the Telecommunications Regulatory Authority and requires all businesses dealing within the telecommunications sector to hold a license permitting them to provide these services to the public. Any business that fails to obtain a license could be subject to fines, suspension or closure. The goals that the regulatory authority seeks to achieve are similar to the foundational objectives of the Competition Law—to guarantee competitiveness, transparency and sustainability within the market.[638] This may explain why the telecommunications sector was excluded from the Competition Law.

6.3.1.3 INTERACTION BETWEEN THE COMPETITION LAW AND TELECOMMUNICATIONS REGULATIONS

As the UAE Competition Law specifically excludes telecommunications from the purview of its authority, the Telecommunications Regulatory Authority continues to maintain exclusive regulatory and enforcement powers—powers that it had been exercising for almost a decade prior to the enactment of the Competition Law. However, as the industry continues to expand and evolve, it is important to examine

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[635] Appendix to Article 4 of the Federal Competition Law of UAE 2012 <http://ejustice.gov.ae/downloads/latest_laws/federal_law_4_2012_en.pdf> accessed 16 April 2017.

[636] Mir et al (n 631).

[637] UAE Federal Decree No 3 of 2003.

[638] Abu Dhabi Government, 'Telecommunication Regulatory Authority' (Abu Dhabi Government, 2017) <https://www.abudhabi.ae/portal/public/en/departments/department_detail?docName=ADEGP_DF_138738_EN &_adf.ctrl-state=jivf2r7a4_4&_afrLoop=14800220405071885#!> accessed 16 April 2017.

the relationship between the Telecommunications Law and the Competition Law.

First, it must be noted that the telecommunications sector within the UAE is a well-developed and largely successful industry within the GCC and the Middle East. There are two primary integrated telecommunications operators within the region—Emirates Telecommunication Corporation (Etisalat) and Emirates Integrated Telecommunication Company (EITC), which implies that important markets in the telecommunications sector are vertical markets. For example, the vertical-specific products and services of Etisalat and EITC are promoted only within the industry (they provide connectivity to other telecommunications operators), although they also engage in horizontal marketing with the delivery of wireless services to end users across various industries. Also, underscoring the importance of this sector within the UAE economy, a report by the Telecommunications Regulatory Authority stated that in 2010 this sector generated AED 3.2 billion in fixed telephony service, AED 18.4 billion in mobile services and AED 2.7 billion in internet services.[639] In terms of the scope of this industry, in 2010 it comprised 5.3 per cent of the UAE's total GDP.[640]

Given the importance of the telecommunications sector to the UAE economy, it is uncertain whether it is justified to specifically exclude the sector from the scope of the Competition Law on the grounds that the sector-specific regulator's objectives are the same as those of the Competition Law. Certainly, the government does not believe that the sector should be unregulated but rather that the existing sector-specific regulator is, at least for the time being, sufficient to achieve the objectives of the competition policy.[641] Thus, the Telecommunications Law provides that the Telecommunications Regulatory Authority's powers are to be exercised without prejudice to any applicable laws or regulations. From a policy perspective, its regulatory actions should therefore be compatible with the requirements of the Competition Law. Nonetheless, when a sector is excluded from the scope of the competition legislation, the logical deduction is that the remedies provided by the competition legislation are inefficient as regards resolving the competition problems in

[639] Ansari (n 627) 150.

[640] Ibid.

[641] Andrew Fawcett, 'How Exempt Are Major Industry Sectors from UAE Competition Law?' (Al Tamimi & Co, June/July 2015) <http://www.tamimi.com/en/magazine/law-update/section-11/junejuly/how-exempt-are-major- industry-sectors-from-the-uae-competition-law.html> accessed 16 April 2017.

that sector. The remedies may also overlap with those already provided by the sector-specific legislation such as price control, non-discrimination, transparency and compulsory access. Also, it may be deduced that there are no or low barriers to entry given that the sector-specific regulation is efficient, unless there is no policy objective to create a level playing field and support new entrants.

Going back to the integration of Sharia principles into all laws in the nation, anti-monopolistic rules were already part of the provisions of the Telecommunications Law of 2003. To amend and harmonise this law with the Competition Law of 2012 would require rethinking the regulatory and enforcement framework for the telecommunications sector; although it would not require substantial amendments in order for both laws to be complementary (as will be seen in Qatar and the US). At the time of enacting the Competition Law, balancing the national economic objectives had priority. It was of primary importance to bring competition protections into otherwise unregulated sectors and exclude those with existing frameworks. Once the nation has fully embraced the principles of the modern competition policy, it may then revisit these previously excluded sectors to bring them in line with a more unified approach.[642] This will be of particular importance in the telecommunications sector due to the existing duopoly in place: there are two dominant integrated telecommunications operators, Etisalat and EITC. The continuance of this two-company dominated system may hold the UAE back from developing this sector, causing significant losses in consumer welfare and act as a barrier to healthy competition practices.

In addition to the influence of Sharia principles, the competition regime must also account for the civil law structure of the legal system. Unlike common law systems in which judicial interpretations create precedents that can explain the grey areas of the law and effectively use a form of judicial intervention to refine the legislation over time, the civil law system evaluates cases on an individual basis leading to uncertainty in the law's application and enforcement. This civil law system combined with the need to uphold Sharia principles makes case management difficult and may discourage the effective enforcement of competition provisions within the laws.

[642] Judit Renata Kovacs, Economic and Legal Analysis of the United Arab Emirates' Telecommunication Market (Unpublished Dissertation, Central European University, 2014).

6.3.1.4 EVALUATING THE MODEL

Having laid out the legal framework of the competition policy for the telecommunications sector in the UAE, the framework can be evaluated using the criteria set out for this analysis above. First, in considering the ease of implementation, there is certainly a gap between the Competition Law and Telecommunications Law. Like the KSA, the UAE had an existing regime for managing competition within the telecommunications sector derived from the Telecommunication Law. However, unlike the KSA, when the UAE's Competition Law went into effect, the telecommunications sector was explicitly excluded. So, from an implementation perspective, nothing new was introduced to the governance of this sector in the UAE by the Competition Law. It follows that unlike the KSA, the UAE is not required to establish a coherent system in order to achieve optimal coordination, whereby the laws and their implementing regulations are modified so as to create a complementary system. As shown in Chapter Five, this could be particularly burdensome and prevent the existence of a coherent competition policy for the telecommunications sector. Thus, competition authorities should not intervene in the telecommunications industry where the sector-specific regulator is already tasked with maintaining market competition.

Second, with regard to governance and interpretation, the dual civil law and Sharia approach, and the lack of any precedential authority, makes application, enforcement and refinement of the competition policy difficult. This is equally a problem in the KSA. Instead of allowing for the law to be developed and refined over time based on the issues presented within the sector, each case is considered anew and can lead to disparate results. It follows that there is no guarantee that almost two decades after its enactment the sector-specific regulation still meets all the relevant good governance principles, including in this case, legal certainty and transparency. Nonetheless, this is not a relational problem that can only be understood in terms of interactions between the application of Sharia and the use of sector-specific regulators. Nothing in Sharia prevents legislators and regulators from adopting relevant good governance principles and amending existing laws or regulations to enhance certainty and transparency.

Finally, the Competition Law seems to exhibit a moderate alignment with the values of the UAE's society and demonstrate the requisite respect for its culture. All laws within the system must comply with Sharia principles so integrating the values of the

society and then the civil system allows those laws and principles to be enforced. However, the effectiveness of the law comes into question when looking at the continued existence of the duopoly and the lack of competitors. Since the telecommunications sector continues to grow and expand, this reflects the needs of the people. Thus, part of the legislation's goal should be to acknowledge those needs and ensure the general welfare by encouraging healthy competition in the marketplace. This is an exigency in both the UAE and the KSA. Nonetheless, the UAE model is appealing because the telecommunications sector is explicitly excluded from the scope of the Competition Law, thereby avoiding an overlap between the Competition Law and the sector-specific regulation.

6.3.2 QATAR: INCLUSION OF THE TELECOMMUNICATIONS SECTOR

In contrast to the UAE, Qatar's competition law regime encompasses the telecommunications sector. The legal system of Qatar is based primarily on Sharia and also on the civil law system since it achieved independence in 1971.[643] The result is a dual legal system similar to that of the UAE. As a developing nation, Qatar embraced the idea of a free market economy and recognised the importance of competition. The Competition Law was enacted in 2006,[644] reflecting the nation's desire to protect economic competition and fight back against market interference. Article 7 of the Competition Law provided for the formation of the Competition Protection and Anti-Monopoly Committee to oversee the implementation of the law in Qatar.[645] The Committee's purpose was to raise awareness about fair competition and its importance within the market, ensure fair pricing and prevent monopolistic practices that would negatively affect fair competition.

6.3.2.1 SCOPE OF THE QATAR COMPETITION LAW

The scope of the Competition Law is limited. It applies only to private sector businesses and their activities within Qatar and does not apply to entities controlled

643 A Nizar Hamzeh, 'Qatar: The Duality of the Legal Systelm' (1994) 30(1) Middle Eastern Studies 79, 79-80.

644 Qatar Law No 19 of 2006.

645 Ministry of Economy and Commerce, 'Competition Protection and Anti-Monopoly Committee' (*Ministry of Economy and Commerce*, 2015) <http://www.mec.gov.qa/en/national-committees/Protect%20competition%20and%20prevent%20monopolistic%20practices'%20Committee> accessed 16 April 2017.

by the state.[646] This is similar to the Competition Law of the KSA as shown in Chapters Four and Five. The Qatari law prohibits private businesses from engaging in collusion, malicious mergers or other abusive conduct that would create a dominant market position and pose a threat to the stability of domestic markets or healthy competition.[647] However, the telecommunications sector is regulated by the Supreme Council of Information and Communication Technology that was established by decree in 2004.[648] The same decree also established legislation governing the telecommunications industry within the nation. This legislation envisaged the licensing of telecommunications services, interconnection and access to telecommunication services and, above all, the prohibition of anti-competitive behaviour. Through its provisions, this law embodies the foundational objectives of competition policy by upholding the need for consumer protection and prohibiting abuse of dominant market positions.[649]

In 2009, the telecommunications legislation was further refined through the issuance of executive bylaws.[650] Among other things, the bylaws expanded consumer protections and prohibited service providers from making any false or misleading claims about the price, quality or availability of services in the telecommunications sector.

6.3.1.3 INTERACTION BETWEEN THE COMPETITION LAW AND TELECOMMUNICATIONS REGULATIONS

Similar to the legal system of the UAE, both the telecommunications and competition laws of Qatar contain provisions regarding the enforcement of competition policy. However, unlike the UAE, Qatar's Competition Law encompasses the telecommunications sector as opposed to explicitly excluding it. In fact, the 2014 policy document established in accordance with Article 48 of the Telecommunications Law

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[646] Carlo Procacci, 'Competition Law in Qatar: A Closer Look' (*Al Tamimi & Co*, September 2016) <http://www.tamimi.com/en/magazine/law-update/section-14/september-6/competition-law-in-qatar-a-closer- look.html> accessed 16 April 2017.

[647] Ibid.

[648] Qatar Decree Law No 36 of 2004.

[649] See Article 43, ibid.

[650] They are discussed in detail in Anita Siassios, 'Qatar Telecom Regulator Gets Tough, (*Al Tamimi & Co*, August/September 2011) <http://www.tamimi.com/en/magazine/law-update/section-7/august-september-1/qatar-telecoms-regulator-gets- tough.html> accessed 16 April 2017.

specifically addresses the applicability of the Competition Law to the telecommunications sector.[651] Part one of the policy document states that telecommunications policies should be read in conjunction with the established laws, which would include the Telecommunications Law and Competition Law.[652] The policy document further provides for the review of the competition provision and practices within the telecommunications sector to bring both the Telecommunications Law and Competition Law into a common framework, thereby furthering consumer protection against anti-competitive behaviours. As such, the Qatari legislator has sought to align the regulation of the telecommunications industry with competition methodologies. However, it is uncertain whether the legislator took into account the nature of the markets in the telecommunications industry. It has been pointed out that competition rules are suited to stable and horizontal markets[653] and require substantial modifications to deal with dynamic and vertical chains of production.[654] Sector-specific regulation on the other hand is designed to deal with dynamic and vertical markets. As in the UAE, the telecommunications sector in Qatar is dominated by vertical markets because the manufacturers or sellers offer products or services that are specific to the industry or group of customers with specific communication or IT needs.[655] Business customers for example require access to secure, reliable and high-performance communication. As such, sector-specific regulation is appropriate in this context.

Regulation is also required in such markets because the deregulated market is likely to fail even with the enforcement of strict competition laws.[656] Due to technological change, telecommunications products and services are based on a complex network that produces products and services of varied quality, nature and delivery.[657] Thus,

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[651] See ICT Qatar, 'Telecommunications Consumer Protection Policy' (2014) <http://www.ictqatar.qa/sites/default/files/documents/Consumer%20Protection%20Policy-Final-ENG.pdf> accessed 16 April 2017.

[652] Ibid.

[653] This concept is defined in Chapter Five.

[654] See Paul Richards, 'The Limitations of Market-based Regulation of the Electronic Communications Sector' (2006) 30 Telecommunications Policy 201, 206-209; Pierre Larouche, *Competition Law and Regulation in European Telecommunications* (Hart Publishing 2000) 203-211.

[655] Swarup Acharya and Kenneth C Budka, 'Telecommunications in Vertical Markets: Challenges and Opportunities' (2011) 16(3) Bell Labs Technical Journal 1, 1-4.

[656] See Nicholas Economides, 'Telecommunications Regulation: An Introduction' in Richard R Nelson (ed), *The Limits of Market Organization* (Russell Sage 2005) 48, 50-52.

[657] Ibid.

detailed regulation is required to make effective use of the elements of market organisation. This is because the consequences of the rapid technological change include increased pressure for cost-based pricing of services and the possibility of competition in long-distance services.

It is difficult to see how competitive outcomes (increased allocative or productive efficiency) may be achieved by market forces in the telecommunications industry without the intervention of a sector-specific regulator. Where for example the dominant supplier (with a large and high-value network) refuses to interconnect with new independent entrants (with a smaller and low-value network), businesses may be compelled to subscribe to separate telephone companies to reach different customers.[658] Sector-specific regulation is required to compel interconnection; something which cannot be achieved through reliance on competition laws. Also, even where economic efficiency can be achieved through market forces, the deviation from the efficiency is socially desirable given that there are important social benefits such as low prices and better access by low-income consumers. The sector-specific regulator may not allow the prices of basic local services to rise above a reasonable level cost in order to ensure universal service. This is desirable in a developing country such as Qatar despite the fact that such an outcome is allocatively inefficient. Also, the enforcement of minimum safety standards in the industry increases social welfare and also ensures that consumers are not exposed to immoral content.

It must be pointed out that not all commentators are convinced that harmony between telecommunications regulation and competition law should be recommended. For example, Gerardin and Luff argue that, at the international level, creating a coherent framework that integrates principles from both the telecommunications and competition laws is not possible.[659] In practice, the laws can coexist. The Qatari government is continuing to introduce competition laws within the telecommunications sector and enforce competition policy and penalise anti-competitive practices in the

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[658] This is what happened in the United States in the early 1980s with AT&T. See David Gabel and David F Weiman, 'Historical Perspectives on Interconnection between Competing Local Operating Companies: The United States, 1894-1914' in David Gabel and David F Weiman (eds), *Opening Networks to Competition: The Regulation and Pricing of Access* (Springer 1998) 75-106. On the incentives of firms of different sizes to interconnect, see Nicholas Economides, 'The Economics of Networks' (1996) 14(2) International Journal of Industrial Organization 675, 675-699.

[659] Damien Geradin & David Luff, *The WTO and Global Convergence in Telecommunication and Audio Visual Services* (Cambridge University Press 2004) 415.

sector. For example, in 2011, the telecommunications regulator issued notices of anti-competitive conduct under the Telecommunications Law regarding the abuse of market power by Qtel.[660] The company was engaged in activities that misled customers after it partnered with Virgin. During this time, Vodafone Qatar launched as a second licensed provider of telecommunications services and filed a formal complaint against Qtel over the Qtel Virgin service. Vodafone Qatar claimed that the introduction of Virgin was effectively a third provider within the nation and that Virgin had not obtained the appropriate licenses to operate.[661] Ultimately, the telecommunications authority ruled against Qtel. The authority found that Qtel had breached the applicable laws through its partnership with Virgin and that the Qtel Virgin marketing strategies comprised misleading and deceptive practices and rose to the level of anti-competitive behaviour in breach of the Telecommunication Law and its bylaws.[662] This illustrates the ex post features of the competition regime within Qatar. Although active in its enforcement of breaches of competition policies, the laws continue to develop and move more toward an ex ante approach that will function as a deterrent to such activity.

6.3.1.4 EVALUATING THE MODEL

Turning to the analysis criteria set out above, there are both positive and negative aspects to the competition regime of Qatar. With regard to the ease of implementation, the laws are enforced simultaneously through relevant regulations. There is little resistance to the concept of competition policy within the state at a theoretical level. Thus, it is believed that competitive outcomes may not be achieved through reliance on market forces and the Competition Law only. The intervention of the sector-specific regulator is also required.

However, it must be noted that although regulators have taken effective steps to promote fair competition in the telecommunications sector, these steps only apply to private actors in the sector and not government entities. This becomes problematic as countries in the Middle East are prone to having their governments control major entities within economic sectors,—for instance, they are the primary

[660] See Siassios (n 651).
[661] Ibid.
[662] Ibid.

telecommunications service providers. State organisations often do not improve because of the lack of effective market controls on these players. Furthermore, government entities are susceptible to the effects of political changes and, without market regulation, politics can then directly affect the provision of services to the public. Arguably, the only way to overcome this barrier is to subject all market players, both government and private, to the same competition policies.

Additionally, there are enforcement concerns that need to be addressed regarding the disparate treatment of government versus private companies. There have been complaints that the Qatari courts rarely support claims made by private entities against the government or its contractors.[663] Further, it has been noted that the process for bringing such complaints lacks transparency, creating the perception that political and judicial institutions are biased in favour of government entities as far as economic investment is concerned.[664]

To combat these issues, Qatar has posited a national vision for 2030 to increase foreign investment within the economy.[665] This includes offering additional perks to foreign companies to invest in Qatar and easing the applicable restrictions on foreign investors. For example, a previous restriction required a local entity to own fifty-one per cent of any venture with a foreign investor.[666] Recently, Qatar has begun the process of achieving these goals by passing laws to simplify the procedures for foreign investors and improve market access in response to increased competition for investment throughout the entire GCC.[667]

With regard to understanding the nation and respect for the culture, the competition regime is somewhat lacking. While the laws are based on Sharia principles, demonstrating the integration of the people’s beliefs into the legal structure, the exclusion of government entities in the enforcement of the Competition Law does little to protect the general welfare of the public. It was not possible to find evidence showing that on the one hand, these state-owned entities represent the best means of ensuring

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[663] See Legal 500, ‘Qatar: Bridging the Gulf’ (2016) 56 <http://www.legal500.com/assets/pages/client-insight/middle_east_insight/files/assets/common/downloads/publication.pdf> accessed 7 April 2017.

[664] Ibid.

[665] Ibid.

[666] Ibid.

[667] Ibid.

the maximisation of the welfare of citizens and, on the other hand, the intervention of the government in the operation of private entities was necessary because market forces could not compel private entities to deliver this objective.

Ultimately, the competition regime in Qatar is an example of the Telecommunication Law and Competition Law serving as complementary instruments. It must be noted that their objectives do not differ because this might create legal confusion and uncertainty. Their objectives are to maintain a competitive market structure within the Qatari economy and maximise consumer welfare—at least as far as the activities of private actors are concerned. This is a model that is most similar to that of the KSA and one that demonstrates that these laws can in fact coexist in a Sharia-based system. Nonetheless, it remains to be demonstrated whether competition rules are suited to the telecommunications sector which comprises vertical markets, where competition is not mainly on price. Also, if the deregulated telecommunications market is likely to fail even with the enforcement of strict competition laws, it serves little purpose enforcing the Competition Law in the telecommunications industry. The UAE approach of excluding the telecommunications industry from the scope of the Competition Law may then be more appropriate. Legislators from both the UAE and Qatar agree on the fact that sector-specific regulation is necessary in the telecommunications industry but they disagree on its optimal design. There are persuasive arguments for and against the exclusion of the industry from the scope of competition regulations. Nonetheless, there is no normative evidence that either approach may provide undertakings in the KSA with the right incentives to enter the telecommunications market, set prices at a reasonable level above cost, and invest in innovation at a level that is socially optimal.

6.4 UNITED STATES: A MODEL FOR PROCEDURAL HARMONISATION?

In contrast to the legal systems of the GCC nations, the US has a much older and more sophisticated competition regime that includes the regulation of the telecommunications sector.[668] What is notable about the US regime is that there is no

[668] As noted above, it has the oldest competition regime in the world. See also, Diane S Katz & Theodore Bolema, 'A Brief History of Telecom Regulation' (*Mackinac Center*, 3 December 2003) <https://www.mackinac.org/6033> accessed 21 May 2017.

single policy that governs competition. Rather, many competition policies have developed over nearly a century of legislation and judicial interpretation.[669] Additionally, there is no single agency or regulatory body that is responsible for overseeing competition policies. Instead, actors from various agencies and industries that span a wide range of state and federal positions must cooperate to ensure that competition policy as a whole is upheld.[670] Hence, the US has a hybrid system that combines broad competition laws with sector-specific regulations.[671] The broad laws represent the antitrust laws that were first put in place to prevent dominant positions leading to market power and abuse. These were followed by the creation of sector-specific regulations with the goal of protecting the public interest.[672] Further still, the competition policy extends beyond federal legislation to the state level, where the state governments have their own regulatory regimes to secure consumer protection.

6.4.1 BACKGROUND

To understand the present interplay of the laws and regulations that comprise the current competition policy in the US, it is important to first understand the history that led to their development. Unlike most countries, including the KSA, that nationalised their telecommunications industry through provision by a government agency or state-owned undertaking, the US did not.[673] In fact, the first commercial telephone service provided was the privately held American Telephone and Telegraph Company (AT&T), which held the patents on the telephone technology invented by Alexander Graham

[669] Federal Trade Commission, 'Guide to Antitrust Laws' (FTC, 2017) <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws> accessed 21 May 2017 (noting that the Antitrust Laws in the US include the Sherman Act, the Clayton Act, and the Federal Trade Commission Act, in addition to various complementary sector-specific regulations).

[670] See ibid (explaining that enforcement is coordinated between the FTC and the Department of Justice, along with the Supreme Court and Congressional inquiries, along with sector-specific entities such as the FCC).

[671] William Lehr and Thomas Kiessling, 'Telecommunication Regulation in the United States and Europe: The Case for Centralized Authority' in Competition, Regulation and Convergences: Trends in Telecommunication Policy Research (SE Gillett and I Vogelsang eds, Lawrence Erlbaum Associates 1999)
<http://people.csail.mit.edu/wlehr/Lehr-Papers_files/LehrKiesslingTPRCVolume.PDF> accessed 12 May 2017 (highlighting that the Telecommunication sector in the U.S. is subject to the broad competition laws of the DOJ/FTC framework including the Sherman and Clayton Acts, as well as the sector-specific Federal Communications Commission Telecommunication regulations).

[672] For example, Federal Communications Commission Regulations, 47 USC § 151 et seq.

[673] International Telecommunication Union, 'Competition Policy in Telecommunication: The Case of the United States of America' (Document CPT/05, 18 November 2002) 1
<https://www.itu.int/osg/spu/ni/competition/casestudies/us/us%20case%20study.pdf> accessed 16 April 2017.

Bell. Ii was not until these patents expired in 1893 and competitors were able to adopt the technology and provide competing services that the regulation of the industry was deemed to be necessary.[674] Up until this point, a natural monopoly had existed so regulators were not concerned with the preservation of competition in the marketplace, despite the existence of a monopolistic bottleneck.[675] Thus, as competitors entered the market, the law continued to develop to meet the changing needs of the industry.

The primary competition law that is still in force is the Sherman Antitrust Act.[676] The Act was passed in 1890 to prohibit business practices that federal regulators deem to be anti-competitive.[677] Although it was created in response to activities in the railroad industry, the law is not limited to any specific sector.[678] Section 1 of the Sherman Act bans business arrangements that create a restraint on trade, and Section 2 prohibits intentional monopolies—as opposed to the natural monopoly first seen in the telecommunications sector.

The Sherman Act was followed by the Clayton Antitrust Act, which was passed by Congress in 1914 to provide further clarification and substance to the Sherman Act.[679] The Clayton Act further strengthened the competition regime by addressing corporate price discrimination, exclusive deals and placing limits on anticompetitive mergers.[680] The goal of the Clayton Act was to promote free trade and prohibit business activities that would harm competition and consumers.[681]

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[674] Ibid.

[675] This describes a situation where a natural monopoly is already operating at its full capacity and cannot handle additional demand but continues to wield wide network-specific market power created by irreversible costs and the absence of potential or actual competition. See Ekaterina Markova, *Liberalization and Regulation of the Telecommunications Sector in Transition Countries: The Case of Russia* (Physica-Verlag 2009) 74-75. This is what happened in the US with regard to AT&T, see Robert W Crandall, 'The Remedy for the "Bottleneck Monopoly" in Telecom: Isolate It, Share It, or Ignore It?' (2005) 72 The University of Chicago Law Review 2, 5-6.

[676] 15 USC §§ 1-7.

[677] Robert L Bradley Jr, 'On the Origins of the Sherman Antitrust Act' (1990) 9(3) Cato Journal 737, 737.

[678] Ibid.

[679] 15 USC §§ 12-27; 29 USC §§ 52-53.

[680] See Lamaj (n 609) 161-162.

[681] Ibid.

6.4.2 DEVELOPMENT OF TELECOMMUNICATIONS LAWS IN THE UNITED STATES

Although competition was being addressed broadly at the federal level through the all-encompassing Sherman Act, when it came to the telecommunications sector, the states regulated competition within their borders. This went on until Congress passed the Communications Act of 1934.[682] This Act centralised the federal regulation of telephone, telegraph and radio communications.[683] It was the most comprehensive piece of legislation in this area and its seven subchapters included regulations on every aspect of the communications and broadcasting industry, including competition.[684] The Act established the Federal Communications Commission (FCC) as the designated body for regulation and oversight of the industry.[685] The Act remained in place until it was largely amended and most of its sections were repealed by the Telecommunications Act of 1996.[686]

Despite the existence of federal regulations, there was still disparate treatment among states.[687] While many were attempting to dismantle the legal and regulatory barriers to competition at the local service level, it became apparent that a state-by-state approach to ensuring competition at the local level would be inefficient and lead to vastly different environments from region to region.[688] In response to industry demands, Congress adopted the Telecommunications Act of 1996. This Act created a national competition policy applicable at all levels of telephony. Also, it recognises the liberalisation of the telecommunications industry and the need for a centralised

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682 47 USC § 151 et seq.

683 See US Department of Justice, 'The Communications Act of 1934' (Justice Information Sharing, 2013) <https://it.ojp.gov/PrivacyLiberty/authorities/statutes/1288> accessed 16 April 2017.

684 See G Hamilton Loeb, 'The Communications Act Policy Toward Competition: A Failure to Communicate' (1978) 1 Ninth Annual Administrative Law Issue 1, 30-33.

685 Victor Pickard and Pawel Popiel, The Strategy and Legacy of FCC Commissioner Michael J Copps (Benton 2018) 5.

686 For a comprehensive analysis of the 1934 Act, see Max Paglin, A Legislative History of the Communications Act of 1934 (Oxford University Press 1989).

687 See Deonne L Bruning, 'The Telecommunications Act of 1996: The Challenge of Competition' (1997) 30 Creighton Law Review 1255, 156-1258.

688 See Reza Dibaj, 'Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame?' (2003) 81 Washington University Law Quarterly 1, 57-59.

regulatory authority to protect the public interest.[689]

6.4.3 INTERACTION BETWEEN THE ANTITRUST LAWS AND TELECOMMUNICATIONS REGULATIONS

With the development of sector-specific regulations, the question then becomes whether the antitrust framework set out in the Sherman Act and Clayton Act informs the interpretation and application of the Telecommunications Act and, if so, to what extent. This is addressed by Section 601(b) of the Telecommunications Act which provides as follows:

> [N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws.

Thus, by the way the laws are construed, the antitrust laws embodied in the Sherman Act and the Clayton Act create the competition framework for economic sectors within the US. Their broad reach makes them applicable to all sectors unless otherwise excepted. Then, within that competition framework, sector-specific regulations are created that address the particular nuances of the specific industry and respond to evolving concerns. The power to enforce these regulations continues to be vested in the FCC, with the states also streamlining their regional laws to be aligned with those promulgated at the federal level.[690] On the other hand, the Sherman Act, Federal Trade Commission Act and Clayton Act are enforced by the Federal Trade Commission (FTC)[691] and the Department of Justice (DOJ). The FTC's Bureau of Consumer Protection is tasked with protecting consumers against deceptive or unfair business practices, while its Bureau of Competition's mission is to eliminate and prevent anti-competitive practices in commerce.[692] The FTC shares jurisdiction over civil cases with the Antitrust Division of the DOJ. The latter may also file criminal cases against entities that wilfully violate competition laws.

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[689] Lehr and Kiessling (n 672) 1.

[690] See Douglas B McFadden, 'Antitrust and Communications: Changes After the Telecommunication Act of 1996' (1997) 49(2) Federal Communications Law Journal 457, 462-466.

[691] For a history of the FTC, see, Marc Winerman, 'The Origins of the FTC: Concentration, Cooperation, Control, and Competition' (2003) 71 Antitrust Law Journal 1, 1-97.

[692] See Amy Marshak, 'The Federal Trade Commission on the Frontier: Suggestions for the Use of Section 5' (2011) 86 New York University Law Review, 1121, 1124-1133.

Considering the criteria set out for the analysis of competition regimes in this chapter, the US approach stands out as a model for the harmony that can be created through a combination of general competition law and sector-specific regulations. With regard to the ease of implementation, the US has continuously worked towards a streamlined approach through the enactment of federal legislation. The federal system of the US allows for national laws to supersede those of the states, and states must bring their local laws into compliance. By working from the top down, the law is set up in such a way that important changes can be made centrally through regulations at the federal level and then the burden of ensuring regional compliance is distributed among the states. Additionally, by utilising a general competition law in conjunction with sector-specific regulations, changes can be made to the regulations in accordance with industry developments without affecting the overarching competition framework.

This is a similar approach to that adopted in Qatar whereby the telecommunications industry is regulated by the competition authorities as well as a sector-specific regulator. Thus, the US legislator also acknowledges the fact that competitive outcomes cannot be achieved by market forces in the telecommunications industry without the intervention of a sector-specific regulator. The advantages of the US system are that both state-owned and private undertakings must comply with the competition legislation and there is no single agency or regulatory body responsible for overseeing competition policies – whose jurisdiction may overlap with that of the sector-specific regulator, thereby creating confusion and uncertainty. Also, the competition policies are based on centuries of parliamentary debates and court deliberations on the efficiency of competition law. The monopolistic bottleneck created by AT&T and subsequent entry into the market by small competitors for example enabled the antitrust laws to be modified significantly with the development of a vertical market, as well as the increasingly complex network producing products and services of varied quality due to rapid technological change.[693]

Turning to governance and enforcement, again centralisation plays a significant role with the creation and preservation of the FCC. The states support the FCC's work at the local level but ultimately it is the leading regulatory body that issues guidance within the industry. Additionally, to the extent that there are gaps in the law, the US has a

[693] See Gabel and Weiman (n 659); Economides (n 659).

common law system. Hence, when cases are heard, the resulting decisions create precedential authority that can be used subsequently to ensure that laws are being interpreted and enforced in the same manner. Although it is agreed that a monopoly established due to economies of scale or advanced technology does not violate the Sherman Act,[694] competition law as a whole has been shaped by court decisions interpreting the Act in light of developments in the industry and with the objective of achieving optimal outcomes.

In *United States v Aluminium Company of America,*[695] for example, the Court of Appeals held that the Aluminium Company of America (Alcoa) had violated the Sherman Act by wilfully engaging in conduct to maintain a ninety per cent market share that indicated a monopoly. In *United States v Paramount Pictures, Inc*,[696] the Supreme Court held that the collective ownership of distribution and exhibition facilities by many production studios that favoured large firms and excluded small firms was in violation of the Sherman Act, and one of the large firms, Paramount Pictures was also guilty of engaging in horizontal and vertical price-fixing as a result. Thus, Paramount Pictures was compelled to sell the theatres in which their films were shown and could not control the distribution and exhibition in order to open up the market to smaller firms.

The landmark case was *United States v AT&T*,[697] where the Department of Justice brought an action against the telephone service giant AT&T which was operating as a regulated monopoly providing phone service. The Court forced AT&T to split its research and development department from local branches that operated telephone lines. This ended the company's monopoly and enabled competitors to enter the market.

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[694] With regard to section 2 of the Sherman Act that criminalises monopolising or attempts to monopolise, see Lamb Enter Inc v Toledo Blade Co, 461 F 2d 506, 514 (6th Cir. 1972), where it was held that if 'success in such a venture could become per se violation of the anti-trust laws, the ultimate effect would be to stifle, rather than to encourage, competition and formation of new business enterprises.' See also, Greenville Publishing Co v Daily Reflector Inc, 496 F 2d 391, 397 (4th Cir. 1974). However, both courts noted that the methods employed to achieve or maintain monopoly power in the market could lead to liability for anti-competitive conduct.

[695] 148 F.2d 416 (2d Cir. 1945).

[696] 334 US 141 (1948).

[697] 552 F. Supp 131 (DDC 1982).

Similarly, in *United States v Microsoft Corp*[698] the government brought an action against Microsoft for restricting the market for competing web browsers unfairly. The company had bundled its personal computer operating system with Internet Explorer and sold the bundle to computer manufacturers. After a remand, the court approved a negotiated consent decree by which the company agreed to share programming interfaces with competitors. This enhanced competition in the personal computers and internet markets.

Then, in *Leegin Creative Leather Products v PSKS, Inc*,[699] the Supreme Court overruled its previous decisions by holding that vertical minimum price agreements did not violate the Sherman Act.

The US's enactment of a competition regime in the telecommunications sector and the development of the relevant rules by courts demonstrate an understanding of the market and respect for the local culture. Indeed, the legislation enacted were derived from the efforts of domestic parties seeking to clarify and enforce their rights. Additionally, the legal structure of the US allows for further amendments based on the desires of its citizens through the democratic process.

6.4.4 SUITABILITY OF THE US MODEL TO THE KSA

While competition laws have a functional economic purpose for the nations that implement them, they are far from an ideal, one-size-fits-all solution. In fact, the nuances of different industries and sectors within an economy necessitate the ability to tailor the laws and approach depending on the subject matter. This is why it is important for the framework to be supported by a reliable and sophisticated judicial system. Thus, as opposed to being a free-standing legislation, competition legislation can best be viewed as a framework within which the government can work. This framework sets out the foundational principles and general enforcement penalties, while the narrower, sector-specific regulations allow those principles to be upheld in practice.

The benefits of competition within the market are many—lower costs and prices for goods and services; better quality; more choices and variety; more innovation; greater

[698] 231 F.Supp.2d 144 (DDC 2002).
[699] 551 US 877 (2007).

efficiency and productivity; economic development and growth; and greater wealth equality.[700] It is important to note that 'the essential point is not whether there is more or less regulation, but what type of regulation is needed'.[701] Answering this question requires having an understanding of the nation in question, its economy and positioning for growth and expansion, and the needs and ideals of its people.

Regulation needs to be a reflection of a coherent competition policy based in competition law and complementary, sector-specific regulations that work together to support the promotion of competition rather than its suppression. For this form of regulation to be effective, it cannot take the shape of fragmented and piecemeal acts of legislation that are superficial deterrents at best and do not carry with them the weight of enforcement.

When dealing with the telecommunications sector, the regulations need to have a solid basis on the foundational objectives for competition policy that serve as a framework for all industries. As competition laws become more comprehensive within nations, as opposed to the existence of numerous frameworks that are created within each different sector of the economy, that framework needs to envisage an approach based on economic regulation. Specifically, such an approach recognises that 'intervention [in] the market is necessary and beneficial only when it offers the solution to certain sorts of market power, and in particular to market failure which derive from formerly monopolistic market structures'.[702]

As sector-specific regulations are developed, they are influenced by the existence of the competition law framework. They are not inconsistent tools for regulating a market given that their objectives are often the same, viz, promoting fair trade and maximising the welfare of citizens. Thus, sector-specific regulation and competition legislation ought to be complementary means of dealing with common problems and achieving mutually desirable solutions, both at the macro and micro levels. Both regimes could therefore work towards preventing the abuse of market power and maximising the

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[700] Maurice E Stucke, 'Is Competition Always Good?' (2013) 1(1) Journal of Antitrust Enforcement 162, 162.

[701] Mario Monti, 'Competition and Regulation in the Telecom Industry – The Way Forward' (ECTA Conference, Brussels, 10 December 2003) 2.

[702] Ibid.

public welfare by placing the end user at the centre of any economic activity.

For such regulation to be effective in the telecommunications sector, the relevant legal approach cannot simply be grounded in administrative functions. The system must be viewed holistically, allowing for an underlying analysis to permeate the legal framework through the use of both competition and sector-specific regulations that account for the nuances of the industry. This will prevent two things: first, the centrality of economics in competition analysis and second, the adoption of a legalistic approach that fails to consider non-legal factors that affect competition in the market. When competition legislation and sector-specific regulations are implemented in this light, they become harmoniously functional and open the door to the development of self-sustaining competitive market conditions.

This is an approach that has been recognised by both Qatar and the US, and to a certain extent the UAE. However, the latter explicitly excludes telecommunications from the purview of its Competition Law and leaves regulation to sector-specific legislation and authorities, despite the fact that the sector-specific legislation is not sufficiently comprehensive to ensure fair competition and protect consumers. Qatar and the US on the other hand have embraced the need for a regime that includes the telecommunications sector in the scope of the competition legislation. The development of Saudi competition policy for the telecommunications industry most closely mirrors that of Qatar – beginning with a communications law that regulates competition within the sector, followed later by a broad competition law put in place as GCC nations attempt to align themselves to global legal trends.

What can be learned from the Qatari and US approaches is that these laws must work together effectively to manage anti-competitive practices through both a deterrent ex ante basis and ex post regulatory enforcement. The Competition Law is essentially a sector-neutral statement of intolerable practices that pose a threat to the market and the general welfare. It is then the place of sector-specific regulation to identify the needs of the market and create the applicable provisions to achieve the industry's goals.

Qatar overcame the issue of prior enactment of the Communications Law by the issuance of a policy document that specifically outlined the ways the two laws would

work together. In the US, provisions in the Telecommunications Act make clear that it is to be interpreted in a manner that is consistent with the competition policies enshrined in the Sherman Act. This is what the KSA is lacking. It needs to find a way to harmonise the statutes and clarify that they are meant to work together to achieve their shared principles and objectives.

A coherent, broad framework and sector-specific approach is the best way to accomplish the protection of competition within the telecommunications sector to achieve the goals of this analysis. Among the options available, it would be the easiest to implement within the Kingdom. The Competition Law serves as a lens through which all other laws should be interpreted. It ensures that competition policy prevails within the Saudi market and the underlying Sharia principles are upheld. Further, as the markets continue to develop and change, these changes can be addressed through sector-specific regulations. This will allow the laws to be amended as needed without affecting the competition framework.

Moreover, the regime would allow for sufficient governance and enforcement. The Competition Law provides for governance at the macro level, providing a basis for enforcing provisions that are contrary to its intent. This is then carried out at the sector-specific micro level by a centralised regulatory authority. By streamlining regulation and enforcement, it would improve the likelihood that laws will be applied consistently and uniformly in each case.

Finally, this system would reflect an understanding of the market and nation and a respect for the local culture. The principles underlying the competition regime are reflective of the Sharia principles that are intrinsic to the Kingdom's people. By preventing these damaging practices, the laws would work together to promote the citizens' general welfare and ensure that their interests were protected by a legal regime that could be adapted as the market continued to develop and change.

6.5 SITUATING REFORM OF THE KSA LEGAL SYSTEM IN THE BROADER DEBATE

The development of competition law is intrinsically linked to the trends of

globalisation.[703] A central feature of this debate is how to employ competition policies to achieve economic welfare on a large scale without destroying local welfare and relations between societies.[704] In many Middle Eastern countries, the telecommunications sector was historically dominated by state-owned entities, such as the STC in the KSA.[705] This led to the creation of natural monopolies even in countries with market economies because the government provided these public services in the place of private entities.[706] In other countries such as the US the sector was dominated by natural monopolies due to intellectual property rights and irreversible costs of entry. However, as the telecommunications sectors in these countries continued to grow and develop, this led to an increase in the number of available service providers and the reform of the relevant legislation. Beginning in developed countries, the telecommunications sector began to embrace liberalisation and deregulation. In developing countries, the industry change brought macroeconomic and infrastructural reforms, often implementing a competition regime for the first time.

Looking specifically at the telecommunications sector of Middle Eastern countries, the government was typically both the service provider holding a natural monopoly in the industry as well as the sector's regulator.[707] However, in recent years, Middle Eastern countries have begun to follow the trends of developed nations, allowing for liberalisation and privatisation of the telecommunications sector. These changes recognise that supporting competitive activity in domestic economic markets helps nations compete on a global scale.[708]

As with any reform based on changes to infrastructure, in this case the implementation of a competition law framework that can apply to the telecommunications sector, it is important to remember that such change takes time. It is an inherently iterative process that requires not only a foundational piece of legislation but also implementing

[703] Singh (n 606).
[704] Budzinski O, The Governance of Global Competition – Competence Allocation in International Competition Policy (Edward Elgar 2008)
[705] See Riad Dahel, 'Telecommunication Privatization in Arab Countries: An Overview' (2001) 0107 API-Working Paper Series 1, 1 <https://core.ac.uk/download/pdf/6337390.pdf?repositoryId=153> accessed 16 April 2017.
[706] See Chapter Five.
[707] Dahel (n 706)15.
[708] Ibid.

regulations that can be amended as needed in response to market needs. In creating these statutes, it is important to take into account the country's main objectives in implementing a competition law regime and continuously evaluate the law's effectiveness in meeting those objectives.

As the world's economy becomes more globalised in nature, it is important that nations create legal regimes that embrace this development and are welcoming to investment, both foreign and domestic, public and private.[709] It is becoming increasingly essential that nations enact coherent and harmonised approaches to regulating competition, and many developed nations, in particular the US, have paved the way for this. The general objective of competition regimes is to 'maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants'.[710] Among other primary objectives are preventing the abuse of economic power, decentralising economic decision-making, and achieving a certain degree of fairness and equity and other socio-political values.[711] These latter objectives are referred to as supplementary objectives and vary by jurisdiction. One should note that the more objectives that are introduced into the equation, the more likely there is to be conflict and inconsistent application of the jurisdiction's competition policy. While the majority of developed nations are moving away from these supplementary public interest objectives, they continue to be widespread in developing and transitioning countries.[712]

Although there is arguably no such thing as 'global competition law', there are certain underlying foundational objectives that remain constant and desirable in all systems that enact competition laws—economic efficiency and the maximisation of consumer welfare.[713] Over time, it has become apparent that in order to achieve such objectives, there must be competition in the market and the way to encourage and preserve such

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[709] Diane P Wood, 'International Harmonization of Antitrust Law: The Tortoise or the Hare?' (2002) 3 Chicago Journal of International Law 391, 391.

[710] OECD Secretariat, 'The Objectives of Competition Law and Policy' (CCNM/GF/COMP(2003)2, 29 January 2003) 2 <http://www.oecd.org/daf/competition/2486329.pdf> accessed 10 April 2017.

[711] Ibid.

[712] Ibid, 4.

[713] Dabbah (n 613) 9. The development of modern competition laws reflects the underlying foundational principles of microeconomic theory. As such theory and business practices develop over time, so too does the competition law. In fact, competition law is essentially in a state of continual evolution in order to keep up with the changes over time in order to achieve the foundational objectives in practice.

competition is through the implementation of a legal framework.[714] The increased use of competition law in recent years has been in direct response to the worldwide changes in economic behaviour and political thinking.[715] One area where competition law is of particular importance is the telecommunications sector—a sector that was often regarded as a natural monopoly within many economies.[716]

While the foundational objectives of competition law are fairly consistent from jurisdiction to jurisdiction, the supplementary objectives are jurisdiction-dependent, particularly in developing countries.[717] As a result, the enactment of competition laws and implementing regulations within a particular jurisdiction is largely influenced by the supplementary objectives.[718] This leads to a dissonance in the implementation of competition regimes. Developing nations often look to the systems in place in developed nations as a basis on which they can model their system. However, the supplementary objectives of the jurisdiction require the regime to be altered to reflect the special characteristics of the jurisdiction.[719]

6.6 BRIDGING THE GAP BETWEEN COMPETITION LAW AND SECTOR-SPECIFIC REGULATION IN KSA

Traditionally-owned and operated by state-owned entities, the telecommunications sector in the KSA is undergoing a period of rapid transformation as shown in Chapter Three. Technology continues to advance, and players routinely enter and exit the market and merge or expand to accommodate the evolving landscape. Specifically, it has been noted that 'the electronic communications industry is at the forefront of technological and social change, and the competitive conditions underpinning the market are critical to societal development'.[720] The question then becomes: how and to what extent is this sector regulated to protect the players and their customers? What becomes apparent when attempting to answer this question is that the approach and appropriate level of regulation differs significantly from jurisdiction to jurisdiction based

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[714] Mark RA Palim, 'The World Wide Growth of Competition Law: An Empirical Analysis' (1998) Antitrust Bulletin 105, 105.
[715] Ibid.
[716] Ibid.
[717] Eugene Buttigieg, *Competition Law: Safeguarding the Consumer Interest* (Wolters Kluwer 2009) 12.
[718] Palim (n 715) 105.
[719] Ibid.
[720] Monti (n 702) 1.

on the circumstances and institutions in place.

Despite these differences, there are arguably certain goals that any competition regime should attempt to achieve within its regulation of the sector—these are the foundational objectives. First, to the extent that a competition law is in place, it should be applicable to the telecommunications sector and provide for effective incentives, sanctions and remedies to deter anti-competitive or monopolistic conduct.[721] Second, there must be transparency with regard to the powers and duties of the competition authority and sector-specific regulator to minimize the potential for impropriety or abuse.[722] Third, there must be coordination between the governing authorities to prevent conflicts due to overlapping jurisdiction; essentially, it must be clear who is responsible for ensuring that competition is substantially preserved.[723] Finally, when a government acts as a player in the competitive market, the governing competition authority must be separate from the entity acting within the market to ensure that there is no impropriety or favourable treatment.[724] The only way that these objectives can be achieved in practice is through the harmonisation of the general competition law framework and the sector-specific telecommunications regulations within a given country.

6.6.1 THE IMPACT OF SHARIA ON COMPETITION LAW

One of the primary factors to be considered when implementing legislation to protect competition is an evaluation of how this introduction of competition culture accords with the culture of the land and its people. It is imperative that societal culture be evaluated and understood so that it may be accounted for from a governance perspective. The protection of competition within a country is of no use if the regime goes against the society's cultural principles and traditions and the people themselves are not receptive to the players entering the market. For a competition law regime to be successful, it must be structured in such a way that it respects those that it aims to

[721] ICN Working Group on Telecommunication Services, 'The Role for Competition in the Telecommunication Services Sector' 1-2 <http://www.internationalcompetitionnetwork.org/uploads/library/doc320.pdf> accessed 16 April 2017.

[722] Ibid.

[723] Ibid.

[724] Ibid.

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As discussed in Chapter Two, Saudi law is based on Islamic principles and the relationship between these principles and competition in the marketplace dates back to the beginnings of Islam.[725] Islam is more than just a religion; it functions as a practical system of life and provides guidance on the different aspects of life in society, including the economy.[726] The primary sources of Islamic law are the Quran and the Sunnah, which collectively make up what is also referred to as Sharia.[727] Islamic law is typically divided into two categories: 'Ibadat, which are obligations regarding worship, and Mu'amalat, which comprises civil and legal obligations.'[728] The regulation of business operations and market competition fall into the latter category. Islamic principles emphasise the need for trade and business activities and provide for mechanisms of market intervention to prevent abuse by traders.[729]

When looking at the role that Sharia principles play as the basis for competition policy and legislation, there are two primary aspects: the first is the prevention of monopolies, and the second is the prevention of damage or harm in the economic sector.[730] Although the Sharia guidance on monopolies was initially limited to food, the Islamic schools of thought and scholars have determined that its scope extends to any good or service supplied by a merchant who intends to dominate the market to the detriment of consumers.[731] However, it must be noted that although such monopolistic practices are prohibited by Sharia, the Competition Law in the KSA does not prevent the existence of a legal monopoly in the market.[732] Legal monopolies most commonly

[725] Dabbah (n 613) 2.

[726] Zulkifli Hasan, 'Islamic Perspective on the Competition Law and Policy' (unpublished paper 2008) 1 <https://zulkiflihasan.files.wordpress.com/2008/07/islam-and-competition-policy.pdf> accessed 16 April 2017.

[727] AbdulRahman Doi, *Shariah: The Islamic Law* (Ta Ha Publishers 1997) 21, 45.

[728] Musaed N Alotaibi, Does the Saudi Competition Law Guarantee Protection to Fair Competition? A Critical Assessment (Unpublished Dissertation, University of Central Lancashire 2010) 36.

[729] Dabbah (n 613) 2; Alotaibi (n 508) 36-37; A Mohammed, *The Aspects and Developments of the Shariah Law*

(2nd edn, Organization of Islamic Word 1994) 170-178.

[730] Alotaibi (n 508) 37.

[731] See R Al-Robi, The Economic Dimension of Islamic Principle of Monopoly and the Opinion of Scholars (Umal Quira Universitu 1991) 14; K Al-Doury, *Monopolies and Its Effect in Islamic Law* (Kahtan Al-Doury 1983) 32; Mohammed (n 118) 173-174; A Al-Shaiqi and A Al-Kmali, 'Hadiths of the Monopoly' (2000) 24(2) Journal of Law 367; M Al-Fiqi, *Shariah Law: Comparative Study* (Dar-Almarik 2002) 226.

[732] See Chapter Five.

occur when the government controls a given sector. A natural monopoly may also occur where a single producer is able to satisfy the entire demand at lowest cost.[733] However, it may also be argued that Sharia permits the existence of the legal monopoly but prohibits the dominant market player from abusing this position to the detriment of consumers, such as through reducing the quality of service or increasing prices.[734] This raises the question of whether the Competition Law is not duplicative given that Sharia already prohibits monopolisation and gives adjudicators the requisite flexibility to determine when a monopoly is acceptable or not. Nonetheless, concerns about legal monopolies within the telecommunications sector are decreasing as the market becomes liberalised and allows for the increased competition of private entities.

The second area of Sharia concern over competition policy relates to the prevention of damage. As a basic principle, the Prophet stated that: 'You should neither harm yourself nor cause harm to others.'[123] Such harm is not limited to physical harm but encompasses the idea of civil or economic harm.[735] Thus, anti-competitive practices aimed at benefiting a few companies at the expense of consumer welfare are contrary to Sharia. This also raises the question of why a competition legislation is needed. Nonetheless, in Islamic nations, all laws enacted must comply with Sharia principles. Thus, any competition regime implemented in an Islamic nation must take into account the prohibition of monopolistic practices and the need to prevent harm. This extends to both the creation of broad competition laws and the development of sector-specific regulations.

6.6.2 DEVELOPMENT OF THE SAUDI MODEL

As mentioned above, the basic purpose of competition—preventing traders from abusing their position in the marketplace—is a longstanding principle of Islam. However, beyond these underlying traditions there are compelling political and economic reasons why this developing nation needed to continue its modernisation

[733] Richard Posner, 'Natural Monopoly and Its Regulation' (1968) 21 Stanford Law Review 548, 548. See also, Neil W Hamilton and Anne M Caulfiel, 'The Defense of Natural Monopoly in Sherman Act Monopolization Cases' (1984) 33(2) DePaul Law Review 465, 465-466.

[734] Alotaibi (n 508) 39.

[735] Muhammad Bin Ismail As-Sanani, Bulugh Al-Maram, *Attainment of the Objective According to Evidence of the Ordinances* (Darussalam 199) 324.

efforts and align itself with the competition regimes of developed countries in the Western world.

6.6.3 ASCERTAINING THE PURPOSE OF COMPETITION LAW

As the markets in the KSA continue to grow in such a way that FDI becomes attractive, it is essential for there to be a legal infrastructure that will protect fair competition in the marketplace and combat monopolistic practices, both by state entities and private companies. The 2014 amendments to the Competition Law reaffirmed this approach in the foreword which states that the law 'aims to protect and encourage fair competition and combat monopolistic practices that affect lawful competition'.[736] The Implementing Regulations further elaborate the goal of the Competition Law in its Preamble, indicating that the purposes of the regime are to protect and promote fair competition, combat monopolistic practices, ensure the availability of high-quality goods and services at competitive prices, encourage innovation, and support the economic growth of society. These developments recognise the importance of the liberalisation of the telecommunications sector through the privatisation process that began in 1998. It is this shift from a national-centric economy to that of a free market one that marks the point at which the KSA began to attract foreign investors from non-Muslim countries.

As noted in Chapters Four and Five, the competition legislation that the KSA has put in place prohibits anti-competitive agreements and the abuse of dominant market positions.[737] In 2005, the CCP (currently, the GAC) was formed and in 2006 it issued the first Implementing Regulation of the Competition Law.[738] The GAC amended articles of the Implementing Regulation in 2008 and adopted a number of governing rules.[739]

Modelling its approach on the competition laws of established Western legal systems such as the US, the aims of the competition law are to create market efficiency and

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[736] Nelson (n 131).

[737] Competition Law enacted by Royal Decree No M/25. The Law is critically analysed in Chapter Five.

[738] Decision of the Council of Competition Protection No. 13/2006 (16 December 2006).

[739] Decision of the Council of Competition Protection No. 25/2008. The governing rules approved by the CCP included: Rules Governing Exceptions and Exemptions; Rules Governing Dominant Position; Rules Governing Economic Concentration; and Rules Governing the Committee for Settlement of Violations of Competition Law, among others. Alotaibi (n 508) 54.

protect consumer welfare by restricting anti-competitive behaviours, abuse of dominant market positions and mergers that would threaten free competition in the market.

Shifting focus from the broad Competition Law to the telecommunications sector specifically, it is noted in Chapter Three that the Telecommunications Act was enacted in 2001 as an attempt to regulate the sector. Although enacted prior to the Competition Law, the Telecommunications Act addressed competition directly and aimed to promote fair competition in the telecommunications sector.[740] To accomplish this, Article 24 explicitly prohibits practices that create dominant market positions, Article 25 restricts mergers, and Article 26 prohibits companies from abusing dominant market positions. In reconciling these two pieces of legislation, what becomes problematic is that the Telecommunications Act was enacted prior to the Competition Law and thus makes no reference to it. For these laws to create a coherent competition regime for the telecommunications sector, the provisions contained in Articles 24 to 26 of the Telecommunications Act must be reconciled with Articles 4 through 6 of the Competition Law, and efforts must be coordinated to effectively enforce these laws to prohibit anticompetitive activities.

Based on the above analysis, there are other specific recommendations that can be made to strengthen the Saudi competition framework. Chapter Seven elaborates on these recommendations and explains how they can be integrated into the Saudi competition regime and put into practice. First, the Kingdom should make clear that all communications laws are subject to the principles embodied in the Competition Law. This approach has been taken by both the US in its provisions of its Telecommunications Act and by Qatar through the issuance of a policy document that reconciles the laws. Given the prior existence of the Telecommunications Act in the KSA, its approach would most likely mirror that of Qatar, else the Telecommunications Act may simply be amended. The Kingdom should issue a binding decree that states how these two laws are intended to work together and perform complementary functions. Alternatively, the Kingdom could amend the Telecommunications Act to expressly subject it to the Competition Law, similar to the approach employed in the

[740] See Articles 1 and 3 of the Telecommunications Act.

US.

Second, as the markets continue to become more liberalised and globalised, the Kingdom must embrace the process of deregulation and re-regulation.[741] Developments in the telecommunications industry and global legal trends, particularly those endorsed by the WTO, require a certain degree of flexibility within telecommunications regulations. There will naturally be some period of trial and error to find the most efficient approach to maximising the market, ensuring equality in the treatment of both service providers and users, and effectively regulating the industry on both ex ante and ex post bases.[742] This will require the Kingdom to adopt an approach of phasing out regulations that no longer serve their purpose and replacing them with regulations that reflect the current state of the market.[743]

Finally, the Kingdom will need to coordinate legislative and enforcement efforts among the Ministry of Communications and Information Technology, the CITC and the Council of Ministers. While the CITC is an independent administrator for the Telecommunications Act, any licenses issued by it pursuant to the Act must be sanctioned by the Council of Ministers.[744] Further, the Ministry of Communication and Information Technology will oversee the planning and implementation of all of the government's strategies and policies within the telecommunications sector.[745] As government policy becomes a national priority for the Kingdom, coordination between these bodies is more important than ever. The Kingdom should make an effort to streamline communications, responsibilities and processes among these bodies and delineate the scope and authority of each. By clarifying their roles, this will lead to more efficient administration of competition policy within the Kingdom.

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[741] See Kamal S Shehadi, 'Challenges to Telecommunication in the MENA Region' (OECD Global Conference on Telecommunication Policy for the Digital Economy, Dubai, 2002) <http://www.oecd.org/internet/broadband/1810112.pdf> accessed 16 April 2017.

[742] Ibid.

[743] Ibid.

[744] Marwan Elaraby and others, 'Telecoms in the Kingdom of Saudi Arabia – An Overview' (*Shearman Sterling LLP*, 2016) <http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/09/Saudi-Arabia-Publications/Telecoms-in-the-Kingdom-of-Saudi-Arabia--An-Overview.pdf> accessed 16 April 2017.

[745] Ibid.

6.7 CONCLUSION

This chapter has conducted a comparative analysis of the competition and telecommunications regimes of three countries, namely the UAE, Qatar and the US. It has shown that competition law is essentially a sector-neutral statement of intolerable practices that pose a threat to the market as well as consumer welfare. However, sector-specific regulation is also important because it identifies and addresses the needs of the market and creates the applicable provisions to achieve the industry's goals. Thus, where competition legislation and sector-specific regulations cannot be harmoniously functional, the sector should be excluded from the scope of the competition legislation if the sector-specific regulator is also tasked with maintaining market competition. However, where competition legislation and sector-specific regulations can be harmoniously functional, they open the door to the development of self-sustaining competitive market conditions. This also helps to prevent two things: first, the centrality of economics in competition analysis and second, the adoption of a purely legalistic approach that fails to consider non-legal factors that affect competition in the market.

It was shown that this is an approach that has been recognised by both Qatar and the US, and to a certain extent the UAE. Legislators from the three countries agree on the fact that sector-specific regulation is necessary in the telecommunications industry. Nonetheless, they disagree on its optimal design. It was argued that the UAE's design is not best suited to the KSA because it explicitly excludes telecommunications from the purview of its Competition Law and leaves regulation to sector-specific legislation only, despite the fact that the sector-specific legislation is not sufficiently comprehensive to ensure fair competition and protect consumers. Qatar and the US on the other hand have embraced the need for a regime that includes the telecommunications sector in the scope of the competition legislation. Hence, these laws work together effectively to manage anti-competitive practices through both a deterrent ex ante basis and ex post regulatory enforcement.

It follows that when dealing with the telecommunications sector, the regulations need to have a solid basis on the foundational objectives for competition policy that serve as a framework for all industries. In the words of Monti, such an approach recognises that intervention in the market is necessary and beneficial because 'it offers

the solution to certain sorts of market power, and in particular to market failure which derive from formerly monopolistic market structures'.[746]

The Qatari and US legislators therefore acknowledge that competitive outcomes cannot be achieved by market forces in the telecommunications industry without the intervention of a sector-specific regulator, but the latter must act within the broader framework of competition policies. Nonetheless, it is argued that the US model is less suitable because in the US both state-owned and private undertakings must comply with the competition legislation, unlike in Qatar and the KSA where state-owned undertakings are excluded despite the fact that they are dominant in the industry.

[746] Monti (n 702) 2.

CHAPTER 7

RECOMMENDATIONS AND CONCLUSIONS

7.1 INTRODUCTION

The telecommunications sector represents one of the many distinct markets that have witnessed growth and increased attention in the Middle East. However, it is also one that has been the subject of monopolistic practices and historically been marked by significant barriers to entry.[747] Yet, over the last fifteen years the region has been undergoing a period of change since the introduction of reforms to legislation and competition policy. The KSA, which is often looked to as a standout leader among the GCC states,[748] is currently best positioned to pave the way for a harmonised approach to telecommunications competition regulation in the MENA region.[749]

What has become apparent in the analysis of the telecommunications sector is that it is not only a driver of economic growth in and of itself but also affects the efficiency and growth of a wide range of other industries.[750] The quality and price of telecommunications services affect the capacity of all businesses within the nation to compete in both foreign and domestic markets, thus directly shaping overall economic performance.[751] As this sector continues to grow within the KSA, it has become apparent that the existing monopolistic model no longer serves the needs of the market and consumers. Technological advancements have mandated that the sector shift away from its natural monopoly and that the barriers to entry be eliminated, allowing for additional private firms to enter the market. Ideally, as the market becomes more competitive, that competition in and of itself will perpetuate the free market environment of the telecommunications sector. However, the KSA has not achieved that state yet. Thus, the Kingdom still requires an effective competition policy.

[747] Raza Rizvi, 'Competition Law in the Middle East – A Perspective from Saudi Arabia and the United Arab Emirates' (*Simmons & Simmons*, 29 October 2013) <http://www.elexica.com/en/legal-topics/antitrust-and- merger-control/29-competition-law-in-the-middle-east> accessed 8 July 2017.

[748] See Section 6.5.4.

[749] E Gregory Gause III, 'Saudi Arabia in the New Middle East' (December 2014) Council on Foreign Relations, Council Special Report No 63. See also, Section 6.6.

[750] Aristomene Varoudakis and Carlo Maria Rossotto, 'Regulatory Reform and Performance in Telecommunications: Unrealized Potential in the MENA Countries' (2004) 28 Telecommunication Policy 59, 59

[751] Ibid.

The purpose of this study has been to discuss the different roles of competition policy enforcement and sector regulation, both within the KSA and comparatively in other GCC nations and the modernised US. The legislative competition framework in the KSA has taken on a dual nature, enforcing competition policy on the one hand and developing sector-specific regulation on the other. However, one can argue that this duality is in fact a strength of the system, and that is what this chapter aims to explore—how a harmonised hybrid approach between competition law and sector-specific regulation creates an ideal environment for effective competition in the Saudi telecommunications sector.

The dualist approach set up by the current Saudi competition framework and the telecommunications sector has helped to ensure that competition policy objectives are being accounted for as telecommunications regulations continue to undergo legislative reform. Ultimately, the goal of competition policy and the competition provisions of the Telecommunications Act is to ensure that the telecommunications market works for the benefit of all participating firms and consumers. By having a complementary approach to competition policy for the telecommunications sector, the Competition Law has ensured that the market remains free and competitive and, where the market fails, sector-specific regulations intervene to restore the balance.

Having explored the history and development of the Saudi telecommunications sector and the Competition Law of 2004, along with a comparative analysis of the prevailing approaches taken by other nations with competition models, this chapter focuses on identifying the goals of competition regulation in the Saudi telecommunications sector and the current challenges facing the existing legislative regime. This chapter then considers the lessons to be learned from the comparative models and specifically explores how a harmonized competition policy framework akin to those of Qatar and the US is most suitable for the KSA to achieve its stated objectives. This section breaks down the specific functions that the Competition Law and sector regulations serve and how these two pieces of legislation can serve complementary functions that create a stronger framework than either one would alone. The chapter then makes specific recommendations for how to improve the current regime and build upon the momentum of Saudi legislative reform initiated in the early 2000s. These recommendations aim to bring the KSA's regulation of competition in the

telecommunications sector in line with the hybrid model employed by the US and Qatar. The proposed legislative amendments are intended to further the development of the Saudi competition law regime specifically within the telecommunications sector, taking into account dominant cultural factors.

This chapter begins by showing how the research questions were answered. It then discusses in detail the lessons that can be extracted from the policy and procedural underpinnings of the comparative models outlined in the previous chapter, outlining how harmonisation of the Competition Law and the Telecommunications Act will create a complementary regime that will best achieve the KSA's telecommunications goals. Finally, this chapter details specific recommendations on how the KSA can effectuate this harmonisation and further refine its telecommunications competition regime.

7.2 RESEARCH QUESTIONS

7.2.1 PRINCIPLES OF THE SHARIA THAT GUIDE COMPETITION POLICY

Although the applicability of Sharia is often intimidating to foreign investors and those unfamiliar with the Saudi Arabian legal system, competition policy is one area where Sharia principles align closely with the economic principles that are familiar in non-Islamic legal systems. Notable Islamic principles that regulate the economic sector include a prohibition on the abuse of any rights; prevention of monopolies; and ensuring the freedom of the economic sector.[752]

In Chapter Two, it was noted that the teachings of Islam regarding business practices are focused on providing equal opportunities to all businesses while establishing an environment that promotes businesses without affecting the rights of other individuals in society. Thus, many principles and rules have been formulated to promote fair and just competition in the market. They demonstrate that the Sharia prohibits anti-competitive conduct by requiring businesses to do the following: prioritise the promotion of the interests of all constituencies (maslahah), refrain from inflicting harm on others (la dhararwa la dhirar), refrain from conducting interest-based transactions

[752] A Mohammed, *The Aspects and Developments of the Shariah Law* (2nd edn, Organization of Islamic Word 1994) 170-78.

(riba), refrain from hoarding or limiting output in order to artificially increase the price of products (ihtikar), refrain from using evasive legal devices (saddu zara'i), and refrain from misusing rights and privileges (assuf fi al-isti).

The above principles generally seek to prohibit one entity from causing harm to another.[753] Such harm is prohibited in all forms, including commercial and economic harm against other businesses and consumers. Anticompetitive telecommunication practices fall squarely within this realm of economic harm as they negatively affect all parties in the market. However, there must be some reasonable balance struck as to what constitutes 'damaging' practices in light of the Competition Law and Telecommunications Act. For example, actions taken to inflate prices or acquire dominant market share are surely intended to produce detrimental effects on other market players. Higher prices negatively affect consumers and market dominance inhibits the success of small market players. Yet, actions that are inherently competitive in nature, such as technological advancements that allow a firm to undercut the pricing of a competitor while having a detrimental effect on another would not be viewed as an unfair practice. In exploring the scope of prohibited actions in the competition realm in light of Sharia principles, additional prohibited actions include exclusiveness; collusion; price-fixing agreements; and dumping practices.[754]

One notable area where the Competition Law differs from the provisions of Sharia law relates to the existence of legal monopolies. Under Sharia law, all monopolies are prohibited. However, under the Competition Law, legal monopolies by the government or wholly-owned state entities are exempted from the law's purview and are implicitly permissible.[755] While this has yet to become an issue within the telecommunications sector, it is nevertheless worth noting. To the extent any such monopoly was to occur, government control of the services would need to be justifiable on the grounds of social objectives. This is because, as shown in Chapter Two, Sharia is predicated on the benefits of the community and imposes a general duty to promote the welfare of all human beings. Hence Sharia continues to govern any monopoly by the state and such a position cannot be used to increase prices or reduce the quality of

[753] M As-Sanani, Bulugh *Al-Maram: Attainment of the Objective According to Evidence of the Ordinances* (Darussalam 1996) 324.

[754] Musaed N Alotaibi, 'Does the Saudi Competition Law Guarantee Protection to Fair Competition? A Critical Assessment' (PhD thesis, University of Central Lancashire, 2010) 38.

[755] Ibid, 40-44.

telecommunications services given that these actions are detrimental to societal welfare.

Ultimately, what one can take away from this discussion is that the principles of Sharia and those of general competition policy are well-aligned. The principles of Sharia that must be accounted for by all laws established within the KSA comprise comprehensive prohibitions of anticompetitive practices that are reflected in the establishment of the Saudi Competition Law and the competition provisions of the Telecommunications Act.

7.22 HOW THE SAUDI COMPETITION REGIME ADDRESSES THE MONOPOLY SYSTEM

It was shown in Chapter Three that although the telecommunications sector was the first to be privatised in the KSA with the objectives of increasing the efficiency of and ensuring fair competition among private undertakings in the industry, what actually happened was that the telecommunications activity was corporatized and kept wholly under full public ownership. Hence, it was pseudo-privatisation given that assets were de facto transferred to state-owned undertakings or quasi-state investors, thereby expanding state entrepreneurship. The state largely owns the three companies that dominate the market and therefore retains such control that makes possible the manipulation of prices to ensure that they are affordable to all customers. It also ensures that customers acquire their desired product or service in accordance with their quality expectations. This leaves room for complex problems such as conflicts of interest and regulatory capture. Thus, it is suggested that with the continuous expansion of the telecommunications market and the entry of companies with no ties to the state, the government should consider empowering private orderings to tackle market failure. It has been widely acknowledged that the developing telecommunications industry is a primary driver of social and technological change.[756] Further, competitive conditions underpinning the telecommunications sector have become critical to societal development.[757] As such, a coherent approach to dealing with the problems arising from this sector is also essential. However, given the

[756] William J Kramer, Beth Jenkins and Robert S Katz, 'The Role of Information and Communications Technology Sector in Expanding Economic Opportunity' (2007) <http://lib.icimod.org/record/13181/files/4252.pdf> accessed 8 July 2017.

[757] Mario Monti, 'Competition and Regulation in the Telecom Industry – The Way Forward' (ECTA Conference, Brussels, 10 December 2003) 2.

conflicting sets of broad, proscriptive enforcement under the Competition Law and narrow, prescriptive regulation under the Telecommunications Act, it can be difficult to achieve market efficiency. One of the primary reasons for having an approach that harmonizes general competition law with sector-specific regulation is the need for a regulatory framework that can effectively account for both ex ante and ex post regulation within market activity.[758]

As it currently stands, the competition regime in the KSA focuses on what a particular market player cannot do and provides little insight into proscribing what a player can permissibly do. This approach fails to effectively regulate the sector in a way that supports the introduction of competitive practices. In fact, this is not a problem isolated to the KSA. It has been pointed out that often regulation in the telecommunications sectors of various nations has instead become synonymous with fragmented and inconsequential norms that in practice inhibit rather than support competition.[759] In resolving this issue, creating sector-specific regulatory frameworks grounded in the tenets of competition analysis creates the most hospitable environment for an economically self-sustaining industry. Such a regulatory system allows for the development of self-sustaining and perpetual market conditions grounded on the underpinnings of competition policies and principles.[760]

Additionally, one of the economic goals of the Saudi telecommunications market is to attract foreign investment. The introduction of cross-border business activities brings with it a new dimension to the complexities of competition law enforcement, particularly where a telecommunications service provider spans multiple jurisdictions.[761] The KSA has made clear that the provisions of the Telecommunications Act and Competition Law governing activities in the telecommunications sector are equally applicable to both foreign and domestic firms. However, this applicability has yet to be tested in practice and may create challenges for effective enforcement.

[758] Ibid.
[759] Ibid.
[760] Ibid.
[761] OECD, 'Challenges of International Co-operative in Competition Law Enforcement' (2014) <http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> accessed 8 July 2010.

7.2.3 THE IMPORTANCE OF A SEPARATE COMPETITION LEGISLATION

It was shown in Chapter Four that there are a number of anti-competitive practices that the government sought to explicitly prohibit by including competition provisions within the Telecommunications Act. However, these anti-competitive practices continued unabated despite the enforcement of the statute together with the Sharia principles that prohibit the abuse of power in the market. Also, there is no guidance for the enforcers of the Sharia law and the competition provisions of the Telecommunications Act, as well as the business community on how the legislator articulates the regulatory approach to exclusionary and exploitative conduct in the Kingdom. As such, it has been difficult for the government regulator to supervise, control and sanction the state-owned STC under the Telecommunications Act, which undermines efforts to promote effective competition in a free telecommunications market. Hence, a separate competition legislation was necessary.

Although the goals of the Saudi Competition Law are commendable, there are certainly some questions as to the effectiveness of the existing regime. This is not to say that progress has not been made but rather that telecommunications sector development has fallen short of its anticipated growth.

The following will consider the limitations of the Competition Law for the telecommunications sector. First, the Competition Law's scope is limited to private firms operating within the telecommunications sector. This means that government entities like public corporations and wholly-owned state entities are exempted from the Competition Law.[762] While this does not currently present an issue within the telecommunications sector as the KSA has not ventured into state-owned telecommunications services, it is possible that this could create an issue with regard to the Competition Law's effectiveness in the future. In the event that the KSA decides to transition telecommunications services from privately operated networks to public

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[762] Sahin Ardiyok and Dilara Yesilyaprak, 'Saudi Arabia: Spotlight on Saudi Arabia's Competition Rules' (*Mondaq*, 19 June 2015) <http://www.mondaq.com/x/406002/Trade+Regulation+Practices/Spotlight+On +Saudi+Arabias+Competition+Rules> accessed 10 October 2017.

utilities, there would be nothing in the current legislative framework to protect the market and prevent a state monopoly.

Returning the focus back to the current private sector development, it is still too early to determine whether the competition regime is proving successful in the Saudi telecommunications sector. By default, there can be no competition when the market lacks multiple service providers or where there is no incumbent in the market. Even when such an incumbent exists, it is unlikely that effective competition can occur when the incumbent dominates the market.

There is no question that the STC has long been the dominant market player in the Saudi telecommunications sector. It was primarily this monopoly that the sector reform intended to break up. In this regard, the Competition Law and the competition provisions of the Telecommunications Act have proven effective in dismantling this monopoly. As shown in Chapter Three, the STC first lost its monopoly over the provision of mobile phone services within the KSA when a second license to provide services was issued to Etihad Etisalat. Then, in April 2007, the STC lost its monopoly over fixed telephone services when a second license was issued to Bahraini Batelco to provide such services.

Despite the end of the STC's monopoly, the telecommunications sector has yet to see the growth anticipated by introducing competition into the market. However, it is too soon to determine whether this slow growth is attributable to the shortcomings of the competition policy or is the result of a market emerging from a decades-long monopoly, which is the more likely of the two. However, one should not mistake slow growth with a lack of progress altogether. For example, there are now two key players in the fixed broadband industry, STC and Go Telecom, and numerous mobile providers, including STC, Mobily, Zain Saudi Arabia, Virgin Mobile Saudi Arabia and Lebara Saudi Arabia.[763]

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[763] Marwan Elaraby and others, 'Telecoms in the Kingdom of Saudi Arabia – An Overview' (*Shearman Sterling LLP*, 2016) <http://www.shearman.com/~/media/Files/NewsInsights/Publications/2016/09/Saudi-Arabia-Publications/Telecoms-in-the-Kingdom-of-Saudi-Arabia--An-Overview.pdf> accessed 16 April 2017.

7.2.4 IMPROVING THE APPLICABILITY OF THE COMPETITION POLICY

It was noted in Chapter Five that among the commitments made by the KSA to accede to the WTO was the enactment of a competition legislation. Such a law was necessary to supports the regulatory framework in industries such as the telecommunications industry. However, it is argued here that the competition legislation that was enacted to assuage the fears of investors of key WTO Member States was problematic. The scope and nature of the Law is affected by wide policy attributes, including the encouragement of FDI through the Foreign Investment Law, and the application of the privatisation policy which has as its main aim the enhancement of participation of the private sector in the domestic economy. Thus, in assessing a complaint or report, the Competition Council may take note of the positive effect of the anti-competitive agreement or conduct of a foreign investor on employment and infrastructure in the KSA. The Council may also take note of the effect on the privatisation policy. However, from a legal perspective, it is objectionable that the Council is required to prioritise economics in the competition analysis in such a subjective manner that makes it difficult to predict how the Law will be applied in any given circumstance.

With the introduction of the Competition Law and its implementing regulations and rules,[764] the main goal of the Saudi government was to promote fair competition, combat monopolistic practices and increase consumer surplus and welfare.[765] It aimed to do this by prohibiting agreements between businesses that restrict commerce or competition, preventing businesses from acquiring dominant market positions, and creating laws that would make the abuse of a dominant market position by a business illegal.[766] Put differently, the ultimate goal of competition policy is to improve overall market performance by prioritizing fairness and efficiency. These legal provisions are particularly important because they embody the notion of fairness that underpins

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[764] The competition law regime comprises the Competition Law, Royal Decree No M/25; Implementing Regulation of the Competition Law; and the Rules Governing the Implementing Regulations of the Competition Law.

[765] Competition Law 2004, art 1.

[766] Nelson (131).

all Islamic business transactions.[767]

he principles of fairness are manifested in two ways under the Competition Law. First, the Competition Law applies to all firms doing business in the KSA, whether domestic or foreign.[768] The only current exception to the Competition Law's applicability relates to wholly-owned, government subsidiaries. This ensures that all companies owned by private firms are subject to the same sets of rules and restrictions and are treated equitably before the law. Second, the principles of fairness are again at the centre of the Competition Law through its provisions that prohibit one business from benefiting to the detriment of another, a principle again derived from Sharia law. The Competition Law combats such anticompetitive activities by prohibiting agreements aimed at restricting commerce or competition, preventing firms from obtaining dominant market positions, and condemning abuses of dominant market positions.[769]

Turning specifically to the telecommunications sector, the KSA had enacted sector-specific regulation prior to the establishment of the Competition Law in the form of the Telecommunications Act of 2001.[770] The goals of the Competition Lawt closely mirrored those of this Act. Under Article 3, the stated objectives of the telecommunications sector regulation are to provide advance and adequate services at affordable prices; create a favourable atmosphere that promotes and encourages fair competition in all aspects of the telecommunications sector; ensure principles of equality are followed; and safeguard the public interest.[771] The CITC derived these objectives from the general Sharia principles underlying all aspects of Saudi society and reconciled them with the needs facing the telecommunications sector at a global and economic level. In addition to the objectives stated in Article 3, the CITC also stated that it sought to comply with the principles of openness, transparency, fairness and equality among all relevant parties, such as service providers, investors, the government, and individual and corporate users.[772]

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[767] Kevin W Lu, Gero Verheyen and Srilal Mohan Perera, *Investing with Confidence: Understanding Political Risk Management in the 21st Century* (The World Bank Group 2009) 51.

[768] Nelson (n 131).

[769] Ibid.

[770] Telecommunications Act issued by Royal Decree No M/12 dated 12/03/1422H (03/06/2001).

[771] Ibid, art 3.

[772] CITC, 'CITC Roles and Responsibilities' (*CITC*, 2017) <http://www.citc.gov.sa/en/aboutus/areasofwork/Pages/default.aspx> accessed 10 October 2017.

Chapter Six in its discussion of Articles 24 through 26 specifically addressed how the KSA would work to achieve these goals through a separate competition legislation. Specifically, any actor within the telecommunications sector is bound by the objectives and policies set out in the law and is prohibited from obtaining or abusing dominant market positions to the detriment of free market competition or general consumers. These provisions, while specific to the telecommunications sector, were much narrower in scope than the framework set out in the Competition Law. They prescriptively addressed specific instances of anticompetitive behaviour within the sector, such as requiring approval before purchasing a stake of five percent or more of the shares of another operator.[773] However, the limited scope of the Telecommunications Act's competition rules means that not all possible forms of anticompetitive activity are covered. Such gaps demonstrate the importance of the Competition Law, which together with the Telecommunications Act can form a comprehensive competition policy.[774] Yet, despite the enactment of the Competition Law more than a decade ago, the Telecommunications Act has yet to be revisited in light of the requirements of the Competition Law.

Notwithstanding, the legislative objective behind each of these attempts at competition regulation is to ensure that the telecommunications market functions efficiently and effectively in such a way that benefits both firms and consumers, whether such objectives are achieved through the establishment of competition policy, through sector-specific regulation or, as this section advocates, a combination of the two. When markets are set up to operate to their fullest potential, firms are able to provide consumers with higher quality services, lower prices and more choices. Such a scenario has become ideal for social market economies in the twenty-first century.[775]

7.3 LESSONS TO BE LEARNT FROM THE COMPARATIVE MODELS

A pervasive question within competition policy and regulation of the telecommunications sector is whether a broad general competition policy provides

[773] Ibid, 25(2).

[774] See Sections 5.7, 6.4.

[775] Joaquin Almunia, 'Competition v Regulation: Where Do the Roles of Sector Specific and Competition Regulators Begin and End?' (Center on Regulation in Europe, Brussels, 23 March 2010).

sufficient oversight or whether additional statutory and institutional framework elements are needed to effectively promote and regulate competition within the sector.[776] Historically, competition regimes were focused on final-output pricing and this was identified as the primary purpose of statutory oversight. However, as competition policy has evolved, the introduction of competition itself into a designated sector has proven to be a better method for consumer protection than any state attempt to artificially cap prices.[777] Acknowledging this necessary function of market competition within an industry sector thus necessitated a supporting statutory regime that would reflect the unique needs of the sector and successfully promote competitive practices and restrict anti-competitive arrangements.[778] The challenge then became a question of what the ideal competition regime would look like.

7.3.1 UNDERSTANDING WHY EXCLUSION IS NOT IDEAL

As illustrated in Chapter Six, some competition laws like the one implemented in the UAE have specifically excluded the telecommunications sector from their scope. In such instances, these explicit exclusions are premised on the notion that the sector is already regulated by another set of legislation and authority. In the case of the UAE, this would be the Telecommunications Regulatory Authority whose authority stems from the UAE Telecommunications Law of 2003.

When evaluating the development of the telecommunications sector in the UAE, the sector-specific regulatory regime was put in place nearly a decade before the Competition Law was introduced. Thus, when contemplating the scope of the Competition Law, it was easier to simply exclude the telecommunications sector rather than reconcile how these two pieces of legislation would operate in harmony with one another. While at the time this may have temporarily eased the legislative burden, in

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[776] S Ran Kim & A Horn, 'Regulation Policies Concerning Natural Monopolies in Developing and Transition Economies' (DESA Discussion Paper No 8, March 1999) <http://www.un.org/esa/esa99dp8.pdf> accessed 8 July 2017.

[777] George Yarrow, 'Report on the Impact of Maintaining Price Regulation' (Regulatory Policy Institute, January 2008) <http://www.aemc.gov.au/Media/docs/Prof%20Yarrow%20Report-80834941-a50a-4bcd-8b0c-
184b30791b18-0.pdf> accessed 8 July 2017.

[778] United Nations Conference on Trade and Development Secretariat, 'The Role of Competition Policy in Promoting Economic Development: The Appropriate Design and Effectiveness of Competition Law and Policy' (TD/RBP/CONF.7/3, 30 August 2010).

the long run these fragmented pieces of legislation have created a precarious situation for one of the nation's largest sectors. By failing to reconcile the two pieces of legislation, there is no broad, gap-filling competition law that can remedy the shortcomings of sector-specific regulation. Thus, each law must be completely self-sufficient and self-contained with regard to both ex ante prohibitions against anti-competitive conduct and ex post enforcement activities.

7.3.2 A HARMONIZED MODEL AS THE WAY FORWARD

Competition law and sector-specific regulation have become intrinsically entwined as two interrelated areas of regulatory competition policy. These two important pieces of legislative infrastructure are designed to correct market failures and address weaknesses within the sector. When used in a complementary fashion, competition policy coupled with regulation play a key role in the efficient regulation of competitive markets within a given sector, contributing to overall economic health and consumer welfare within a particular nation.

In countries like Qatar and the US which have adopted competition policy alongside sector-specific regulation, there has been a paradigm shift in the public policy toward the telecommunications industry. This has been marked by three important changes that are manifested in the telecommunications sector: a tendency to privatise the services previously provided solely by state-owned companies; opening up the telecommunications industry to competition; and reorienting regulatory oversight by shifting focus away from final output prices and instead toward the promotion of healthy competition in all respects within the telecommunications sector.[779] This policy shift recognised that state-owned monopolies were failing to make use of new technological opportunities, which in turn disadvantaged consumers and endangered the competitiveness of businesses as they relied on the provision of telecommunications services from these monopolistic players.[780]

The shift to sector-specific regulation in the telecommunications sector reflects a change in approach to the basic tenets of competition policy. Rather than an attempt

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[779] Martin Hellwig, 'Competition Policy and Sector-Specific Regulation for Network Industries' (Max Planck Institute for Research on Collective Good, Bonn 2008/29) 3 <https://www.coll.mpg.de/pdf_dat/2008_29online.pdf> accessed 8 July 2017.

[780] Ibid.

to prevent abuse in final output prices to protect consumers, regulation of the telecommunications industry is now focused on promoting the development of healthy competition in the sector, including competition between networks and in downstream markets and complementary services.[781]

To understand how both competition law and sector-specific regulation are essential components of a comprehensive telecommunications competition policy, it is important to first consider the objectives each is intended to achieve.

7.4 ACHIEVING THE OBJECTIVES OF COMPETITION LAW

There is no denying that effective competition is a key element to the success of any market. Competition laws form a crucial part of competition policy, which ensures the health of the market. Competition laws serve to prevent anticompetitive actions that reduce market competition or swiftly bring an end to abuses of power that thrive to the detriment of competitor firms and consumers.

At the most basic level, the primary objective of competition policy, as exemplified through the enactment of competitions laws, is to maintain and protect effective competition. Competition laws are specifically designed to protect a properly functioning market, allowing firms to engage in healthy competition to meet economic supply and demand. For competition laws and the resulting competition policy to be effective, firms within the market sector must be able to freely enter and exit the market, be incentivized to provide high quality services while remaining competitive on pricing and product availability, and not be hindered by unfair regulations or dominant firms acting in an abusive manner with the goal of reducing competition.

As a result, competition policy is not simply a lofty ideal attributable to a utopian market concept but a concrete mechanism designed to address a particular market failure – monopolies.[782] When monopolies are permitted to dominate, the market as a whole

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[781] See for example, Nicholas Economides, 'Antitrust Issues in Network Industries' (May 2008) <http://www.stern.nyu.edu/networks/Economides_Antitrust_in_Network_Industries.pdf> accessed 8 July 2017.

[782] Niamh Dunner, *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge University Press 2015).

suffers. What has become apparent is that the only way to adequately address the monopoly issue is to implement anticompetitive prohibitions and behavioural restraints on incumbent firms within a market sector through effective competition policy. This stops them from either illegitimately acquiring market power or from exercising such excessive power in the case where a monopoly has already been achieved.

Competition laws are, by their nature, generic and widely applicable. They are characterised by their ex post intervention on a proscriptive basis. These generic competition laws apply broadly to the economy. A nation's competition law should ideally have very few exceptions to its applicability and any exception should be adequately justified. It is contentious whether competition laws should apply only to the private sector or whether they should encompass public firms and state-owned entities, but unequivocally they should apply to both domestic and foreign market players. By minimising the number of exceptions, a general competition law significantly decreases the possibilities for differential treatment among market players. As a result of the law having broad and consistent applicability, this eliminates the need for the creation of ad hoc solutions to sector-specific issues or market failures, instead ensuring that all market players are subjected to consistent and fair treatment. This is particularly important in KSA legislation which has largely been codified on an as-needed basis to address specific contemporary legal situations.

Additionally, competitive markets reduce the potential for corruption. Sectors become regulated by market forces as opposed to the decisions of policy-makers that may encompass an alternative agenda. The existence of competition law further extends this transparency by providing a mechanism for the assessment and investigation of alleged anticompetitive practices. Enforcement can be undertaken by the competition authority directly or complaints can be made by consumers or market players. In either instance, the alleged misconduct is then assessed in light of the prohibited and permissible conduct under the competition law.

Finally, the integration of competition into markets through the enactment of competition laws forces companies to become more innovative and efficient. They continue to find ways to improve their product, reduce costs and increase productivity, resulting in a better consumer experience and more significant economic contributions.

7.4.1 ESTABLISHING THE GOALS OF SECTOR-SPECIFIC REGULATION

Having established that competition law is a crucial aspect of competition policy, one may then wonder why regulation is also a necessary element in this equation. Sector-specific regulation serves a number of purposes that cannot otherwise be achieved through competition laws alone. While competition laws can do away with market monopolies, one cannot rely on the individual enforcement of competition rules to govern the activities of an entire sector. In order to preserve an environment that will allow both incumbent players and new entrants to thrive, complementary sector regulation is also essential.

The goal of sector-specific regulation, from a competition perspective, is to create an environment that encourages free market competition. The way to achieve this in practice is to enact statutory provisions that address market failures within the particular economic sector. The goal of statutory regulation is to recreate the market conditions that would exist in an effectively competitive environment absent these market failures. Sector-specific regulations often accomplish this by creating means of access for additional players to the previously monopolised market, such as through licensing. In particular, the issuance of operational licenses has been a key growth factor in the telecommunications industry.[783]

Unlike competition law, which generally has the limited aim of prohibiting anticompetitive practices at a broad level, sector-specific regulations often have multiple objectives.[784] While a competition authority established by a competition law may focus solely on market efficiency by reducing anticompetitive behaviour, the introduction of multiple goals for sector regulation allows for a government to balance concerns over market efficiency with other strategic objectives, such as increasing foreign investment or strengthening political ties. For example, regulatory supervision can function to balance the correction of market failures with broader systemic outcomes. A regulation may be necessary to protect consumers from an imminent detrimental action, but in remedying that market failure there may be a ripple effect

[783] Hellwig (n 780).

[784] D Daniel Sokol, 'Limiting Anticompetitive Government Interventions that Benefit Special Interests' ((2009) 17 Geo. Mason L. Rev. 119.

throughout the market beyond those immediately affected. It is then up to the regulatory regime to address such concerns.

While in some instances there will inevitably be overlap in the goals and means used to achieve the objectives of both competition law and sector regulations, the introduction of multiple objectives at the sector level may lead to inherent conflict and contradictions. For instance, sector regulation primarily concerns itself with three things: the promotion of effective competition similar to the goals of the competition law; the internal market dynamics; and the market players' interests.[785]

The interplay of the concerns may give rise to conflicts when the regulation imposes conditions on the incumbent firms, such as establishing barriers to entry or creating behavioural restrictions, for the sake of advancing the competitive environment. However, just as these competing objectives may be at odds, they can also result in a certain degree of complementarity when protection of the market players' interests through the creation of standards for fair competition furthers the goals of promoting effective competition within the marketplace.

7.4.2 HARMONIZING THE TWO INTO AN EFFICIENT, COMPLEMENTARY REGIME

The telecommunications sector serves as a prime example for how competition law and sector-specific regulation can work in a concerted way. The telecommunications industry by its nature requires a degree of ex ante regulation to complement and support competition enforcement. This has manifested itself in the existing legislative regime in the KSA.

There are two facets of the competition policy that concern telecommunications in the KSA: the Competition Law and the sector-specific Telecommunication Act. The Competition Law serves as the broadly applied anticompetitive or antitrust statute, equivalent to the Sherman Act in the US or the Competition Law in Qatar, while the Telecommunications Act serves as the regulatory sector statute with provisions that were pre-emptively modelled on anticompetitive principles prior to the enactment of the Competition Law, which would be akin to the Telecommunications Act in the US

[785] See Alexandre de Streel, 'The Relationship Between Competition Law and Sector Specific Regulation' (2008) 47(1) Reflets et Perspectives de la Vie Economique 55, 55-72.

and telecommunications statutes of Qatar. The evolution of these laws is uniquely interesting because in many ways they seek to achieve the same outcome, albeit through their own devices, which begs the question of what is the optimal coordination of the two? This section explores why both the general competition law and sector specific regulations are essential to a comprehensive framework that will effectively protect market integrity and consumer welfare.

7.4.3 COMPETITION POLICY COHERENCE

Competition policy is generally applicable across all markets unless the sector is expressly or impliedly exempted. Regulation on the other hand is enacted on a sector-by-sector basis. For example, the regulation for one sector does not affect the functioning or operation of the other sectors. For there to be a fully coherent competition policy regime within the KSA telecommunications sector, it is essential that both the Competition Law and Telecommunications Act exist and operate harmoniously.

As legislatures have searched for the ideal regulatory conditions that can accommodate progress and innovation in the telecommunications sector, policy-makers have attempted to unleash market dynamics by engaging in the strategic choice of sector deregulation while maintaining an overarching competition law framework. As this model has evolved over time, it has become accepted as the most appropriate means of regulating the telecommunications sector because it effectively combines sector-specific regulation with general competition law policy, both of which are put into effect by entities that are independent of market players.[786]

As the legislatures attempted to strike this delicate balance between the specific and the general, it became apparent a balance also had to be struck between encouraging innovation and fair competition. In outlining an ideal regulation framework, there needed to be a competition policy that was technology-neutral and embodied the necessary prohibitions against anticompetitive practices in a broad manner, which then served to facilitate the existence of various markets. Those markets, such as the telecommunications sector, then required sector specific regulation that was narrowly

[786] Antonios G Broumas, 'The Necessity of Sector Specific Regulation in Electronic Communications Law' (2009) 4(3) Journal of International Commercial Law and Technology 176, 182.

tailored to its subject matter, created to be flexible and adaptable to market trends. This sector-specific regulation would work to prescriptively limit anticompetitive behaviours, thereby allowing the market to exist with minimal public intervention to pursue technological and economic advancement. The sector-specific regulation would delineate the boundaries of permissible activity while the competition law acts as the invisible hand, waiting to intervene when market players fall foul of the competition regime. This is aptly phrased by Broumas who states that this 'legal flexibility and market competitiveness can only be achieved through a deregulatory approach based on competition law principles, applied through the combination of generic competition law and sector-specific regulation'.[787]

This is the approach followed by the US and, to a certain extent, Qatar. In the US, the Sherman Act and its associated statutes function as the general competition law. It is not tied to any particular industry or economic sector but outlines the anticompetitive behaviours that will not be tolerated within the free market economy of the country. The telecommunications sector is then regulated by a combination of legal instruments and regulatory bodies, including the Federal Trade Commission and the Federal Communications Commission, that together comprise the sector-specific telecommunications legislation for the US. The telecommunications legislation functions as the guiding law for activities that are permissible and prohibited and the competition law comes into play when the boundaries of the sector-specific regulations are exceeded. This dual regulatory system combining general competition law with sector specific regulation operates to guarantee effective competition in the liberalised communications market.

What is notable about the US's harmonised approach is that it has stood the test of time. As noted in Chapter Six, the Sherman Act has been referred to as the bedrock competition law worldwide and has formed the basis for many competition laws around the globe enacted over the past century. While the competition framework in the US has grown and adapted along with technology and the market, its basic principles still remain firmly in place. This Act represents the epitome of strong competition law. Its general applicability has made it adaptable to the various needs of an evolving society but it is also able to operate in tandem with sector-specific regulations. In fact, sector-

[787] Ibid, 177.

specific regulations such as those governing the telecommunications sector were developed with the intention of being part of this hybrid system.

Unlike in the KSA, in which the Telecommunications Act was enacted first, followed by the Competition Law, the Sherman Act predated the vast majority of modern sector-specific regulation. Thus, as regulations were developed, they were done so under the working assumption that the Sherman Act stood firm in the background as the overarching check on anticompetitive practices, allowing the sector-specific regulation to deal with the substance of a particular market sector. The laws, through their express provisions, were created to work in tandem. The Telecommunications Act specifically subjected itself to the overarching antitrust laws. This framework allows for the easy adaptation of sector-specific regulations with changes in technology or market economies without jeopardising the established competition regime.

A hybrid system of tandem competition and telecommunications laws was more recently taken up within the GCC by Qatar. However, unlike in the US and similar to the KSA, Qatar first enacted its Telecommunications Act, followed by its Competition Law. Yet, the Qatar legislature recognised the need for these laws to work in concert to create an effective competition regime within the telecommunications sector. To reconcile these two pieces of legislation, Qatar issued a policy document that addressed the applicability of the Competition Law to the telecommunications sector and asserted that the telecommunications policies should be read with the established competition laws.

In both these instances, the laws were ultimately reconciled to create a singular competition policy framework to govern the telecommunications sector. It is this coherence among various legislations that the KSA should be aiming for as it continues to streamline its competition policy with regard to telecommunications.

7.4.3.1 PROCEDURAL VERSUS SUBSTANTIVE GUIDANCE

As discussed above, the general competition law and sector-specific regulations have different objectives and ultimately serve different functions in practice within the telecommunications sector. To understand their respective goals and functions, each will be considered in turn.

Generic competition laws have proven to be an invaluable regulatory tool in markets that have a natural tendency toward monopolisation, such as the telecommunications sector. They serve an inherently procedural function by prohibiting those practices that are detrimental to market competition across the board. By operating on a broad basis and with an unrestricted scope, they inherently cover all aspects of anticompetitive behaviour within a country's economy beyond the intricacies of any particular market sector. Further, by establishing a set of general competition principles, a broad competition law establishes a framework for interpreting the anticompetitive provisions of a sector-specific regulatory provision. However, it is this broad and generic nature of competition law that makes it insufficient on its own to regulate the telecommunications sector. Competition laws are characterized by their general and vague nature and lack the specificity and coherence of sector-specific regulations.

Conversely, sector-specific regulation serves a more specific and substantive function. It necessarily addresses the technical and economic aspects of sector regulation. The provisions contained in a telecommunications regulation, for instance, would address aspects of standard settings to be adopted by firms and address economic aspects such as price regulation. While embodying the spirit of competition policy, these provisions are inherently specific to the sector and market for which the law is enacted and would not otherwise be governed by a broad competition law. By establishing a separate set of sector-specific regulations, the law can be easily amended to reflect changes in technology and market development within the telecommunications sector without affecting or compromising the competition law regime.

7.4.3.2 EX ANTE AND EX POST ENFORCEMENT

Another advantage to having both a competition law and sector-specific regulation governing the telecommunications sector is that they can address anticompetitive behaviour on both ex ante and ex post bases. With the exception of merger review and approval, competition laws generally operate on an ex post basis. This means that competition law enforcement occurs after the anticompetitive actions have taken place and harm to the market has already occurred. Ex post competition rules have generally been characterised as backward-looking; narrowly viewed and driven primarily by demand; focused on exploitative abuses rather the fostering cooperation between firms; fact specific; best enforced through the civil courts; and result in

remedies that are rather declaratory in nature.[788]

Conversely, sector regulation relies on an ex ante approach. Ex ante rules aim to prescriptively guide business conduct by making clear why types of activities are permissible and what activities are restricted. The aim of such regulations is to take a proactive approach to fostering a competitive environment. Sector-specific ex ante rules are characterised as forward-looking in that they aim to regulate future behaviours; define markets in broader terms than competition laws; focus on addressing market failures through making changes to industry structure; are not fact-specific; provide specific, prescriptive remedies; are best enforced through independent, sector-specific regulators as opposed to the courts; and are characterised by detailed remedies that account for the broader considerations of consumer welfare and investment incentives.[789]

By utilising both competition law and sector regulation together, a competition policy framework is created that allows for both ex ante enforcement by guiding market practices and ex post enforcement by regulating anticompetitive behaviours. This creates a system in which market players understand that there are consequences to their actions and have a clear picture of what actions they may take without falling foul of the competition regime.

7.4.3.3 INFORMATION NECESSARY FOR ENFORCEMENT

Following on from the ex ante versus ex post enforcement debate is the information that is needed about a market player's activity to adequately enforce competition policy. Ex ante enforcement is not fact-specific and will not require any particular information because the events have not yet occurred. The exception to this is a proposed merger or acquisition of a significant stake in a market firm. In such instances, sufficient information must be provided to allow the competition authority to evaluate the implications of the proposed course of action in light of competition policy. This often requires the regulator to engage in significant fact-finding to allow for the accurate evaluation of the impact and effects on the market of the proposed conduct.

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[788] Peter Alexiadis, 'Balancing the Application of Ex Post and Ex Ante Disciplines Under Community Law in Electronic Communications Markets: Square Pegs in Round Holes?' in E Buttigieg (ed), *Rights and Remedies in a Liberalised and Competitive Internal Market* (Gutenberg Press 2012) 137, 139.
[789] Ibid, 139-140.

Conversely, ex post competition enforcement has a clear informational advantage because, by its nature, such enforcement takes place after the alleged anticompetitive conduct has occurred. In such circumstances, the competition authority is vested with sufficient information to determine the nature and detrimental effect of the anticompetitive action and appropriately sanction the infringing party. This ensures that market balance is restored and players are put back into a substantially similar position they were in prior to the investigated conduct.

7.4.3.4 NATURE OF ENFORCEMENT REMEDIES

Another important area of convergence between competition law and sector regulation relates to the different types of remedies imposed depending on the law governing the anticompetitive conduct. Remedies under competition law are intended to address the specific conduct or anticompetitive behaviour of a firm in the market. As such, the remedies imposed when a violation is found are often declaratory and structural in nature. Mergers can be used as an example. When a merger is proposed, the competition law's application requires evaluating what remedy will resolve the competition problem and preserve the competitive nature of the market. If such a merger would create market dominance, the request for approval of the merger will be denied. Other alternatives constituting structural remedies could include reorganization of the firms, the sale of certain assets by the firms or the creation of new competitor firms through licensing arrangements.

Unlike the primarily structural remedies of competition law, the remedies of sector specific regulation are designed to correct a specific market failure and are a form of behavioural remedy. Behavioural sector regulation remedies are designed to directly address the conduct itself, such as setting pricing levels, lifting barriers to entry or asserting conditions that mandate the provision of particular services. These remedies often include sanctions, injunctive relief or other deterrents that would prevent a party from engaging in anti-competitive behaviour or impose consequences if the detrimental activity is not rectified. Ideally, these remedies are designed to correct the market's failures and address issues before they rise to the level of anticompetitive behaviours under the competition law. However, if used appropriately, they can also promptly address more minor anti-competitive behaviours before structural remedies become necessary. As such, these two forms of remedies work hand in hand to

preserve an environment of effective competition in the market.

7.5 CHALLENGES FOR THE SAUDI COMPETITION REGIME IN THE TELECOMMUNICATIONS SECTOR

One of the primary challenges facing GCC states like the KSA is how to effectively implement and enforce national competition laws alongside sector-specific regulation while at the same time keeping the powerful and continuously growing private sector businesses content.[790] In reality, this is not entirely possible. Many of these businesses, such as the STC, achieved near monopolistic status prior to the competition legal reforms in the early 2000s through arrangements that are no longer permissible. These large players relied heavily on barriers to market entry to maintain their positions; barriers that the competition regime now seeks to eliminate. For example, Article 4(4) of the Saudi Competition Law expressly prohibits 'preventing any firm from exercising its right to enter or move out of the market at any time or hampering the same'.[791]

7.5.1 JURISDICTIONAL CONFLICTS

Additionally, the telecommunications sector in the KSA is currently subject to two different sets of regulations, resulting in businesses facing uncertainty on enforcement related issues. As it currently stands, there are competing jurisdictions and forums for the enforcement of competition provisions related to the telecommunications sector. Under the Telecommunications Act, the CITC has jurisdiction over competition-related matters whereas under the Competition Law the Competition Council has similar authority. Thus, both authorities are permitted to regulate and enforce statutory competition provisions against anti-competitive behaviours including anti-competitive agreements, merger control procedures and abuses of dominant positions within the market. As a result of the fragmented development of Saudi competition policy in the sector, there is no established hierarchy between the two authorities, leaving all firms, both domestic and international, operating in the telecommunications sector within the KSA subject to the enforcement authority of both.

[790] See Rizvi (n 748).
[791] Competition Law 2004, art 4(4).

In resolving such jurisdictional conflicts, the competition regime should allocate the power to deal with competition issues within the particular sector. There are three primary ways this could be addressed. First, the sector regulator under the Telecommunication Act could be granted the exclusive power to oversee competition issues arising within the sector. Second, both the sector regulation and the competition authority as empowered by the Competition Law could maintain concurrent, respective powers to handle enforcement matters. However, in such circumstances it is necessary for the boundaries of their respective powers to be clearly defined in order to maintain the efficiency of the competition regime. Further, to the extent that there is any overlap between enforcement powers, there should be an ultimate hierarchy of authority as to which enforcement authority has priority. Finally, the competition authority empowered by the Competition Law could maintain exclusive jurisdiction for handling enforcement matters within the telecommunications sector.

When multiple authorities are competent to oversee or enforce the same subject matter, jurisdictional conflicts may occur and could potentially result in parallel actions before different authorities. Such duplicative jurisdiction in the absence of a clear hierarchy of authority can lead to inefficient allocation of resources and leaves open the potential for contradictory enforcement decisions. Thus, it is important that any revisions to the legislative frameworks or attempts to reconcile the existing pieces of legislation pre-emptively resolve such jurisdictional conflicts. Ultimately, to resolve these issues, the KSA needs to establish a hierarchy of authority between the respective bodies to determine which will have the duty or right to engage in enforcement efforts.

7.5.2 SUBSTANTIVE ISSUES

When dealing with two pieces of legislation that predominantly address the same subject matter, two substantive issues in the application of these laws may arise. First, both the competition law and the sector-specific regulation rely on legal norms that use the same terminology, and second, both sets of laws are applied to the same industry. However, the KSA has been relatively proactive in this regard by clearly defining the relevant terms in the context of preliminary articles of each piece of legislation. This has yet to be an issue with the enforcement of competition policy in the KSA but it is worth noting as a possible area for future attention as the sector

continues to grow and develop.

While the future of the telecommunications sector in the KSA is unpredictable, what is clear is the need for the KSA to introduce measures and policies that will increase and encourage participation and growth by both foreign and domestic players in the private sector of its economy. The KSA has taken an important step forward by aligning itself with the WTO and implementing a competition law regime. These actions demonstrate that the government is committed to transforming semi-stagnant and monopolised domestic economic sectors into thriving ones that are attractive to foreign investment. However, to continue to reap the benefits of such forward progress, the KSA must continue to rethink and refine its approach by harmonising its various pieces of legislation and encouraging transparency and accountability in the enforcement of competition policy.

The general competition law and sector-specific regulations must be complementary in nature and function in harmony. As it currently stands, the Competition Law applies to all economic activity with only very few exceptions. Article 3 of the Competition Law provides that the '[p]rovisions of this Law shall apply to all firms working in Saudi markets except public corporations and wholly-owned state companies'.[792] Unlike other nations that have exempted certain industry sectors from the purview of the general competition law, such as the UAE, the KSA approach is one of broad applicability with only certain firms excepted. As, as a result, the competition policies of the KSA apply to all industries, including regulated industries, and there are no particular sectors that are immune from competition policy or exempted from its application.

7.6 PROPOSALS FOR REFORM

First and foremost, if the KSA is going to continue to utilise both a general competition law and a sector-specific regulation to govern competition in the telecommunications sector, these two pieces of legislation need to be harmonised. The Telecommunications Act was enacted prior to the establishment of the Competition Law and thus makes no mention of the law. Given that the competition provisions are

[792] Competition Law 2004, art 3.

much more detailed in the Competition Law, it would make sense that the four articles comprising Chapter Six of the Telecommunications Act become subject to and interpreted in accordance with the Competition Law.

7.6.1 CHANGES TO THE TELECOMMUNICATIONS ACT

To formalise this relationship between the two pieces of legislation, the KSA should take action to assert that any communications laws, including the Telecommunications Act, are subject to the principles embodied in the Competition Law. There are two ways that this could be done in practice. The first is to amend the Telecommunications Act and include a provision specifically referencing the Competition Law and outlining that the competition provisions of the Act are to be interpreted in compliance with and are subject to the provisions of the Competition Law. This is akin to the reconciling of the US telecommunications legislation with the provisions of the Sherman Act.

Alternatively, the KSA could follow the approach of Qatar and issue a policy document that reconciles the laws. This approach would be the least burdensome and would require the issuance of a binding decree that interprets how the two laws are intended to work together and perform complementary functions. This would be akin to the implementing regulations that are issued in the KSA after a new law is enacted. These provisions would detail the hierarchy of the laws and preemptively resolve any jurisdictional conflicts.

7.6.2 CHANGES TO THE COMPETITION LAW

In addition to the changes to the Telecommunications Act outlined above that would reconcile the coexistence of the two pieces of legislation, there are additional changes that could be made to further strengthen the Competition Law and its applicability in the telecommunications sector.

First, the Competition Law should not permit the creation of intentional monopolies of any kind. While market+ dominance alone is not per se unlawful, the driving intent and economic impacts that stem from a monopoly fall foul of the provisions of the Competition Law. For instance, there can be dominance in the market without an intentional monopoly, such as with a new service or technology. However, when this dominance becomes a market power that ventures into monopolistic territory is when the company engages in anti-competitive behaviours to prevent the entry of other

competitors. A company that uses its dominant position to restrict the options available in the market and maintain its position as the sole provider of the goods or services has a significant impact on both society and the economy. Additionally, there are currently certain permissible monopolies. For example, wholly-owned state companies are excepted from the rules against monopolies in the marketplace. These state companies do not face regulation or consequences for their monopolistic practices. This allows the state to maintain a position of power with regard to certain aspects of the telecommunications sector, potentially to the detriment of consumers.

To reconcile these concerns, the language of the Competition Law should be amended to prevent companies from obtaining or maintaining a dominant position through anti-competitive means. This also would mean repealing Article 3 of the Competition Law so that public and wholly-owned state companies are no longer excepted. This would bring the Competition Law fully in line with Sharia principles and place all commercial telecommunications providers, both currently existing and to be developed in the future, on an equal footing.

Second, the breadth of the Council of Competition Protection, the competition authority empowered by the Competition Law, should be expanded to explicitly encompass ex post enforcement efforts for anticompetitive activities in all sectors, including the telecommunications sector. Ex post measures are those taken after anti-competitive actions have occurred. Examples of ex post measures would include sanctions, revocation of business licenses, injunctions against anti- competitive activities and other suitable remedies in law or equity to counter a company's anti-competitive behaviours. Ex ante authority to address issues prior to the anti-competitive actions would remain the purview of sector-specific authority. A classic example of ex ante authority is requiring companies to submit their merger and acquisition plans for review and approval prior to taking action. Such pre-emptive regulation minimises the number of anti-competitive activities that are effectuated and reduces the burden of ex post enforcement authorities. While often in a regulatory structure, the same entity is responsible for both ex ante and ex post enforcement, the telecommunications sector in the KSA implicates multiple competition regulation authorities, including the broad competition authority and the sector-specific CITC.

It is essential that the regulatory actions and enforcement goals of these authorities

are complementary, and their actions are coordinated to further the goals of the Kingdom's competition policies. In light of this coordinated enforcement regime, the empowering legislation should also be amended to include provisions that explicitly address cooperation between the CCP and sector-specific authorities. These provisions should detail the respective enforcement authority and responsibilities of each authority while emphasising the shared goals of furthering competitive practices in the market. Further, there should be provisions that address the need for cooperation between competition authorities as not all situations can be resolved solely on an ex ante or ex post basis. This cooperation would include sharing resources and support personnel when needed and sharing investigative information to further enforcement efforts.

Finally, the CCP should adopt additional guidelines to clearly articulate how anticompetitive activities are assessed and provide clear examples of prohibited activities under the competition framework and the potential penalties for engaging in such conduct. As it currently stands, the law contains broad prohibitions against anti-competitive behaviours. However, it provides little in the way of how such behaviours are identified; how investigations are conducted; how proposed actions are evaluated; what behaviours it ultimately deems to be anti-competitive; and what the penalties are for engaging in such activities. To remedy this, the guidelines should be more specific about how the competition authorities will operate within their assessment and enforcement capacity.

For instance, most competition analyses start with the competition authority evaluating the impact that the pending action will have on consumers and the economy. The guidelines should provide additional insight into what factors they consider in evaluating this impact and what methodologies the authorities should use in making their assessments of activities. Further, the guidelines should highlight illustrative examples of sanctionable anti-competitive activities, such as mergers that result in monopolies, price-fixing agreements and actions that artificially drive up the consumer costs for goods or services. Identifying these examples will put companies on notice of what behaviours are prohibited and will serve as a deterrent to parties for utilising similar tactics. Finally, the guidelines should expressly state penalties for engaging in such behaviours. For instance, the guidelines could list merger denial, monetary

sanctions, revocation of business licenses, injunctive relief and other possible ex ante and ex post activities that could be taken to prevent or remedy anti-competitive behaviour.

7.6.3 DEREGULATION AND RE-REGULATION

As the telecommunications sector, among other notable markets, continues to become more liberalised and globalised, it is important for the KSA to embrace the process of deregulation and re-regulation. As touched on in Chapter Six, the ongoing developments in the telecommunications industry require a certain degree of flexibility within the governing regulations. Although at first glance it may seem counter-intuitive to engage in a certain degree of deregulation of the telecommunications sector under the Telecommunications Act, this may be a necessary step to building a coherent and functional competition regime.

The goal of deregulation is to reduce the extent of explicit sector-specific regulation, instead relying on increased competition to meet public policy objectives. The driving force behind the deregulation trend has been an increased recognition of the benefits of competition for a particular industry sector. However, deregulation should not be construed to mean the abolishment of all sector-specific regulation. Instead, it is a step in the process that allows for a relaxation in the sector-specific regulation to evaluate the extent to which competition introduced by way of the developing competition policy assists with achieving the desired outcomes. Once the effects of competition are determined, the KSA can then revisit the sector-specific regulations to engage in a period of re-regulation to preserve the balance achieved by the introduction of competition into the sector.

As with any type of legislative sector reform, some degree of trial and error is necessary to find the most efficient approach to protecting the business interests of private firms and the general welfare of consumers.[67] In practice, this requires the Kingdom to adopt an approach of phasing out regulations that no longer serve their purpose and replacing them with regulations that reflect the current state of the market.[68]

7.6.4 COORDINATED LEGISLATIVE AND ENFORCEMENT EFFORTS

Under the concurrent jurisdiction of the Competition Law and the Telecommunications

Act, the competition authority, the Ministry of Communications and Information Technology, the CITC, and the Council of Ministers are all involved in some way with the legislation and enforcement of various competition provisions.[793] For example, the CITC is an independent administrator of the Telecommunications Act but any licenses issued by it pursuant to the Act must be sanctioned by the Council of Ministers. Further, the Ministry of Communication and Information Technology oversees the planning and implementation of all of the government's strategies and policies within the telecommunications sector, but it does not have sole legislative authority to amend the Telecommunications Act and its supporting rules and regulations to further these goals.

As the KSA works to reconcile the coexistence of the Competition Law and Telecommunications Act, it will also need to coordinate legislative and enforcement efforts. Specifically, the Kingdom needs to delineate which bodies will be responsible for the development and applicability of the general Competition Law to the telecommunications sector and what the process will be for amending the Telecommunications Act as changes are made to the KSA's competition regime. Additionally, a hierarchy needs to be established to determine what entities will hear different types of enforcement actions. Ideally, the civil courts are best positioned to hear enforcement actions on an ex post basis and the independent regulator under the Telecommunications Act is the ideal forum for the resolution of ex ante concerns.

7.6.5 INCREASED TRANSPARENCY

In addition to reconciling the overlapping areas of legislative and enforcement jurisdiction, the KSA should promote competition in the telecommunications sector by encouraging transparency in the duties and powers of the competition authority and telecommunications regulator. This includes clearly delineating the hierarchy of authority between the competition authority and sector regulator; providing expeditious decision-making processes; promptly removing any unjustified regulatory restrictions on competition; limiting regulation to measures intended to create or maintain market incentives; engaging in sound competition analysis when defining or assessing markets; periodically reviewing regulations to ensure that they continue to serve their purpose; and providing reasoned decisions based on sound competition principles

[793] See Sections 4.2 and 5.4.

when engaging in enforcement actions.

One possible means of doing this would be to establish a committee that includes personnel from both entities. While there is not currently any overlap between those who serve as part of the competition authority and as part of the telecommunications regulator, their jobs often mirror each other and require addressing many of the same issues. Creating a two-way dialogue between the broad competition authority, whose goal is to promote competition policy in all sectors and to support the Saudi economy as a whole, and the sector-specific telecommunications regulator, whose role is to ensure that competition policies are being implemented and enforced specifically within the telecommunications sector, will open up the possibilities for coordinated and cohesive action. The competition authority can keep the telecommunications regulator informed of its overall mission and vision for Saudi society and its economy as a whole, and the telecommunications regulator can identify sector-specific challenges and obstacles that would be better addressed at an overarching, hierarchical level by the competition authority. By not only delineating the respective roles of these two authorities but also finding ways for them to operate in concert, the KSA can set itself up for success in this sector and in the future by utilising this model as other sector-specific regulations arise.

7.6.6 REGULATORY IMPACT ANALYSIS

One additional exercise that may be useful for the KSA as it goes through the process of deregulation and re-regulation is conducting regulatory impact analyses on a regular basis.[794] According to research conducted in the US, regulation is more apt to create negative externalities if there is not a designated body to actively supervise the sector. Thus, incumbent market players, when left to their own devices without oversight, will continue to engage in conduct designed to exclude the competition. As a result, it is imperative the government or the department or agency to which it delegates its authority of overseeing these sectors evaluates the impact of existing regulations and

[794] Given that regulation has several impacts, the analyses provides a comprehensive appraisal of the potential impacts of new regulation and helps to determine whether the regulation may achieve the expected goals. See Jacobo Torriti and Ragnar E Lofstedt, 'The First Five Years of the EU Impact Assessment System: A Risk Economics Perspective on Gaps between Rationale and Practice' (2012) 15(2) Journal of Risk Research 169, 169-186; Romano R Reyes and CE Sottilotta, 'Regulatory Impact Assessment in Mexico: A Story of Interest Groups Pressure' (2015) 8(1) Law and Development Review 99, 99-101.

their effects, both positive and negative, on telecommunications sector competition.[795]

7.7 THE FUTURE OF THE KSA'S COMPETITION POLICY IN THE TELECOMMUNICATIONS SECTOR

As has been discussed at length in this section, both competition law and sector-specific regulation are essential components in a comprehensive and effective competition policy. Once such a competition policy is appropriately established, this infrastructure will allow for the proactive identification of anti-competitive behaviours and practices in the telecommunications sector. By understanding the patterns that these behaviours follow and the effects that they produce, the KSA can also pre-emptively take remedial action to further constrain these behaviours going forward. Furthermore, by taking a firm stance against such anti-competitive behaviours in the telecommunications sector and garnering publicity from enforcement activities, the KSA is able to further reinforce the underlying goals of the Competition Law and the nation's overall competition policy.

The next step for the KSA is to engage in some measure of legislative streamlining as outlined in this chapter. To effectively promote competition in the telecommunications sector, there must be some harmonisation between the fragmented pieces of legislation. Whether this takes the form of continued legislative reform resulting in amended versions of the existing laws or a decree reconciling them and clearly articulating how they will be articulated in tandem, attention needs to be paid to bridging the gap between these two areas of applicable competition regulation.

However, reform does not simply stop there. This period of deregulation and re-regulation in the KSA is just beginning and there will need to be continued reform efforts as the KSA finds it footing in the telecommunications sector. One of the ongoing struggles within the legislative framework of the KSA generally is the lack of available information with regard to the legislative history, intent, interpretation and enforcement. In order to identify market failures and areas for continued improvement, the Saudi legislature must continue to investigate the aspects of competition policy in the telecommunications sector. As the market continues to grow and expand, this means

[795] OECD, 'Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)' (2008) <https://www.oecd.org/gov/regulatory-policy/44789472.pdf> accessed 8 July 2017.

gathering information about attempts at anticompetitive agreements, obtainments and abuses of dominant positions, attempted mergers, and enforcement activities. By collecting data on anticompetitive behaviours, both those that are being deterred through ex ante enforcement and those prosecuted through ex post prosecution, the KSA will hopefully have sufficient data to continue to refine its competition regime moving forward.

Additionally, the KSA should track, to the extent possible given the civil nature of its legal system, the interpretations of competition policy used for rendering enforcement decisions and civil court judgments. By analysing judicial applications of the general competition law to telecommunications cases, the legislature will be able to continue to shape substantive sector-specific policy to pre-emptively address market failures. Further, to the extent that the judiciary struggles to enforce competition law principles in the telecommunications sector, this will allow for the development of amendments to increase the effectiveness of the Competition Law.

7.8 AREAS FOR FURTHER RESEARCH AND DEVELOPMENT

Although identifying the most appropriate model for competition regulation within the telecommunications sector is an important step in the evolution of the KSA's competition law regime, it represents only a threshold issue. Once an appropriate model is chosen, the legislative work for the Kingdom is just beginning and the legislations and implementing regulations must be amended to accommodate the choice of model. Further doctrinal research should be done on the legislative language that similarly modelled systems have used to harmonise competition laws and telecommunications laws. This language, along with the proposals contained in this thesis, could be used to model legislative reforms within the Kingdom or provide the basis for generating a new decree that would reconcile the two laws.

Additionally, empirical research should be conducted with the objective of determining the effectiveness of the current competition regulation of the telecommunications sector. It is especially important to determine the extent to which the current competition regulation prevents vertical agreements that restrict competition. This may help to determine which vertical agreements are prohibited in the KSA. The findings

could then be used as a basis for comparison once changes are made to the system. As with any type of regulatory development, there will be a certain necessary degree of trial and error. As the KSA goes through this process, assessing its progress will help to identify notable improvements and lessons that can be applied to other sectors. Finally, research should be done on the KSA's approach to competition law generally in light of the competition trends taking hold in the rest of the world. The KSA is unique as a Muslim country that integrates Sharia into all aspects of its legal system. As such, the Kingdom is often limited in how it can adopt global trends into its domestic legal system. However, competition law is one area in which Sharia may be even more restrictive in principle than most competition regimes and may serve as a model from which non-Muslim countries can learn.

7.9 CONCLUSION

The concept of competition law is relatively new to the Middle East. The KSA, as one of the early adopters in the region, is positioned to serve as a model for how competition law will apply to developing telecommunications sectors in the region. Not long ago, the KSA struggled against codifying its laws and is now in a period of necessary legislative reform. At present, the KSA is faced with two pieces of separate legislation—the Competition Law and the Telecommunications Act—that must be reconciled in order for the telecommunications sector to continue to grow and ultimately thrive.

This study has undertaken the task of dissecting the current state of competition policy in the Saudi telecommunications sector and addressing how it can be improved to align with global competition law trends. Chapter Two focused on how Sharia has affected the development of competition policy within the KSA and introduced the practical problems created by the STC's effective monopoly of the telecommunications sector and the lack of a hospitable environment for foreign investment. Chapter Three focused on the background of the telecommunications sector in the KSA, tracking the development of the Act and the CITC. Chapter Four then illustrated how market players in the telecommunications sector abused their dominant positions and how this detrimentally impacted the free market economy. Chapter Five then explored the development of the competition policy in the KSA and the Kingdom's accession to the WTO. Chapter Six proceeded to compare the current state of Saudi

telecommunications competition policy with the prevailing models of two other GCC states, along with that of the highly-developed US which serves as an aspirational model for a harmonised competition law structure. Finally, this chapter concluded with an in-depth discussion of why harmonisation of the Competition Law and the Telecommunications Act is important for a sustainable telecommunications market in the KSA and provided specific recommendations for how the Kingdom can move forward.

For the KSA to develop a telecommunications market that will both continue to serve as a thriving economic sector as well as enhance the welfare of its citizens, it is necessary for it to implement a solid and modern regulatory framework to govern competition in the sector. In practice, this requires the existence of complementary statutory provisions that can work in harmony to create a solid legislative framework, as well as the support of the institutions involved through their acceptance of their regulatory responsibilities. It is only through cooperation between the legislative and enforcement aspects of competition regulation that the KSA will be able to meet the challenges that lie ahead for this developing sector.

Liberalisation of the telecommunications sector and introduction of competition into the market should function as an objective but not the ultimate goal—they are a means to an end. What competitive markets allow for is the continued growth of the sector in such a way that it will support the national economic objectives of the KSA. Among the desirable outcomes are attracting new investment, particularly foreign investment; continuing to improve national infrastructure; expanding the reach of telecommunications access to promote citizen welfare; bringing the KSA in line with regional and global competition and telecommunications law trends; and encouraging both legislative and technological innovation.[75]

As the Kingdom continues to address anticompetitive behaviours and challenge monopolistic tendencies, it is important that both the government and the regulatory agencies each play their part in supporting the market. In practice, this means frequently revisiting and reassessing the existing legislative provisions and enforcement efforts, along with the respective allocation of powers and responsibilities among competition regime authorities. The future success of the telecommunications sector rests on the collaboration and cooperation of the various governmental

institutions involved in competition regulation.

While creating a harmonised framework is an essential part of telecommunications success, it must be complemented with judiciously exercised enforcement efforts aimed at protecting the welfare of both private firms and consumers. Sector success is not an isolated effort but rather requires coordinated efforts to consolidate competition and combat anticompetitive behaviour at both the general and sector-specific levels to ultimately achieve an effective competition policy regime.

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