Title: The interface between the General Authority for Competition and regulatory agencies in Saudi Arabia: Obstacles & Reforms

A Thesis Submitted to Brunel University for the award of the degree of Doctor of Philosophy

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Abstract

This thesis investigates the impact of the introduction of Competition Law in three regulated sectors in Saudi Arabia, namely Telecommunications, Electricity and Civil Aviation. The analysis aims to test the current practices of the Council of Competition and the regulatory agencies of the regulated sectors regarding how competition is regulated and explore the challenges and obstacles that these institutions face in the performance of their functions. Additionally, this Thesis discusses the interplay between Competition law and the sectoral regulations in the Saudi system. While Competition Law is enforced by the Council of Competition in the whole market, the sectoral regulations are enforced by the regulatory agencies in the regulated markets, and each sectoral regulation has its own competition rules. The main issue in this regard is the conflict between the provisions of Competition Law and the competition rules included in the sectoral regulations. Also, the absence of a clear relationship between the Council of Competition and the regulatory agencies, which leads to conflicts of institutional jurisdiction between these authorities and the double consideration of cases by both the Council of Competition and the regulatory agencies.

The thesis attempts to fill this gap by examining the viability of adopting two main models: exclusive and complementary. The exclusive model grants exclusive power to power to the Council of Competition to enforce Competition Law exclusively in the regulated markets. In contrast, adopting the complementary model of delineating the relationship between these institutions would lead to a division of power between the Council of Competition and the regulatory agencies by mandating authority for the regulatory agencies to enforce Competition Law or the competition rules in the sectoral regulations. If this model is chosen it needs to set up clear mechanisms for cooperation and coordination among those authorities, so that the existing enforcement problems are eradicated.

Declaration

I declare that the work presented in this thesis is my own, any information originating from other works have been quoted and referenced.

Turki Mesfer Alkahtani

Acknowledgement and Dedication

I would like first and foremost to thank the Almighty God for giving me the opportunity and wisdom throughout all aspects of my life.

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List of Acronyms

ACCC: Australian Competition and Consumer Commission

ATLB: Air Transport Licensing Board

BT: British Telecommunications

CAA: Civil Aviation Authority

CC: The Council of Competition in Saudi Arabia

CCIER: Centre for Competition, Investment & Economic Regulation

CDSI :Central Department of Statistics and Information

CITC: Communications and the Information Technology Commission

CMA: Capital Market Authority

CMA: Competition and Markets Authority

CML: Capital Market Law

CPA: Consumer Protection Association

CWP: Concurrency Working Party

DFT: Department of Transport

DTI: Department of Trade and Industry

EASA: European Aviation Safety Agency

ECJ: Court of Justice OF THE European Union

ECRA: Electricity and Cogeneration Regulatory Authority

ERRA: Energy Regulators Regional Association

ERRA: Enterprise and Regulatory Reform Act

EU: European Union

GAC: General Authority for Competition

GACA: General Authority of Civil Aviation

GCC: Gulf Cooperation Council

GEC: The General Electricity Corporation

GEMA: Gas and Electricity Market Authority

GNP: Gross National Product

ICN: International Competition Network

IRCL: Implementing Regulation of Competition Law

JRG: Joint Regulators Group

MENA: The Middle East and North Africa

MOFA: Ministry of Foreign Affairs

MVNO: Mobile Virtual Network Operators

NAO: National Audit Office

NETC: National Electricity Transmission Company

OECD: Organisation for Economic Co-operation and Development

OEEC: Organisation for European Economic Cooperation

OFCOM: Office of Communications

OFT: Office of Fair Trading (UK)

OFTEL: Office of Telecommunications

PPP: Public-Private Partnership

PTT: Telegraph and Telephones

SCC: Saudi Communications Commission

SEC: Saudi Electricity Company

SEC: Supreme Economic Council

SMP: Significant Market Power

STC: Saudi Telecom Company

SWCC: Saline Water Conservation Corporation

TFEU: Treaty on the Functioning of the European Union

SCECO: the Saudi Consolidated Electricity Companies

UK: United Kingdom

UNCTAD: United Nations Conference on Trade and Development

USOs: Universal Service Obligations

WEC: Water and Electricity Company

WTO*:* World Trade Organisation

Table of legislations

EU& UK:

- Civil Aviation Act 2012
- Competition Act 1998
- Council Regulation (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty (Council Regulation EC No 1/2003).
- Electricity Act 1989
- Energy (Northern Ireland) Order 2003, S.I. No.419 (N.I. 6)
- Gas Act 1986
- Health and Social Care Act 2012
- Railways Act 1993
- Regulation (EC) No 717/2007 of the European Parliament and of the Council of 27 June 2007 on roaming on public mobile telephone networks within the Community and amending Directive 2002/21/EC (Text with EEA relevance) Official Journal L 171, 29/06/2007
- Telecommunications Act 1984
- The Competition Act 1998 (Concurrency) Regulations 2004, S.I.No.1077 of 2004.Office of Fair Trading (OFT), Concurrency Application to Regulated Industries (December 2004)
- The Competition Act 1998 (Concurrency) Regulations 2014 No. 536
- Transport Act 2000
- Water Industry Act 1991

Saudi Arabia

- Capital Market Law 2003
- Civil Aviation Law 2005
- Council of Ministers Law 1993
- Electricity Law 2005
- Implementing Regulation of Competition Law 2004
- Law of the Judiciary 2007
- Regional Law 1992
- Saudi Cabinet Decision No 74 of 2001
- Saudi Company Law 1965
- Saudi Competition Law 2004
- Saudi Telecommunications Law 2001
- Shura Council Law 1992
- The Basic Law of Governance 1992
- The Law of Board of Grievances 2007
- The Law of Commercial Court 1931
- The privatization strategy in Saudi Arabia, The Saudi cabinet's decision No. 219 (11 November 2002) (Privatization Strategy) based on Supreme Economic Council Decision No. 1/23 (4 June 2002).
- The Saudi Foreign Investment Law 2000

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Chapter One: Introduction

1.1 Preamble

During the last two decades of the 20th century, many governments all over the world decided to stop or limit the monopoly supply of public convenience services through the privatisation of public utilities.[1] Privatisation is considered an instrument for reforming the economies of countries that have been forced to change through external pressures by international organisations, such as the World Trade Organisation (WTO), or through local developments.[2] The government of the Kingdom of Saudi Arabia is no exception. When the Saudi government decided to keep pace with global economic development and the requirements of the country's accession to the WTO[3], it took steps to effect changes in its judicial system by establishing new courts with new jurisdictions and by reforming its legal system through the adoption of new laws, such as the Competition Law 2004, Telecommunications Law 2001, Electricity law 2005 and Civil Aviation Law 2005, or through the amendment of others, such as the Trademark Law 2002. The Competition Law of Saudi Arabia has undergone some reforms in late 2019. However, due to the time constraint not all the reforms were addressed in this thesis.[4]

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[1] Thoralf Dassler, 'Combining Theories of Regulation – Proposing a Framework for Analysing Regulatory Systems Worldwide' (2006) 14 *Utilities Policy* 31-43.

[2] Rijit Sengupta and Cornelius Dube, 'Competition Policy Enforcement Experience from Developing Countries and Implications for Investment', OECD Global forum on International Investment VII 'Best practices in promoting investment for development' CUTS (2008) < http://www.oecd.org/investment/globalforum/40303419.pdf> Accessed 10 May 2019.

[3] After several negotiation and conclusion of a bilateral treaty with the other WTO members, Saudi became a full member of WTO on 11 December 2005. https://www.wto.org/english/thewto_e/acc_e/a1_arabie_saoudite_e.htm> (Accessed 10 May 2019).

[4] Royal Decree No. (M/75), dated 6 March 2019, and published in the Official Gazette on 29 March 2019("Competition Law"). Resolution No. (337) of the Authority Board of Directors, dated 25 September 2019, approving the Implementing Regulations ("Implementing Regulations").

Prior to its accession to the WTO, Saudi Arabia was known as a closed economy for a long time. According to the Saudi Minister of Commerce and Industry, 'the accession will further integrate Saudi Arabia's economy into the world economy. It will also deepen the universality of the multilateral trading system'.[5] The government of Saudi Arabia realised the need to develop the local economy and the importance of transformation towards integration into a global economic system in terms of trade globalisation. This transformation included market liberalisation and the privatisation of some sectors from state ownership and control to reduced state involvement.

Consequently, the government proposed that the private sector should take part in the advancement of the economy. The main aims of privatisation were to introduce competition towards economic development and to create an environment in which consumers benefit from the lower prices of goods and services, as well as from the development of modern technologies introduced to the market far more quickly in comparison to monopoly, as in a supply situation.[6] As a result, the trend in Saudi Arabia has been the privatisation of utilities previously owned and managed by the government.

1.1.1 Competition in a Liberalised Market

Market liberalisation aims to encourage competition, provide incentives for reducing the cost of production and increase product innovation. Despite the regulatory framework in the EU, network sectors have been designed to operate efficiently whilst reforming the market structure gradually. There is a significant space between the efficient and authorised opening up to competition in these industries. Therefore, there is a questionable locus about regulation and competition policy as tools for overseeing the liberalisation of network sectors, that is, if such tools are indeed the

[5] BBC, 'Saudi WTO Membership Approved: The World Trade Organisation has Approved Saudi Arabia's Application for Membership After 12 years of Talks', 11 November 2005. http://news.bbc.co.uk/1/hi/business/4427880.stm> Accessed 10 May 2019.
[6] Dassler (n.1) 31.

best to use in this context and the nature of the relationship between these tools (either as complements or substitutes).[7]

The advent of the privatisation programme came with the requirement to establish regulatory bodies. These bodies are responsible for the supervision and regulation of their respective sectors. Regulating competition in regulated sectors is one of such tasks. Competition is considered one the most important aspects of privatisation. Privatisation encourages competition and trade liberalisation through opening up markets and attracting investment.[8] Despite the emergence of regulatory bodies around the world, the operation mechanisms of these bodies are controversial and not well understood in developing states.[9] This is especially the case for the regulatory framework in Saudi Arabia.

The adoption of a competition law undeniably plays a crucial role in a country's economy and development. For example, developing countries that have not adopted a competition law are in the lowest level of development.[10] However, adopting this law does not necessarily mean its accurate and effective implementation as well.[11] The effective enforcement of laws has always been a significant issue. Without the proper application of laws or the absence of the effective implementation of laws, achieving the aim of the adoption of these laws is impossible. Furthermore, no less important is the institutional structure of the administrative authorities that play the regulatory and supervisory role in applying the laws, as well as the role of judicial authorities in settling disputes that arise from the infringement of relevant laws at the time of implementation.

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[7] Pierre Buigues, 'Competition policy versus sector specific regulation in network industries The EU experience', UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 30 October to 2 November 2006.

[8] Maghawri Shalabi, *Protect competition and prevent monopoly between theory and practice: an analysis of the most important Arab and international experiences*, (Dar Arab renaissance, 2005), 99.

[9] Navrov Dubash and Narasimha Rao, 'Regulatory Practice and Politics: Lessons from Independent Regulation in Indian Electricity' (2008) 16 *Utilities Policy* 321-331.

[10] Eleanor Fox and Michal Gal, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' (2014) *New York University Law and Economics Working Papers* 374.

[11] Tay-Cheng Ma, 'The Effect of Competition Law Enforcement on Economic Growth', (2012) Journal of Competition Law and Economics, Vol.7, No. 2 301-334.

The existence of effective institutions in the market can spur economic growth and promote competition without adopting a competition law through market liberalisation, economic freedom and deregulation. For example, four Asian countries (India, China, Singapore and Hong Kong), which are considered among the fastest-growing economies in the world, had not adopted an anti-trust law until very recently.[12]

Nevertheless, the institutional design is very important, as it affects the successful implementation of the competition framework and the enforcement of the anti-trust law. The institutional design is akin to the design of a house, in which many factors should be considered to facilitate life for the inhabitants of the house. Examples of these factors are a family's values, aspirations and needs.[13]

1.1.2 Challenges on the Implementation of the Competition Law

As with any law, competition law has resulted in widespread controversy in itself and in terms of the effectiveness of its enforcement. Competition law and sectoral regulation play an important role in promoting market competition and the growth of the country's economy. It also aims to promote consumers' welfare by providing a wide range of products, improving product quality and ensuring competitive prices. Given the importance of a competition law, many countries have adopted it; In their comprehensive study on the Comparative Competition Law Dataset, Bradford et al., discovered that 129 countries had national competition law by 2010.[14] After adopting such laws, however, developed countries have faced some difficulties and challenges regarding its implementation. The officials from over 100 competition authorities regularly participate at the annual Global Forum on Competition every year organised by the OECD, where they discuss the challenges faced in their enforcement of competition laws. For instance, competition provisions in trade

12 ibid.

13 Eleanor M. Fox, 'Antitrust and Institutions: Design and Change', (2010) 41(3) Loyola University Chicago Law Journal 473.

14 Anu Bradford, Adam S. Chilton, Chris Megaw & Nathaniel Sokol, 'Competition Law Gone Global Introducing the Comparative Competition Law and Enforcement Datasets', (2018) Journal of Empirical Legal Studies, VOL. 16, 411.

agreements, merger control in dynamic markets, competition in the digital markets etc.[15] The ICN, which is an international organisation comprised by 139 competition authorities from 126 jurisdictions around the world, provides another forum for competition authorities around the world to discuss their best practices in competition policy and enforcement.[16] Therefore the importance of competition law at the global scale is undeniable. Given that markets are regularly evolving, these authorities face constant challenges of newly emerging anticompetitive practices.

An anti-trust law is a type of law that is constantly undergoing amendments[17]. For example, "the content and enforcement of UK competition law has altered dramatically in a short space of time".[18]

Saudi Arabia is a developing country. Its economy has a huge impact on global markets, as the country is among the leading producers and exporters of oil and oil derivatives. Its local market is the largest in the region, and it is considered an attractive destination for foreign imports from all over the world. Saudi Arabia was one of the first developing countries that sought to join the WTO because of its strong belief in the many benefits of keeping pace with the rapid development of the global economy through steps, such as the liberalisation of the market, opening up of the economy to foreign investors and the privatisation of some utility sectors, such as telecommunications, the electricity sector and the civil aviation sector.

As in many developing countries, Saudi Arabia's anti-trust laws are relatively new. The legal regime in the country faces a myriad of challenges that are common to a developing country that is aiming to achieve a perfect market situation. The report of the 'Working Party on the Accession of the Kingdom of Saudi Arabia to the World

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15 OECD 2019, Global Forum on competition available at http://www.oecd.org/competition/globalforum/), accessed in 20 April 2020.

16 International Competition Network (ICN), available at (www.internationalcompetitionnetwork.org), accessed in 20 April 2020.

17 Cosmo Graham, *EU and UK Competition Law*, (2nd edition, Pearson, 2013).

18 Kirsty Middleton, Barry Rodger, Angus MacCulloch & Jonathan Galloway, *Cases & Materials on UK & EC Competition Law*, 2nd edition, Oxford University Press,2009), 61. Barry Rodger and Angus, Macculloch, *Competition Law and Policy in the EU and UK* (5th edition, Routledge, 2015) 23-24.

Trade Organisation' states that the Saudi government faces difficulties in the enforcement of its new laws.[19]

1.2 The Conceptual Framework

1.2.1 The Competition Law Concept

To define competition law, Dabbah states that the concept of competition should be clarified first. He expresses that competition has no formal definition. However, he describes competition by relying on various sources. Competition is defined as a process in which companies strive to obtain new customers.[20] Dabbah describes competition law as the legal rules that are used to protect competition in the market.[21] According to a report by the Organisation for Economic Co-operation and Development (OECD), 'Antitrust law is a form of economic regulation intended to promote economic effectiveness by warranting that firms produce what consumers greatly need at the least prices'.[22]

In other words, competition law consists of the legal rules that regulate the behaviour of competitors in the market by prohibiting certain practices among firms, such as anti-competitive agreements, abuse of the dominant position of a firm or merger operations that can affect the competition between firms through the creation of a dominant position. Competition law is also described as the legal rules that are designed to regulate competition in the market between competitors and to prevent monopoly by creating a competitive environment to promote consumer welfare through the provision of good-quality products with competitive prices.[23]

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[19] Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization, 2005, Document WT/ACC/SAU/61.
[20] Maher Dabbah, *EC and UK Competition Law: Commentary, Cases and Materials* (Cambridge University Press, 2004), 5-6.
[21] Ibid
[22] OECD report, 'Regulatory Reform and Innovation < https://www.oecd.org/sti/inno/2102514.pdf> accessed 15 May 2019.
[23] Bernard Hoekman and Peter Holmes, 'Competition Policy, Developing Countries and the WTO', (1999), The World Economy, Vol. 22, No. 6875-6893.

The terminology used for competition law differs in in various jurisdictions globally. For instance, in the UK, it is called Competition Law, in the US, it is called anti-trust law, in China anti-monopoly law, in Germany, it is called the law against unfair competition, in Australia, Competition and Consumer law, in India, there is the Monopolies and Restrictive Trade Practices Act, while in Saudi Arabia, it is called Competition Law. Although this law has various names and is certainly different in its competition provisions and implementation tools across countries, these names may reflect legislative concerns in those jurisdictions about their actual economic environment, market structure and performance to achieve the target of adopting that law.[24]

Differentiating competition law from competition policy may be confusing for the general public. Therefore, defining the concept of competition policy in this research is essential to clarify its scope, importance and effects. Although the competition policy of a government is important in regulating market competition, competition law contributes to savings in the market and economic development, in general.[25]

Anti-trust law has two components. The first is competition law and efficient enforcement to restrict anti-trust agreements by firms, prevent the abuse of a controlling position by a dominant company in the market and hinder merger operations which may create a new dominant position for firms.

The second is government actions that promote competition or the competition outcomes in the market, such as creating a trade framework and industrial policies, as well as increasing the reliance on market forces.[26] Regulation is also considered a strong tool of competition policy in that it can be used to privatise public firms, liberate utilities, address market failures and regulate prices and quality within the regulated sectors.[27]

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[24] Dabbah (n.20), 6.
[25] Sengupta and Dube (n.2).
[26] Ibid
[27] Taimoon Stewart, Julian Clarke and Susan Joekes, 'Competition in action: Experiences from Developing Countries', (2007) International Development Research Centre, Ottawa, 5-6.

‘Competition policy is essentially understood to refer to all governmental measures that can have an impact on competition, in local and national markets, by directly affecting the behaviour of enterprises and the structure of industry. Competition policy is an instrument for achieving an efficient allocation of resources, technical progress and consumer welfare. It also helps to regulate concentration of economic power detrimental to competition and promotes flexibility in adjusting to the changing international economic milieu’.[28]

Competition authorities and other public authorities, such as regulatory bodies, are responsible for implementing the competition policy. For example, adopting and enforcing the competition law, which are a part of the competition policy, are some of the tasks of competition authorities.[29]

1.2.2 The Concept of Sectoral Regulation

To define sectoral regulation, this section explores separately the conception of some terms, such as regulation, economic regulation and sector-specific regulation. Although regulation has no specific definition, this section includes several descriptions of regulation, which can be helpful for understanding the entire thesis.[30] Regulation can be defined as one of the fundamental roles of the state in its aim to promote the welfare of society. Regulation can also be regarded as the approach that the government uses to restrict private activities.[31] It is a legal tool applied by the government on individuals or entities through the imposition of sanctions to make them comply with policies.[32] Regulation is defined as follows:

> ‘the monitoring and control of a sector or business by Government or an entity appointed by Government. Direct and indirect controls and

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[28] Sengupta and Dube (n.2).
[29] Dabbah (n. 20), 8.
[30] Johan den Hertog, ‘Review of economic theories of regulation’, (2010), Tjalling C. Koopmans Research Institute, Utrecht School of Economics Utrecht University Paper Series 10-18, <http://www.uu.nl/rebo/economie/discussionpapers >Accessed 10 May 2019
[31] J G Christensen, ‘Public interest regulation reconsidered: From capture to credible commitment’, (2010) “Regulation at the Age of Crisis”, ECPR Regulatory Governance Standing Group, 3rd Biennial Conference, University College, Dublin.
[32] den Hertog (n. 30), 12.

limitations are imposed upon the regulated entity. Regulation tends to be categorized into economic regulation and other forms of regulation'.[33]

Regulation refers to an instrument that would justify the government's effort in intervening in the market by implementing its policies and supervising the behaviour of stakeholders to address market failures and promote consumer welfare.[34] It has three types, namely, economic regulation, social regulation and administrative regulation. Economic regulations are the governmental restrictions imposed on the decisions of companies with regard to barriers to entry and exit or the prices of products and services for enhancing the efficiency of markets through the provision of goods and services. Social regulations are meant to protect society's rights and welfare. Examples are promoting environmental welfare, ensuring safety in the workplace and providing protection from fraudulent activities. Finally, administrative regulations are used as a governmental tool to manage both public and private sectors. Examples are regulations on health care administration, intellectual property rights and taxes.[35] This research will largely be based on economic regulations, as these are the most relevant to the study and will assist in answering the research questions.

1.2.3 Objective of Competition Law and Sectoral Regulation

The main aim of the Competition Law is to promote consumer welfare by ensuring a competitive process in the market. The target of sectoral regulation involves the structure of the sector, users' interest and the promotion of competition.[36]

Basically, Competition Law aims to improve economic efficiency through two means. The first is to foster consumer welfare by ensuring the good quality of products, their competitive prices and the wide range and variety of goods to choose from. The second is to protect actual or potential competitors and prevent restrictions or changes in competition in the market by prohibiting anti-competitive agreements

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[33] See www.worldbank.org/pppirc. Accessed 15 May 2019.
[34] OECD report (n. 22).
[35] Ibid
[36] Alexandre de Streel, 'The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications' (2008) *Reflets et perspectives de la vie économique* 2008/1 (Tome XLVII), 55-72.

among competitors and merger operations which may give rise to creating an overriding position in the market or a unilateral behaviour, such as abuse of a dominant position.[37]With regard to sectoral regulation, utility sectors are considered the backbone of the economy. If consumers are not satisfied with public services, their quality or their price, the social and political stability of the state will be affected. Therefore, states adopted sectoral regulations to protect the public's interests by imposing some obligations on public utility providers, such as providing public services with universal quality and reasonable prices. The state used to be the provider of all utility services, whether directly or through state-owned companies. However, after the global movement on privatisation and market liberalisation, the state passed on some of its responsibilities in providing utility services to private operators through the privatisation of certain public sectors; regulatory bodies that are responsible for regulating and supervising these sectors were also established.[38] Sectoral regulation also aims to promote competition in regulated sectors through price regulation and access regulation, as well as promoting environmental safety and income redistribution.[39] Competition Law and sectoral regulation have a shared objective, which is to address market failures and economic inefficiency.[40]

1.2.4 The Interplay between the Competition Law and Sectoral Regulation

The relationship between competition law and sectoral regulation has attracted many researchers. Competition policy constitutes a branch of economic policy that includes the enforcement of competition law, which is applied by competition agencies and judicial institutions to all sectors. Regulation here is defined as sector-specific rules

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[37] Gary Hewitt, John Clark, and Bernard Phillips, 'A framework for competition law', in R. Shyam Khemani (ed) *A Framework for the Design and Implementation of Competition Law and Policy* (World Bank & OECD, 1999) 141-150.

[38] Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 8–12 November 2010, Chapter VII, TD/RBP/CONF.7/L.7 < https://unctad.org/en/pages/MeetingsArchive.aspx?meetingid=17888> accessed 15 May 2019.

[39] Ibid

[40] Rishika Mishra, 'Harmonizing regulatory conflicts', (2013) CUTS Centre for Competition, Investment & Economic Regulation (CUTS CCIER) <http://www.cuts-ccier.org/pdf/Harmonising_Regulatory_Conflicts.pdf> accessed 15 May 2019.

that are applied by regulatory and judicial institutions.[41] Sectoral regulation basically depends on ex ante business operation, for example, structuring the market and controlling prices.[42] In ex ante interventions, regulators have to take further or heavy and frequent actions on different business behaviours and apply rules on certain behaviours.

Businesses face fewer risks when the regulation interventions achieve their desired outcomes,[43] and the purpose of competition law is protecting market competition by preventing anticompetitive situations and inadmissible behaviour through 'ex post punishments."[44] Moreover, it has been seen that sectoral regulation is a vital instrument for creating a competitive environment in the market, while competition law is promoting and protecting competition in the market.[45]

Even though there are differences between competition law and sectoral regulation, overlapping may occur between them[46]. This overlap has been carefully studied because it is an important element in developing and protecting market competition.[47] Overlapping often occurs in two areas: in the definition of the market and in evaluating market power with regard to antitrust regulation. These two areas are crucial in deciding whether a competition issue is present and for defining a number of issues in sectoral regulation.[48] Although there are a number of

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[41] Christian Kirchner, 'Competition policy vs. Regulation: Administration vs. Judiciary' in Manfred Neumann and Jürgen Weigand (eds), *The international handbook of Competition* (Edward Elgar Publishing, 2004).

[42] Pornchai Wisuttisak, Liberalization of the Thai energy sector: a consideration of competition law and sectoral regulation, ,(2012), *Journal of World Energy Law and Business*, Vol. 5, No. 160-77.

43 Pierre-André Buigues, 'Competition policy versus sector-specific regulation in network industries– the EU experience' UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, <http://www.unctad. org/sections/wcmu/docs/c2clp_ige7p14_en.pdf> accessed 14 May 2019.

[44] Paul A Grout, 'Competition Law in Telecommunications and its Implications for Common Carriage of Water', (2001), CMPO Working Paper, 02/056, CMPO, University of Bristol. http://www.bristol.ac.uk/media-library/sites/cmpo/migrated/documents/wp56.pdf Accessed 20 May 2019.

[45] Pornchai Wisuttisak, *Competition Law and Sectoral Regulation in the Electricity Sector in Thailand: Current Problems, International Experience and Proposals for Reform*, (PhD thesis, UNSW Australia, 2013).

[46] Maher M. Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) Cambridge Law Journal, vol 70 (1), 113-143.

[47] Wisuttisak (n. 45)

[48] Dabbah (n. 46)

complicated issues between competition law and sectoral regulation,[49] it is believed that they complement each other[50] and both 'work together to achieve markets that work well'.[51] The reason is that antitrust legislation and frameworks are unable 'alone to create market competition in the utility sectors';[52] however, they can stop and restrict the influence of anticompetitive behaviour that limits freedom of competition.[53] Therefore, there is a need for regulation to introduce 'market competition into utility markets'.[54]

In addition, Wisuttisak stated that with the purpose of promoting and protecting market competition, competition law and sectoral regulation need to complete each other to stop current businesses 'from abusing their market power as well as increasing market power in the liberalised and privatised utility sectors'.[55] Competition law and sector-specific regulation offer related solutions for dealing with 'market power and distorted market competition'. Thus, it is crucial for all nations to reform regulations and competition law with the intention of developing market competition and effectiveness 'in their liberalised utility markets'.[56]

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[49] Kirchner (n. 41).
[50] ibid
[51] Joaquín Almunia 'Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?', Center on Regulation in Europe (CERRE)23 March 2010, Brussels, <http://europa.eu/rapid/press-release_SPEECH-10-121_en.htm> Accessed 18 May 2019
[52] Wisuttisak (n. 45).
[53] Ibid
[54] ibid
[55] ibid
[56] ibid

1.2.4.1 The Context of Developed States

In 2009, Rab studied the function of the UK Competition Commission (now the CMA) on the boundary between sector regulation and antitrust law, asserting that achieving the right 'blend' between antitrust law and sector regulation is probably better than trying to balance them. She argued that the reason for this was that the boundaries between the two would be increasingly blurred.[57]

However, Monti's study on 'Managing the Intersection of Utilities Regulation and EU Competition Law' showed that, from an EU view, antitrust law and sector regulation are instrumental to market competition; nevertheless, there is a need to clearly draw a line between the two.[58]

In his study on the interplay between antitrust law and sectoral regulation in electronic communication, Streel suggested that antitrust law and sector parameters have much in common but that their differences should define the scope of sectoral regulation. Therefore, sector regulation is required when it is more effective than competition law for resolving market failures.[59] Streel also argued that sector regulation should not be aligned with competition law fundamentals but rather be used as a basis for the regulation of autonomous fiscal principles related to the purpose of regulation.[60]

Nevertheless, there is no single option that can be applicable to all countries, which have a competition law and sectoral regulations that govern competition problems in the regulated sectors. There is range of factors that may impact the selection of the shape of the interface between two legal systems and division of the functions between the respective enforcement authorities. These factors are the legal system,

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[57] Suzanne Rab, 'From ordered competition - towards a new competitive order? The role of the UK Competition Commission at the interface between sector regulation and competition law', (2009) European Competition Law Review, vol 30(10), 505-529.

[58] Giorgio Monti, 'Managing the Intersection of Utilities Regulation and EC Competition Law' (2008), LSE Law, Society and Economy Working Papers 8/2008 < http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-08-Monti.pdf> accessed 18 May 2019.

[59] Alexandre de Streel, 'The Relationship between Competition Law and Sector Specific Regulation: The case of electronic communications' (2008) XLVII (10) *Reflets et perspectives de la vie économique*.

[60] Ibid.

the characteristics of the regulated sectors and the social and economic context for any jurisdiction.[61]

"In fact, different countries have chosen different approaches to ensure coordination and policy coherence between sector regulators and the competition authority. These approaches can be classified into five types:[62]

1. to combine technical and economic regulation in the sector specific regulation and leave traditional competition law issues, such as the prohibition of anticompetitive conduct and merger control, to competition law;
2. to combine technical and economic regulation in the sector specific regulation and include some or all traditional competition law aspects as well;
3. to combine technical and economic regulation in the sector specific regulation and include some or all traditional competition law aspects as well, while ensuring that the sector regulator performs its functions in coordination with the competition authority;
4. to organise technical regulation as a stand-alone function for the sector regulator and include economic regulation into general competition law;
5. to rely solely on competition law enforced by the competition authority".[63]

[61] UNCTAD (2017). Model Law on Competition (2017) – Revised chapter VII. TD/B/C.I/CLP/L.7. Geneva. 17 May 2017, available at https://unctad.org/meetings/en/SessionalDocuments/tdrbciclpl71707970_en.pdf, accessed 20 April 2020.

[62] UNCTAD 'Best Practices for defining respective competences and settling of cases, which involve joint action of competition authorities and regulatory bodies'. (2004) TD/B/COM.2/CLP/44. Geneva. 19 August 2004.

[63] UNCTAD 'Best Practices for defining respective competences and settling of cases, which involve joint action of competition authorities and regulatory bodies'. (2004) TD/B/COM.2/CLP/44. Geneva. 19 August 2004.

1.2.4.2 The Context of Developing States

States continuously regularise their competition laws so that they are in conformity 'with their market-oriented economic reforms process'.[64] In addition, many developing countries have adopted sector-unique regulatory laws as private investors have ventured into the markets.[65] The sudden increase of interest in both regulation and competition law in the economies of emerging economies illustrates the important changes that have been occurring in their economic and political environments due to internal and external factors.[66]

A comparative study of sector regulation in several developing countries, including India, Indonesia, Vietnam, Cambodia, South Africa, Kenya and Zambia, examined the unique tests that face emerging economies in general,[67] showing that developing countries are in need of formal improvements and improved co-operation between sector regulators and the competition bodies. Only then they can work together for promoting the improvement of competition in the utility markets.[68]

Zhang et al examined panel data from 36 countries from 1985 to 2003[69]. The results showed that competition in the production of electricity is more effective in enhancing performance than privatisation or other forms of regulation.[70]

In addition, a report on anti-competitive businesses and their effects on development prospects was presented at the United Nations Conference on Trade and Development (UNCTAD). This report was collected from a variety of conference papers, indicating that competition regulation and policy have become vital instruments for enhancing market competition in fast-growing economies as the result of privatisation and liberalisation policies. The report underlined empirical

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[64] Udai Mehta and Richa Bhatnagar, 'Sectoral Regulation – Challenges for the Developing World', CUTS Centre for Competition, Investment & Economic Regulation (CUTS C-CIER) with support from Agency Francaise de Developpement (AFD), France, No. 4/2007 <http://www.cutsinternational.org/pdf/C-CIER-No-4-2007.pdf> Accessed 18 May 2019.

[65] ibid

[66] ibid

[67] ibid

[68] Ibid.

[69] Y. Zhang, D. Parker and C. Kirkpatrick, 'Electricity sector reform in developing countries: An econometric assessment of the effects of privatization, competition and regulation' (2008) *Journal of Regulatory Economics*, 33(2), 159-178.

[70] ibid

studies in developing countries, such as Romania and Pakistan, where competition law and policy play integral complementary roles with sector regulation in coping with anti-competitive strategies in the utility sectors.[71]

One of the leading researchers in the field is Posner, whose study 'Theories of Economic Regulation' discussed regulation within the context of 'public theory' and 'capture theory'. Public theory sheds light on regulation, which is produced in line with the overall need for the correction of unsustainable and punitive market practices. This theory supports sectoral regulation as a significant mechanism for governing the utility sector for the greater public interest.[72] However, the theory 'holds that regulation is supplied in response to the demands of interest groups struggling among themselves to maximise the incomes of their members'.[73]

Recently, the relationship between competition bodies and sector regulators has been a subject of debatable in both developed and developing states throughout the world. This issue arose after the establishment of special regulatory bodies that were required for regulatory reforms and sectoral regulation after the emergence of privatisation. The regulatory frameworks of these bodies encourage and promote competition in the sectors that were controlled by the states, which led to the existence of natural monopolies.[74]

[71] Wisuttisak (n. 45).
[72] Richard A Posner, 'Theories of Economic Regulation', (1974), Bell Journal of Economics and Management Science, Vol. 5, No. 2. 335-358.
[73] ibid
[74] Dabbah (n. 46), 113-143.

1.3 Research Problem

With the current application of competition law in Saudi regulated sectors, there has appeared an issue that revolves around the jurisdictional conflict between the Council of Competition (CC) and the regulatory agencies. One of the largest companies, the Saudi Telecom Company (STC), which operates in the Saudi telecommunications sector, has been punished twice for same violation; the first occasion was by a regulatory body of the telecommunications sector, whereas the second time was by the Council of Competition.[75] To illustrate this problem (see Figure 1, below)[76]. The issue of jurisdictional conflict between institutions has been stated in the annual report of the CC without a serious and clear plan for reform.[77] One of the motivations for this research is to explore the factors that contribute to the cause of this issue, so as to propose reforms and present workable model regarding the relationship between the Council of Competition and the regulatory agencies in competition with it in the Saudi regulated sectors, as well as the division of labour between these institutions in this regard. To illustrate this problem, the Saudi Competition Law was enacted in 2004, but most of the sectoral regulations were adopted prior to this. This has resulted in a confusion about the allocation of roles and responsibilities among these agencies. The Saudi government enacted the competition law without considering the fact that there was an existing regulatory framework for competition for each sector, and that potential conflict between these could arise involving the competition authority on the one hand and the regulatory bodies on the other. Moreover, some sectors have provisions that relate to competition matters, whereas

[75] The Council of Competition's decision No. 123 in 27/2/2013 for breaching the Competition law 2004, Administrative Court, Case decision No. K/1/15062 (2015) Approval by Administrative Court of Appeal decision No. K/5799 92015), <https://www.gac.gov.sa/ComplaintsViolators.aspx> Accessed 25 February 2020. The same case has been considered by the Communications and Information Technology Commission (CITC) in 2010 < https://akhbaar24.argaam.com/article/detail/254141> Accessed 25 February 2020.

[76] The diagram was designed by compiling from various sources: Article 18 of the Saudi Competition Law 2004, Article 2 of Regulations of the committee for examining violations of the communications system and procedures 2001 and The Board of Grievances 2007.

[77] The annual report of the Council of Competition, 2014, 75, available at www.coc.gov.sa Accessed 25 February 2020.

other sectors do not. Overall, the interplay linking the competition authority and regulatory agencies plays a key role in regulating competition in regulated industries. However, there are some matters that may negatively affect this relationship and lead to preventing or restricting the proper implementation of the agencies' function. Primarily such matters include the weakness in drafting competition law and sectoral regulations and the insufficient design of these agencies, which has led to a lack of sufficient relations between them. Such relationship problems arise from an overlap or duplication of functionality or jurisdiction, which creates confusion about roles and responsibilities, not only between these agencies but also for complainant companies. Furthermore, the confusion that arises from the aforementioned overlapping or duplication of roles, responsibilities and powers is further compounded by ambiguity of laws or the absence of guidelines for the cooperation and coordination between these agencies. In most jurisdictions, the interplay involving the competition authority and regulatory agencies is considered a constant test, which has been debated recently in many global forums. So far no solution has been found for this matter because all jurisdictions have attempted to deal with this issue through different approaches. Beyond that, within a single jurisdiction in pursuit of a solution, different approaches can be found between sectors.

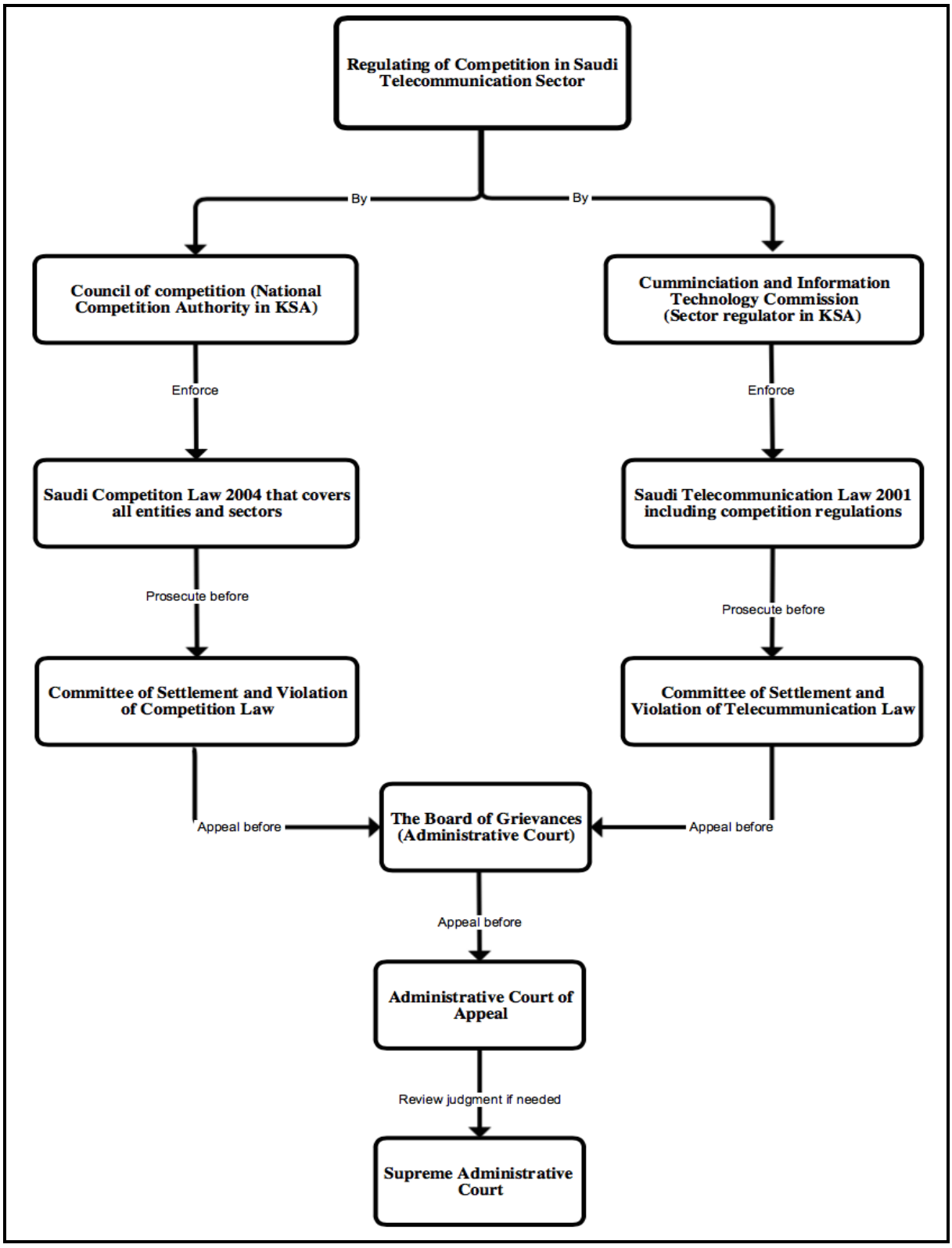

Figure 1 The institutional structure to regulate competition in Saudi telecommunications sector (compiled by the author).

The diagram above shows the implementation and judicial procedures for enforcement of the Competition Law and the Telecommunications Law as examples of the sectoral regulations. As the diagram shows, a case starts at the Council of Competition when receiving a complaint from stakeholders (competitors and consumers) regarding to violation of competition law or through an initiative taken by the Council of Competition in any sector or market related to a suspicion of breaching for the provisions of the Competition Law. Normally, the initiative by the Council of Competition is included in the Council 's tasks. In the left side of the diagram we can see the prosecution stage by the Council of Competition before the Competition Law Violation Settlement Committee, which will be discussed later in chapter three. This committee is part of the Saudi Judicial Authority, the role of which will be explained together with the quasi-judicial committees in chapter two. After considering the case by the Quasi-judicial committee with the attendance of the representatives of prosecution and the violator, the members of the committee will make a decision regarding to the violation. The decision can be appealed before the administrative court, which will be discussed later in chapter two, as part of the Saudi judicial system. The decision of the Administrative Court can be appealed before the Administrative Court of Appeal, whose decision is final and cannot be appealed unless there is a violation of the due process. In this case the Supreme Administrative Court must review the decision only without hearings and pleadings.

The right side of the diagram shows the implementation and judicial procedures for the enforcement of the Telecommunications Law as example of sectoral regulations. As the diagram shows, the case starts at the CITC when receiving a complaint from stakeholders (competitors and consumers) regarding a violation of the Telecommunications law or through an initiative of the CITC in the telecommunications sector in relation to a suspicion of breach of the provisions of the Telecommunications Law. Normally, the such initiatives are within the Commission's tasks. In the right side of the diagram, we can see the prosecution stage by the Commission before the Telecommunications Law Violations Committee, which will be discussed later in chapter four. This committee is part of the Saudi judicial Authority, the role of which will be explained later in chapter two. After considering the case with the attendance of the representatives of prosecution

and the violator, the members of the committee will make decision regarding the violation. The decision can be appealed before the Administrative Court, which will be discussed later in chapter two, as part of the Saudi judicial system. After reviewing the decision, the court must make a decision regarding the violation and the decision can be appealed before the Administrative Court of Appeal. Its decision is final and cannot be appealed unless there is a violation of the due process, in this case the Supreme Administrative Court must review the decision only without hearings and pleadings.

1.4 Research Aim and Objectives

The aim of this Thesis is to investigate the factors that contributed to the jurisdictional conflict between the Council of Competition and the regulatory agencies by highlighting the institutional designs of the Council of Competition and regulatory agencies and exploring their influence over competition regulation in Saudi regulated sectors, particularly the telecommunications, electricity and civil aviation sectors. These sectors have been selected as case studies for this research for several reasons. The first consideration is that these sectors have been privatised and liberalised. The second consideration is the size of the markets where the numbers of consumers have increased recently in Saudi Arabia. The third consideration is the importance to the Saudi economy through open competition and local and foreign investment in the telecommunications and civil aviation sectors, although the electricity sector has not yet shown this. The fourth consideration is that these sectors have different approaches with regard to regulating competition. However, the Saudi government has a plan to open competition in the electricity sector in the near future, at least in the production and distribution fields.

In addition, the diversity of the Saudi regulated sectors' methods for dealing with competition regulation has motivated the researcher to select those sectors so as to understand the Saudi legislator ideology that has been used to adopt laws and regulations in a particular economic system. For example, competition provisions are included in telecommunications and electricity laws, despite the absence of competitors in the electricity sector, whereas, the competition rules are excluded from civil aviation law. However, all competitors in the civil aviation sector are

subject to competition laws by the CC, although the biggest airline in the sector, which is a state-owned company, is exempt from the antitrust law.

This Thesis also aims to evaluate the capacities of these institutions, through their design which based on the competition law and the sectoral regulations. Moreover, the evaluation includes exploring the obstacles and challenges that face those institutions in performing their tasks.

Furthermore, the researcher will attempt to propose the necessary reforms concerning the legal and institutional framework for Saudi competition law and sectoral regulations. The legal framework is considered a fundamental element for designing the Council of Competition and regulatory agencies, and delineating the relationship among these institutions to enforce their roles effectively and sufficiently in the Saudi market can be achieved by reforming competition law and sectoral regulations by proposing workable designs for these institutions and by creating clear relationships between these institutions. In addition to overcoming obstacles and solving the problems faced by these institutions, emphasis needs to be given to the implementation of their tasks.

In addition, the researcher seeks to present a model for sector regulators by finding a workable mechanism for enforcement of Saudi antitrust law in regulated areas by taking advantage of other countries' experiences in this concern and finding out which institution is going to be the best for regulating the competition (a sole institution for regulating competition or a complementary relationship among regulatory bodies, such as a concurrence system?). Although this is not purely a comparative analysis between Saudi Arabia and other countries, it can offer a reflection of the unique Saudi Arabian scenario. The approach is based on the common practices used among various countries and the notable differences between them and those in practice in Saudi Arabia.

At the same time, concentration is made on some factors that distinguish Saudi Arabia from other countries, such as cultural, politics and economic factors that have played an important role in Saudi legislation and international agreements. For example, in Saudi Arabia the importing of spirits and pork are prohibited for religious reasons. Therefore, the World Trade Organization (WTO) was forced to amend its agreement with Saudi Arabia. Also, the Arab boycott of Israel was taken

into account for Saudi membership in the WTO. Therefore, to reach the aims of this research, the following objectives, have been determined and are outlined below:

1) To evaluate the institutional design of the Council of Competition and the regulatory agencies through four elements that are considered as the characteristics of successful competition authorities. These elements are:[78]

a) The independence of the institution.
b) The leadership of the institution.
c) Structure and processes.
d) Relationships with regulatory agencies.

These criteria are similar with those provided by William Kovacic in his review of the Federal Trade Commission, which included mission, structure, resources, relationships, leadership, strategic planning, policy research and development and deployment of agency resources as 'institutional foundations of success of FTC performance'.[79]

Thus, we have an evaluation of the institutional design of the Council of Competition and the regulatory agencies through these four elements, which are considered as the characteristics of successful competition authorities. These elements will give the researcher a clear vision and help in selecting the authority that has the capacity and sufficient recourses to be above another or at least to help for choosing the workable model of the relationship between the Council of Competition and the regulatory agencies that can be applicable.

2) To assess the Competition Law and the sectoral regulations in Saudi Arabia because the institutional structure of those authorities is based on the design of those law and regulations.

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[78] Stephen Wilks, 'Institutional Reform and the Enforcement of Competition Policy in the UK', (2011), European competition journal, Vol. 7 No. 1, 1-23.

[79] William E. Kovacic, 'The Federal Trade Commission at 100: Into Our 2nd Century', a report provided to FTC in 2009, available at https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf accessed in 20 April 2020.

1.5 Research Questions

This Thesis will attempt to answer one main question: To what extent the introduction of Competition Law has had an impact on the enforcement of the sectoral regulations in Saudi Arabia?

In order to properly cover all aspects of this question, five additional questions must also be addressed:

1) What are the functions of the Council of Competition in the Saudi market?

2) What are the roles of the regulatory agencies in the regulated markets?

3) How the institutional design of the CC and RA can influence the functions of these agencies?

4) What is the relationship between the Council of Competition and the regulatory agencies?

5) How the enforcement of Competition Law can have consequential effects on the enforcement of the sectoral regulations?

1.6 Literature review

The interaction between sectoral regulations and competition law has been a subject of an ongoing debate amongst scholars.[80] The studies about the Saudi Competition Law is limited though. Therefore, this study will focus on reviewing the available studies regarding the Saudi jurisdiction and other similar jurisdictions that share related matters with Saudi Arabia. Alotaibi provided a study that is considered as an important research regard to the Saudi Competition Law, where it covered the main aspects of the Saudi Competition Law. According to his findings, there are some observations which are considered as factors to impact on the enforcement of the

[80] See among others, François-Charles Laprévote, Sven Frisch, and Burcu Can, 'Competition Policy within the Context of Free Trade Agreements (E15 initiative on Strengthening the Global Trade and Investment System for Sustainable Development', (2015), <http://e15initiative.org/wpcontent/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf> Accessed 27 July 2019; Robert D. Anderson, Anna Caroline Müller and Antony Taubman, 'Competition Policy and the WTO TRIPS Agreement: An Essential Platform for Policy Application, and Questions Unresolved' in Robert D. Anderson, Nuno Pires De Carvalho and Antony Taubman (eds.), *Competition Policy and Intellectual Property in the Global Economy* (Cambridge University Press, 2018); Frank H. Easterbrook, 'Vertical Arrangements and the Rule of Reason: Antitrust Law Enforcement in the Vertical Restraints Area' (1984) 53 Antitrust Law Journal 135

Competition Law. Some of the factors are related to legal framework and others related to the institutional framework. Alotaibi confirmed there is no independence of the Council of Competition, which is responsible of the enforcement of the Competition Law in Saudi Arabia, also the lack of financial and Human Resources. Moreover, he criticised the exemption of the state-owned enterprises of the application of law. The researcher found there is no relationship between the Council of Competition and the regulatory agencies, which might be appeared its cases later. Building on the previous study, this research focused on the relationship between the Council of Competition and the regulatory agencies. The research will discuss the nature of the issues and study the factors that contribute of the problem and propose reforms.[81]

Moreover, Wisuttisak studied the relationship between competition law and sectoral regulation in his Thesis entitled "Competition Law and sectoral Regulation in the Electricity Sector in Thailand: Current Problems, International Experience and Proposals for Reform". He discussed about Competition law and sectoral regulation in the utility sectors, particularly the electricity sector in Thailand, in order to explore the problems and issues regarding the competition law and the regulation in the electricity sector. Also, he provided the international experience as a possible framework for Thailand. Wisuttisak proposed some reforms for Thailand system. The differences between his study and this study are as follows: Firstly, this study concerns the Saudi system. Secondly, this study coves three regulated sectors in Saudi Arabia, namely Telecommunications, Electricity and Civil aviation. Thirdly,

[81] Musaed Alotaibi, *Does the Saudi Competition Law Guarantee Protection to Fair Competition?* Unpublished PhD Thesis, University of Central Lancashire, 2010.

this study focuses on the relationship between the Council of Competition and the regulatory agencies in Saudi Arabia.[82]

In addition, all over the world young competition authorities have faced many challenges in the first years of their establishment. There are many studies that observe and reflect on the experience from these authorities and others international organisations, such as (OECD), (UNCTAD) and (ICN). One of these studies was by ICN, where presented a report entitled "Lessons to be Learnt from Experiences of Young Competition Agencies". This report was based on a survey with questionnaires and highlighted the following challenges faced these young authorities:[83]

a) Legislative Challenges

It can be beneficial for young competition authorities if their design of institutional framework is inspired by other jurisdictions. However, it should be implemented carefully to be compatible with their internal regulations and practices. Also, the application of competition policy requires accurate approaches within a single jurisdiction. Therefore, it is rare to find a policy that fits with the competition policy within a single jurisdiction. Thus, the comparison of national statutes with other jurisdictions can be challenging.

b) Policy-Related Challenges

The lack of cooperation and coordination of policy and efforts between young competition authorities and other government and regulatory agencies is one of the

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[82] Pornchai Wisuttisak, Competition Law and Sectoral Regulation in the Electricity Sector in Thailand: Current Problems, International Experience and Proposals for Reform, (PhD thesis, UNSW Australia, 2013).

[83] ICN Report 'Lessons to be Learnt from Experiences of Young Competition Agencies' (2019), available at:https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/06/SGVC_YoungerAgenciesReport2019.pdf accessed in 20 April 2020. This report is an update of the ICN report in 2006, 'Lessons to be Learnt from Experiences of Young Competition Agencies', available at: https://goo.gl/M5pcx8

most common challenges that these young authorities face in their attempt to enforce Competition Law and promote competition in the markets. This issue might have been caused by adopting the Competition law without consideration to the existing legislation. This is an important issues that should be addressed, in order to avoid conflicts between the Competition Law and sectoral regulations.

c) Resources-Related Challenges

Young competition authorities, as any government bodies, are suffering from the limitations of their budget and available funds and tend to express some reservations in this regard. However, young competition authorities are constantly complaining about the limitations of their budget, especially in countries that public resources are extremely limited or constrained.

d) Staff Expertise-Related Challenges

The lack of human resources, especially staff that is qualified and experts in competition law and policy, is considered as a challenge for young competition authorities.

e) Judiciary Challenges

Judiciary plays a crucial role for the application of Competition Law and competition policy, especially if it can show some familiarity with competition law and its economic aspects. However, some authorities have reported that competition cases have taken long period to be decided. Moreover, some judgments are questionable.

f) Competition Culture Challenges

Promoting a culture of competition and the advocacy of competition policy among stakeholders is important to achieve the enforcement of Competition Law and policy effectively. A culture of competition implies that there is an the awareness amongst academia, governmental and non-governmental authorities, the judiciary, the business sector, the media and the general public of the provisions of competition law and competition policy as well as their targets in promoting and protecting competition in the markets and the economic development.

1.7 Importance of the Research

Competition plays a key role in the development of the business environment. The importance of competition is derived from the fact that businesses are mainly based on the freedom of the market and that they are vital to economic growth. In spite of their importance to competition, businesses were not an important element for policymakers until recently. At this point, they were not concerned about the development of a legislative framework for the development of this area. However, changes have been made that pay attention to the importance of competition in the form of legislative and institutional activities.[84] There are several effects of competition on the market: current and potential competitors, the quality of goods and services, reduction of prices and consumer welfare.

In the past, most Middle East countries had not adopted general competition laws, except for laws that included provisions relating to the protection of competition in the market. For example, Saudi Arabia enacted a law on patents, a law on trade names and a law on trademarks before adopting the current competition law in 2004. The Saudi competition law, as with any competition law, covers all elements of competition law, including merger operations, anti-competitive agreements, and the abuse of dominant positions. In general, it can be said that the existence of a sound legal system can enhance a business environment and even attract more investment. Competition law is also important to foreign investors in certain areas of business. Mergers and acquisitions in particular are significantly affected by competition and anti-monopoly rules.

This research aims to address the regulation of competition in Saudi regulated sectors, which will offer new knowledge and insights in the area of competition law. Consequently, the findings of this Thesis will be useful to academic researchers, public practitioners (e.g., CC staff and judges), private practitioners (e.g., domestic and foreign investors and lawyers), and consumers.

84 Investment Promotion Foundation, http://www.jordaninvestment.com/Default.aspx (accessed 23 May 2019).

One of the most important goals of this research is to create a platform for developing countries, especially those that share the same religion, culture and economic aspects, and to address their local issues relating to competition law as stipulated by the World Trade Organisation. At the same time, there is need to maintain a harmonised approach between developing and developed countries in this regard. Reforming competition law in developing countries and restructuring their competition and regulatory bodies is one of the main challenges these countries have yet to face.

This Thesis includes some recommendations that can be workable in several developing countries. These countries, such as the Arab Gulf countries and the Middle East and North Africa (MENA) region, have similar legislation, and legal transplant between them would be easier than from other jurisdictions, particularly other developed countries. The research recommends that countries should have the freedom of deciding on the approaches that they take in terms of market regulation. However, such freedom must be pegged on the basic aspects of fairness and justice to the parties involved. There is need to streamline the roles of each of the players in the process of regulation. The Saudi market is considered an ideal environment for investment and competition for both domestic and foreign investors because of the Saudi government's encouragement by opening the market to investors, the privatisation of the public sector, providing facilities such as investment loans, low taxes on foreign firms, the availability of raw materials and the rise in profit margins.[85]

[85] Musaed Alotaibi, *Does the Saudi Competition Law Guarantee Protection to Fair Competition?* Unpublished PhD Thesis, University of Central Lancashire, 2010.

1.8 Research Methodology

The Thesis' main question concerns the influence of the introduction of competition law in the enforcement of sectoral regulations in regulated sectors in Saudi Arabia. To answer this question, there are some sub-questions that will be answered first and will gradually lead to the answer of the main research question of the present Thesis. Research methodology is considered a fundamental tool for researchers, as it allows them to conduct their research efficiently and improve the knowledge in their field through their original contribution. Thus, choosing the appropriate methodology helps researchers deliver research outcomes that are balanced, justified and academically sound.[86]

It is often difficult to categorise a Thesis, particularly one on the subject of law under any specific headings, as many works of this type involve a combination of methods.[87] Henn et al makes the important distinction between 'method' and 'methodology'.[88] They state that 'method refers to the range of techniques that are available to us to collect evidence about the social world. Methodology, however, concerns the research strategy as a whole'.[89] Academic research, through a thorough examination of the subject matter, can lead to the exploration of different arguments about a number of key issues. Thus, researchers seek to evaluate these arguments, balance them and finally select the ones that adequately support the most convincing or conclusive position; if this is not possible, researchers can innovate by adopting a new position, which is based on a completely new point of view of a different perspective of the subject matter.[90] Legal research, in particular, is the type of academic research that needs to be conducted through an appropriate methodology,

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[86] Ashish Kumar Singhal and Ikramuddin Malik, 'Doctrinal and Socio-Legal Methods of Research: Merits and Demerits', (2012) Educational Research Journal, Vol. 2, No 7, 252, 254.
[87] Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (2nd, Pearson/Longman, 2007) 31.
[88] Matt Henn, Mark Weinstein and Nick Foard, *A Critical Introduction to Social Research* (2nd edn, Sage 2006) 10.
[89] Ibid
[90] Mark Van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2011) 12.

so that it contributes to the better understanding of rules, their sources, their development and their evolution.[91]

This Thesis has been based on the use of different methods. To begin with, doctrinal research methodology has been employed. Doctrinal research has been defined as 'a detailed and highly technical commentary upon, and systematic exposition of, the context of legal doctrine'.[92] The choice of this method was made, because the main aim of the present Thesis is the examination of primary sources of law, the interpretation of the legal provisions, their development and application in practice.[93] More specifically, doctrinal legal research involves a review, a critical analysis and an evaluation of legal rules, policies and principles as well as the jurisprudence of the courts and the interaction between different institutions.[94] As mentioned earlier, the Thesis will provide an in-depth analysis of the Saudi Competition Law, which is a comprehensive legal document of great importance for the operation and the credibility of the Saudi market, as it is designed to protect and encourage fair competition. Through the examination of its provisions and its overall operation in practice, it will be shown whether and to what extend it ensures fair competition and regulates all commercial practices in the Saudi competition market. At the same time, the analysis will extend to the relevant regulatory instruments of three regulated sectors, namely telecommunications, electricity and civil aviation, with view to ascertain if there is a significant overlap with the Competition Law and what reforms can be introduced so that their relationship is streamlined for the benefit of consumers, business and the Saudi market as a whole.

Then, the Thesis also employs critical analysis as a method to evaluate the current institutional and regulatory framework in competition law and sectoral regulation in

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[91]Khushal Vibhute and Filipos Aynalem, 'Legal Research Methods' (2009) Teaching Material, Prepared under the Sponsorship of the Justice and Legal System Research Institute, 46-50.

[92] Salter and Mason (n. 73), 49. See also Terry Hutchinson and Nigel Duncan, 'Defining and Describing What We Do: Doctrinal Legal Research' (2012) 17(1) Deakin Law Review 83, 84.

[93] Salim Ali, Zuryati Yusoff and Zainal Ayub, 'Legal Research of Doctrinal and Non-Doctrinal', (2017), International Journal of Trend in Research and Development, Vol. 4, No 1, 493, 495. See also Mike McConville and Wing Hong Chui, *Research Methods for Law*, (Edinburgh University Press, 2007) 18-41.

[94] S.N. Jain, 'Doctrinal and Non-Doctrinal Legal Research', (1972) 14 J ILI 487.

Saudi Arabia. The choice of these two methods was made on the basis of the topic examined in the Thesis and the specific characteristics of the Saudi legal order. More specifically, the analysis aims to discover whether there are any lessons to be learnt from the operation of the existing model of regulation in practice for a considerable period of time. It is also important to examine whether this model has served its purpose as part of Saudi Arabia's privatisation strategy considering that we live in the era of globalisation and modern economies have been extremely interconnected and interdependent. The following sections will provide more detail on these methods.

A legal researcher is generally expected to analyse the content of the law and critically assess the authority of the legal doctrine examined. Doctrinal research is related to the formulation of legal 'doctrines' within the interpretation of legal rules. The answers to every legal problem may be obtained by following a fundamental logic and a close examination of the relevant legal instruments can reveal a considerable amount of information about the structure of the legal rules in question. Therefore, this Thesis, which focuses on Saudi Arabia, will mainly rely on the study of statutory sources, legal texts and academic literature in the area of competition law.

Doctrinal research through is based on three pillars. Firstly, the arguments of doctrinal studies are based on and are supported by 'authoritative sources, such as existing rules, principles, precedent and scholarly publications'.[95] Secondly, since 'the law represents a system, through the production of general and defendable theories, legal doctrines aim to present the law as a coherent set of principles, rules meta-rules and exceptions at a different level of abstraction'.[96] Thirdly, 'decisions in individual cases are supposed to exceed arbitrariness because they have to (be) fit

[95] Rob van Gestel and Hans-Wolfgang Micklitz, 'Revitalizing Doctrinal Legal Research in Europe: What About Methodology?' (2011), EUI Working Paper, Law 2011, 5 <https://www.researchgate.net/publication/254778062_Revitalising_doctrinal_legal_research_in_Europe_What_about_Methodology> accessed 07 May 2019.
[96] ibid.

into the system'.[97] Dealing with different situations presupposes that the existing rules will be used differently, will be extended, or even changed, but the system will always be the same to maintain consistency and legal certainty.

The doctrinal research process typically includes two steps. The first step requires the positioning of sources of law and then the second is to analyse texts.[98] In the first stage of legal doctrinal research, a plethora of relevant materials should be collected. These materials may be normative sources, such as statutory texts, general norms of the law or binding precedents or authoritative sources, such as case law and scholarly legal writing.[99] This approach aims to evaluate the effectiveness and overall efficiency of both the law and its implementation, in order to identify factors and elements that may undermine the level of protection afforded in the area of competition law in Saudi Arabia. Therefore, this Thesis has relied on a wide range of sources, in an attempt to cover different perspectives, approaches and offer a spherical analysis of the subject matter in question, such as books, articles, work papers, onlne sources, international reports and annual reports related to the structure of state authorities (legislative, executive and judicial), the Council of Competition and the regulatory agencies in Saudi Arabia. Through these sources the process of drafting and adopting the Saudi laws will be explain and the process of establishing governmental and judicial institutions and their role. Before moving forward, it is worth adding that the doctrinal approach has not been free from criticism. For instance, it has been described as too formalistic in its approach.[100] This description is based on the fact that it sometimes leads to the oversimplification of the legal doctrine and often does not provide a sufficient basis upon which a Thesis can be supported in such a way that the research questions can be efficiently answered.[101]

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[97] ibid.
[98] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge, 2013), 6.
[99] Mark van Hoecke, *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Bloomsbury Publishing 2011), 1-17, 4.
[100] Daithi Mac Sithigh and Matias Siems, 'Mapping legal research' (2012) 71(3) Cambridge Law Journal 651, 663. See also Salter and Mason (n. 2), 119.
[101] Jan Smits, 'What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research' in Rob van Gestel, Hans-W. Micklitz and Edward L. Rubin (eds.), *Rethinking Legal Scholarship: A Transatlantic Dialogue*, (Cambridge University Press, 2017) 207-228, 210-11.

However, in the present Thesis the doctrinal approach is used as merely the starting point. It is true that cases and statutory material are traditionally construed as black letter law, however it is up to the individual researchers to decide how to approach and analyse such material, specifically determining what questions are presented for examination.

Secondly, critical analysis will be used to consider the background of Saudi laws generally, how they were drafted or amended, the judiciary system, its different institutions, their functions and the litigation before them. Such analysis offers an overview and some background information about the Saudi legal and judicial system that allows a better understanding of its philosophy and operation.[102] Furthermore, when the emphasis shifts to the analysis of competition law, the formation and competences of the Council of Competition, its functions and jurisdiction will be discussed, so that a critical analysis of its institutional design will be possible, which in turn will allow a more thorough assessment and will pave the way to determine whether ultimately it is fit for its purpose. The same approach will be used in relation to the Saudi regulatory agencies and sectoral regulations in the areas of Telecommunications, Electricity and Civil Aviation. This analysis will allow the researcher to answer the first question of the Thesis about the formation and the competence of the Council of Competition and regulatory agencies, highlighting the strengths and weaknesses of the existing system. Based on this analysis and assessment, the Thesis will provide recommendation for the future and proposals for reform.

The choice of critical analysis was based on the researcher's attempt to employ critical judgement in relation to the object of the present Thesis. Panu Minkinnen has talked about this approach and has used the term 'self-reflection', which is the basis of being critical and developing a 'critical attitude' towards what one studies and the

[102] Piergiorgio Corbett, *Social Research: Theory, Methods and Techniques*, (SAGE, 2003), 103.

questions one asks of it.[103] This frees the subject from dependence on hypostatised forces and allows a more reflective, unbiased and academically sound analysis. It basically informs knowledge by questioning the nature of prevailing or existing knowledge and directing attention at the processes and institutions which legitimate knowledge. In other words, critical methodology is an evolving process, dynamic and dialectic.[104]

Finally, it is worth mentioning that the combination of these two methods will allow the present Thesis to engage in a multi-level and thorough study of the competition law framework in Saudi Arabia in a way of getting a better understanding of the law and act as a source of inspiration for new legislation or reform of the existing rules.[105] These critical elements will help the researcher to identify solutions to specific legal problems and provide a model of how different legal rules can work in addressing a specific problems or dealing with particular legal issues.[106] However, it needs to be taken into account that the rules do not operate in a vacuum and different rules operate differently in different countries.[107] In a successful critical legal study, it is necessary to understand the basic principles, values and practices of the law that is examined before the discussion moves to recommendations and reform proposals.[108] This is why it is of paramount importance to highlight at this point that this Thesis will aim to support a set of specific proposals for reforms, which will mitigate the defects of the existing system, and not to offer conclusive solutions for any problems identified.

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[103] Panu Minkkinen, 'Critical Legal "Method" as Attitude' in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge, 2013) 119. See also Jürgen Habermas, 'Knowledge and Interest' (1966) 9 Inquiry: An Interdisciplinary Journal of Philosophy 285, 294.
[104] Lee Harvey, *Critical Social Research*, (Unwin Hyman, 1990), 96-7.
[105] Peter De Cruz, *Comparative Law in a Changing World* (2nd edn, Cavendish, 1999), 18.
[106] Terry C.M. Hutchinson, *Researching and Writing in Law* (Lawbook Co 2006), 106.
[107] Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998), 17.
[108] Alan Watson, *Legal Transplants: An Approach to Comparative Law* (2nd edn, University of Georgia Press 1993), 12.

1.9 Research Limitations

This research is based on the previously listed research questions, and involves an evaluation of the institutional design of the Council of Competition and the regulatory agencies, and an exploration of their influence over competition regulation in Saudi regulated sectors, particularly the telecommunications, electricity and civil aviation sectors. The first aspect analyses the institutional framework and the performance of the Council of Competition, which has the power to apply competition law in all markets and over all sectors, to find out disadvantages that exist in these regulations that may negatively impact their efficiency and to make a comparison of elements with the best model of competition law in developed countries. The second aspect analyses and evaluates the institutional design of regulatory agencies, in particular telecom sector regulators, electricity sector regulators and civil aviation sector regulators.

At the same time, the research excludes for two reason other regulated sectors in Saudi jurisdiction. To start with, it has a clear vision about the regulation of competition in its sector. For example, the financial sector (stock market) is regulated by the Saudi Capital Market Authority (CMA), which enforces Saudi Capital Market Law (CML).[109] The Merger and Acquisitions regulations of the Saudi Capital Market Law include provisions that are based on the process and substance of compliance of the offer with competition law, from notifying the Council of Competition to obtaining its approval of that offer. Thus, the regulator of the financial sector does not deal with competition rules except for what is stated above regarding merger and acquisition operations in the stock market, which appear in existence of a clear relationship between the Council of Competition and the regulator of the financial sector.[110]

The absence of one or more of the basic components is necessary for the sector to become a regulated sector. For example, the postal service sector was excluded from this research because the Saudi post is an establishment without existing under a

[109] Article 16 of Merger and Acquisition regulations from the Saudi Capital Market Law, which was issued by Royal Decree No. M/30 in 31/07/2003, www.cma.org.sa Accessed 18 May 2019.
[110] ibid.

sector regulator. The rental car sector also was excluded from the present Thesis because there is no official regulator. It would have been impossible to research areas or topics that are unregulated in the context of this research. Moreover, the information obtained from such unregulated sectors would not have been relevant to this Thesis.

1.10 Thesis Structure

To fully answer the abovementioned research questions, this Thesis will be divided into six chapters. The first chapter will provide the introduction to the thesis, including the background of the research and the literature review. The second chapter explains the implications of Saudi legal and judicial systems on the institutional structure of the Council of Competition and regulatory agencies in regulating competition in the Saudi market. The aim of this chapter is to provide an idea of the Saudi legal system as a government, its authorities, and its judicial system, and to reference regulation of competition in Islam, considering that Islamic law is an essential source of Saudi legislation. However, it is not the only source of Saudi laws.

At the same time, this chapter involves a presentation of the institutional structure of the country and how judicial authorities apply competition law and sectorial regulations. Such legal enforcements by the judiciary may occur in the private or public sectors.

In chapter three, the institutional design of the Council of Competition in regulating competition in the Saudi market will be discussed. However, there are multiple functions of the Council in this regard. The chapter also aims to explain those tasks and challenges facing the Council as it seeks to carry out those duties, will be referred to these challenges but will be focusing deeply on the challenges and obstacles regarding the regulating of the competition in Saudi Arabia regulated sectors, where the Council of Competition regulates the competition in the regulated and unregulated sectors, but the council of competition regulates the competition in Saudi regulated sectors jointly with regulatory bodies.

Chapter four explains the institutional design and the function of regulatory bodies that regulate competition in Saudi regulated sectors. At the same time, this chapter

will discuss how competition is regulated in Saudi regulated sectors by regulatory bodies. The research offers an explanation on the roles of the institutional and legal structure of these bodies in this regard, and the obstacles that are faced by these bodies in performing their functions.

Delineating the relationships between the Council of Competition and the regulatory bodies in Saudi Arabia will be explained in chapter five. The focus of this chapter fits squarely with the current practices of these institutions in regulating competition in the Saudi regulated sectors and as to which of these institutions has the power, the priority and the authority to investigate and make a decision in regard to a violation of the provisions of competition law and the competition rules that are included in sectorial regulations. The conclusion of the research and proposed reforms will be provided in chapter six. The aim of this last chapter is to provide a summary of the research, findings, recommendations, and contribution of knowledge.

Chapter Two: The structure of Saudi legal and judicial systems

2.1 Introduction

Saudi Arabia is a different state among world countries because its legal system and tradition. For example, it is considered the birthplace of Islam, therefore it is the most important country for both Muslim people and Muslim countries. Even though it is one of the developing countries, it plays a crucial role in the global economy. Saudi legislation has been affected by several religious and cultural aspects. Saudi legislation is based on two elements; the first element is Islamic law (Shariah), such as criminal law and personal status law (family law), and the second element is statutory law, such as commercial law and financial law. In fact, the second element, which is based on modern laws but it should also be compatible with the Islamic principles or at least not contradict these principles. According to the Basic Law of Governance, the Constitution of Saudi Arabia is the Holy Qur'an and the Sunnah (traditions of the Prophet Muhammad) which are primary sources of Islamic law .[111]

The aim of this chapter is to present an overview of the legal structure and the sources of legislation in Saudi Arabia through a discussion of the formation of the state authorities and their functions such as the method of the issuance of new laws, the interpretation of these laws, their amendment and implementation by the governmental bodies. In addition, this chapter aims to clarify the institutional structure flaws of the state authorities and procedural administrative defects, which may affect the relationship amongst state institutions in the implementation of laws in general, and competition law in particular, which might create a conflict or overlapping jurisdiction between these institutions.

In addition, this chapter aims to give a clear image about the judicial authority, its composition and competence in the application of the law as well as the settlement of disputes that can occur. The importance of this chapter is that it is a key point to start

[111] The Basic Law of Governance (1992), Art 1.

to discuss about the Saudi competition law, sectoral regulations, and the enforcement procedures by the competition bodies and their relationship with the judicial institutions. All these issues are important to reflect on the key areas and then to recommend the proper way to reform the Saudi Competition law, if needed.

This chapter is divided in three sections. The first section will discuss the component of Saudi legislation, which included competition law from the Islamic perspective by discussing the sources of Shariah (Islamic law), competition regulations, the enforcement of competition rules and the overall impact of Shariah on Saudi law. The second section will present the background of the Saudi economy and its importance in the global economy. The last section will explain the formation of State's Authorities and their effect in Saudi competition law.

2.2 The component of Saudi legislation

As stated before, Saudi legislation is based on two kinds of regulations: firstly, the regulations that have been taken directly from Shariah provisions, which are not allowed to change. Only scholars, who can interpret these provisions, can offer juristic opinions (Fatwa). Secondly, modern statutory laws should be compatible with Islamic principles or at least not contradict these principles.

2.2.1 Sources of Shariah (Islamic law)

Shariah is the source of legislation in the Islamic countries since the emergence of Islam and the mission of the Prophet Muhammad peace be upon him. Shariah (Islamic law) is an Arabic term that refers to the approach to Islamic religion to be followed by Muslims.[112] Shariah is divided into two types of sources: First, primary sources that include the Holy Qur'an (the book of God) and the Sunnah (Prophet Muhammad's sayings and actions).[113]

Even though Shariah, through the Holy Qur'an and the Sunnah, regulate many religious and social aspects of life and some legal issues that are important for both

[112] Abd Ar-Rahman I. Doi, *Shariah: The Islamic Law* (2nd rev edn, Ta Ha Publishers Ltd 1997) 2

[113] Ayoub Al-Jarbou, *Judicial review of administrative actions under the Saudi law*, (King Fahd National Library, 2011), 20-21.

individuals and societies in general, it however does not include solutions for particular problems and matters. On other hand, it appears to be flexible by providing the opportunity for jurists and scholars to interpret and explain the primary sources, matters, and circumstances that evolve with time by finding tools and methods, which are considered secondary sources. Secondary sources include *Al-Ijma*, the consensus of opinions, and *Al-Qiyas*, analogical deductions.[114]

In addition, Shariah consists of two categories of obligations, namely *Ibadat* and *Mu'amalat*. First, *Ibadat* is defined as obligations regarding worship and rituals that regulate the relationship between a person and his God (Allah), such as prayer five time a day and thefasting month (Ramadan). Second, *Mu'amalat* refers to obligations related to civil or legal transactions that regulate the relationship between the people among themselves and between people and the state, such as family law, commercial law, constitutional law and labour law.[115] *Ibadat* obligations are not susceptible to amendments, because of the existence of detailed explicit provisions, whereas *Mu'amalat* obligations can be amended as circumstances change.[116] There are four schools of Shariah, namely *Hanbali*, *Shafi*, *Maliki*, and *Hanafi*. All these schools are similar in their applications of the fundamental principles of Shariah; however, the differences between them are in their interpretation and opinions of minor branches of Shariah.[117] For example, each school has developed its own definition of monopoly. The *Hanafi* scholars define monopoly as buying food for hiding it for forty days until increasing its price to sell it afterward.[118] On the other hand, *Maliki* scholars have defined monopoly as hoarding of goods with excluding food until increasing their price for achieving profits.[119] The Shafi scholars consider monopoly as buying food once consumers need it, in order to sell it more its causal price.[120]

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[114] Ibid, 23-24.
[115] Mohammad Hashim Kamali, *Shariah law: An introduction*, (One world Publication 2009), 42.
[116] Al-Jarbou (n.113).
[117] Abd Ar-Rahman I. Doi (n. 112)
[118] R Al-Robi,, *The Economic Dimension of Islamic Principle of Monopoly and The Opining of Scholars*, UmalQura University, 1991), 11.
[119] M Al-Homiri,, The Large Code, vol. 10, (Al-Kiriah Publistion, 1906) 122.
[120] S Al-Hithami, Tohfa Alminhaj Bisarah Almintaj, vol. 2, (Dar-Alfiker, 1897), 120.

Finally, the Hanbali scholars consider monopoly as a prohibited behaviour once three conditions are met:

a) buying goods

b) if these goods are necessary for consumers,

c) if this process will harm others, either traders or consumers.[121]

2.2.2 Competition rules in Shariah (Islamic) law

In Shariah, there is no definition of competition,[122] however, there are some principles related to Islamic economics. These principles regulate the market and the relationship between traders and consumers. Moreover, there are principles related to fair competition, as follows: preventing monopoly, prohibiting damage and preventing abuses of right.[123]

i) Preventing monopoly

As stated previously, there are four jurisprudential schools of Shariah, namely *Hanbali*, *Shafi*, *Maliki*, and *Hanafi*. Each school has its own definition of a monopoly. The definition of monopoly to a *Hanafi* jurist, for example, is the purchasing of food for the purpose of storing for forty days (or thirty days) to wait for an increase in prices. According to *Maliki* scholars, monopoly is defined as storing any food in the market in order to sell and make profits when the prices are volatile; this excludes food used for eating, not for selling. In the *Shafi* School, the definition of monopoly is the purchasing of food only during sales and hoarding it for selling once prices increase, even if the food is needed. *Hanbali* jurists consider a monopoly as the purchasing of food only when consumers need it in order to decrease its commonness on the market and raise prices.[124]

It can be clearly seen that all jurists of Shariah agree that the hoarding of goods is not considered a monopoly if it does not meet three conditions. Firstly, the hoarding of

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[121] A Ibn-Qudamah, Al-Mugni, vol. 4, (Cairo Library, 1970), 244.

[122] A. Alnasser, *Commercial Competition* (Unpublished PhD Thesis, Al-imam Muhammad bin Saudi Islamic University, 2010) 75

[123] D Alshehri, *Conflict of jurisdiction regarding competition protection in the telecommunications sector*, Unpublished PhD Thesis, DAU, 2013) 125

[124] M. Ali, *Competition and monopoly under Sharia law* (Dar Arab Renaissance 2008) 65

goods while awaiting a rise in prices. Secondly, the storing of goods when people need them. Finally, the hoarding of goods in excess of the hoarder's necessary needs at that time.[125]

ii) Prohibiting damage

Causing harm, whether to the individuals themselves or to others, is prohibited by Shariah, as stated by the Prophet Muhammad (peace be upon him).This principle is one of the most significant and widest believed in Shariah, and it regulates human relationships because it is not solely about the economic system. However, it includes any actions or behaviours that can cause damage to others in any types of relationships between people. In Shariah (Islamic) law, any damages are prohibited either against Muslims or non-Muslims. This prohibition includes any actions or behaviours that are against human life or property. For example, using or selling alcohol is prohibited in an Islamic state, therefore, when it is found, it will be destroyed.. However, non-Muslims can ask for compensation. The commercial field includes human relationships whether between traders among themselves or between traders and consumers. Shariah Shariah considers monopolies and anti-competitive practices as behaviour that harms market competition, current and potential competitors, and consumer welfare.[126]

iii) Preventing abuse of rights

Shariah considers rights a gift from Allah (God) and rights should be restricted for the purpose for which they were granted; otherwise, it is considered a misuse of the right when it exceeds its purpose. Therefore, abuse of rights by merchants in the market is prohibited by Shariah, which is also known as an abuse of dominant position.[127]

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[125] Ibid, 63–69.
[126] Alshehri (n. 123)
[127] M. Alkhozai, *Abuse of the right* (JUB, 2009), 295–313

iv) Additional types of monopoly practices

According to Abin-Alqim, who is a *Hanbali* jurist, two kinds of monopoly practices are considered unjust to the people. Therefore, Shariah prohibits the following: Firstly, service monopolies, which occur once the professionals and traders, such as farmers and construction workers, monopolise their careers, refuse to teach their knowledge, except to a certain category of people in order to raise the price they charge people and abuse their right to practice their profession. In order to avoid future monopolies, governments can compel the owners of those professions to take a fair salary and oblige them to learn these professions to others.[128] According to Article 4(5) in the Saudi Competition Law, refusal to supply is considered as a kind of abuse of dominant position.

Secondly, refusal to supply involves obliging a dealer or vendor to sell to specific dealers while refusing to deal with and supply other dealers. Many scholars believe that governments can compel dealers to enable price fixing and force them to sell or buy goods for the same value on the market.[129] According to Article 5(4) of the Saudi Competition Law, this is considered as an example of abuse of dominant position.

2.2.3 The Enforcement of Competition Rules in Shariah

There is a concept in Shariah Law that is called (Hosbah), which means the Promotion of Virtue and Prevention of Vice in general life. One of its most important functions is to monitor and control the markets to prevent monopoly, fraud whether from raising of the prices or from the methods of production of goods, cheating in the commercial activities also sellers was committed to put prices on goods. At the beginning of Islam, this job was one of Muslim leaders' jobs, after that it was transferred to their representatives.[130]

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[128] M. Ali, *Protection of competition in the light of the antitrust and dumping: a comparative study between Islamic law and another law* (Dar Arab renaissance 2006) 215
[129] Ibid, 228–229
[130] Ali (n. 124), 225-236.

2.2.4 The Impact of Shariah Law on Saudi law

According to the Basic Law of Governance, the Constitution of Saudi Arabia is the Holy Qur'an and the Sunnah (traditions of the Prophet Muhammad). Therefore, Sharia (Islamic law) plays an important role in Saudi legislation whether with laws that derive directly from Sharia (Islamic law) which should exist in the context of the principal sources of Sharia (Islamic law), which are the Holy Qur'an and the Sunnah or others laws that it should be compatible with Sharia principles.[131] On other hand, all judges in the judicial institutions in Saudi Arabia must be qualified in Islamic law (Sharia) even in administrative courts, which specialise in different areas of law. Therefore, the impact of Islamic law appears in Saudi legislation and the appointment of judges for the courts.[132]

2.3 The Legal System of Saudi Arabia

2.3.1 Background of Saudi Arabia and its Economy

Saudi Arabia is considered as one of the developing countries. It was founded by King Abdulaziz in 1931. Most of its regulations are modern, however some of them need to be reformed and developed over time. The location of the Kingdom of Saudi Arabia is in the far southwest of Asia, where it occupies about four-fifths of the Arabian Peninsula. It encompasses an area of about 2.25 million square kilometres,[133]and it is divided into 13 provinces. The main centres include Makkah and Madinah, which are considered Islam's two holiest cities, and the capital city of Riyadh. The total population of Saudi Arabia in 2012 was around 29 million.[134]

In terms of its economy, Saudi Arabia is the first state in the world in terms of oil production and reserves, the fifth in natural gas reserves, and the ninth in the production of natural gas. The value of Saudi Arabia's total imports during 2011 was US$131,574 million, an increase of US$24,721 million, or 23% compared to the previous year, whereas the value of imports during 2010 was US$106,854 million.

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[131] A. Ashalhoub, *The Constitutional Law in the Kingdom of Saudi Arabia between Islamic Law and comparative Law*, (Arabic edition, King Fahd National Library, 2012), 271-288.
[132] Judiciary law (2007), Art 31(4).
[133]The Kingdom's geographic position is available at www.mofa.gov.sa. Accessed 18 May 2019.
[134]*Saudi Annual Statistics Book*, Central Department of Statistics and Information, www.cdsi.gov.sa. Accessed 18 May 2019

The European Union is considered the second most important group of countries for imports, with a value of US$35,520 million (27% of total imports), an increase of US$5,231 million, or 17%, compared to the previous year.[135] The UK is considered one of the top countries from which Saudi Arabia imports, with a value of US$3,816 million (3% of total imports), an increase of US$374 million, or 11%, over the previous year.[136]

On the other hand, the value of Saudi Arabia's total exports during 2011 was US$364,600 million, an increase of US$113,525 million, or 45%, over the previous year. Compared to 2010, the total value of exports was US$251,074 million. EU Member States are considered the third most important group of countries to which Saudi Arabia exports, with a value of US$43,719 million (12% of total exports), an increase of US$19,865 million, or 83%, over the previous year. The volume of trade exchanges between the Kingdom of Saudi Arabia and most countries in the world has increased since 2001.[137]Accordingly, Saudi Arabia has a strong economy and an attractive market for domestic and foreign investments. However, the Saudi government should provide adequate legal protection through strengthening and updating all laws that are relevant to the economy in order to show to investors that Saudi Arabia is a valid investment environment.

2.3.2 Basic Law of Governance

The system of Saudi government is monarchy. In 1992, four fundamental regulations were released when the Custodian of the Two Holy Mosques King Fahd Al Saud approved the issuance of constitutional laws, which include the Basic Law of Governance, Cabinet law, Shura Council law (consultation) and the Regional law.[138] The Basic Law of Governance contains 9 parts and 83 articles. The first part of the Basic Law of Governance provides general information, such as the state's capital

[135]Ibid
[136]Ibid
[137]Ibid
[138]The Basic Law of Governance, Royal Order, No. A-90, dated 1 March 1992; The Consultative Council Law, Royal Order, No. A-91, dated 1 March 1992; The Regional Law, Royal Order, No. A-92, dated 1 March 1992; The Council of Ministers Law, Royal Order, No. A-13, dated 20 August 1993

city, its language, its religion, and its emblem.[139] The second part includes the process of inheriting the throne by the Royal family.[140] The third part is about the value of society, including the encouragement of education amongst the members of the community and the consolidation of national unity by promoting Arab-Islamic values.[141]

Section four of the Basic Law of Governance includes economic principles, such as the fact that all natural resources are the property of the state. In addition, Saudi law defines the means of exploiting these resources as well as their development and protection. Moreover, it states that the government protects public funds and private ownership.[142] Furthermore, the Basic Law of Governance covers more than this, such as the rights of citizens and residents and the government's duties, the general principles of the authorities of the state, financial affairs, and institutions of audit.[143]

There are those who believe that Saudi Arabia does not employ constitutional law because the Basic Law of Governance states that the Constitution of Saudi Arabia is the Holy Qur'an and the Sunnah (traditions of the Prophet Muhammad). Indeed, the Basic Law of Governance is the Saudi Constitutional law, however, it should exist in the context of the principal sources of Sharia (Islamic law), which are the Holy Qur'an and the Sunnah.[144]

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[139]Basic Law of Governance 1992, Arts 1, 2, 3 and 4.
[140]Ibid Arts 5, 6, 7 and 8.
[141]Ibid Arts 9, 10, 11, 12 and 13.
[142]Ibid, Arts 14–22.
[143]Ibid, Arts 23–83.
[144]Faleh Alkahtani, *Current practices of Saudi corporate governance: a case for reform* (Unpublished PhD Thesis, Brunei University 2013)

2.3.3 The State Authorities

In Saudi Arabia there are three independent state authorities. All of these authorities are governed by the King because he is the point of reference for all these authorities.

2.3.3.1 Executive Authority

In Saudi Arabia, the executive branch is the cabinet, which is headed by the King, who is also the Prime Minister. The King has absolute power over the executive authority, which includes the provinces, the Ministries, and the independent and semi-independent agencies.[145] The members of cabinet are the Prime Minister, who is the King, the Deputy Prime Minister, who is the Crown Prince, Ministers with ministerial portfolios, Ministers without ministerial portfolios, and the King's counsellors. The function of cabinet is to manage the internal and external affairs of the state and to oversee the implementation of laws.[146]

Every province in Saudi Arabia has a local governments headed by the Governor of the region; some Ministries have branches in these provinces. The aim of dividing the country into several provinces is to develop governmental services that are provided for all citizens, such as security, health care and education.[147]

With regard to independent and quasi-independent agencies and authorities, they can be divided into investment and financial agencies, such as the Saudi Fund for Industrial Development, social welfare agencies, such as the Social Security Administration, educational training and consulting agencies, such as those for technical education and vocational training and economic agencies, such as the Royal Commission for Jubail and Yanbu.[148] In addition, the Saudi Council of Competition (CC) is an independent authority in theory but in practice itis not independent, because the Saudi Minister of Commerce and Industry is its Chairman and this Council is located in the Ministry of Commerce and Industry.[149]

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[145]Basic Law of Governance 1992, Arts 55–60
[146]Council of Ministers Law 1993, Arts12–19
[147]Regional Law 1992, Art 1.
[148]Al-Jarbou (n.113).70
[149] Alotaibi (n. 81)

2.3.3.2 Legislative Authority

In the past, the legislative power was concentrated in the hands of King Abdulaziz, the founder of Saudi Arabia, and religious scholars. At present, the King prescribed starting issuing royal decrees for the approval of the draft regulations provided by the Scholars or Shura Council (consultation) or the cabinet. Saudi Arabia's King plays a major role in the legislative process through the appointment of the members of the legislative institutions, which are Shura Council (consultation), the cabinet and the senior Scholars.[150]

There is a historical stretch of the King's role since the Islamic state where the leader was ruling in Islam is prescribed either directly by himself or his representatives, who are called state governors, so this is not something new in Saudi Arabia because the Saudi legal system is based on Shariah (Islamic law). As stated before, in 1992 King Fahd Al Saud approved the introduction of constitutional laws, which include the Basic Law of Governance, the cabinet Act, the Consultative Council Act and the Regional Act. Ayoub says the main reason behind that was the demands that had been received from liberals and conservatives regarding the governmental policies.[151]

The Scholars

In Islam there is no separation between state and religion, as in Western countries (secular states), so it is clear the important role that the Scholars play in the legislative process. There are two types of laws in Saudi Arabia; the first is the laws derived directly from Sharia (Islamic law) and the second is the regulations that have been issued to cover all aspects of life that have not been mentioned in Sharia (Islamic law) but which should be compatible with the Sharia principles. Saudi Arabia's legislation has been affected by the Hanbali School, however the Saudi scholars disagree with that, because they believe that they can take advantage from other schools of Shariah.[152] Accordingly, in Saudi Arabia the Scholars play an

[150] Ashalhoub (n. 131), 267-270.
[151] Al-Jarbou (n.113), 75.
[152] Ashalhoub (n. 131), 271-288.

important role by monitoring and assessing any new law in terms of compatibility with the Sharia principles. Saudi competition law is one of these laws that has been found to be compatible with the Sharia principles. Therefore, there is no disagreement amongst the Scholars on this issue. One of the most important role of Scholars is that when the price of products increases with a suspicion of monopoly or anti-competitive agreement between traders, some Scholars complain to the King, in a meeting or through a letter to him on behalf of people. This complaint includes a request to open an investigation by the competent authorities regarding this issue.

Moreover, Scholars may issue a religious opinion about any topic if requested by the King. For instance, the King requested a juristic opinion (Fatwa) from the Scholars about drug trafficking after the high rate of drug smuggling to Saudi Arabia. In response a law was issued by the Scholars that includes a sentence of up to death for drug traffickers in Saudi Arabia.[153]

The King

In Saudi Arabia the King is the head of state because he is the Prime Minister and he is reference for all authorities.[154] The King has absolute power over all authorities. As stated before, Saudi Arabia's King plays a major role in the legislative process through the appointment of the members of the legislative institutions. The decisions of these institutions need approval from the King as he is the Prime Minister. Also, the King has the right of final decision when there is a divergence of views between Shura Council (consultation) or the cabinet.[155]

With regard to the external affairs of state, the King is the supreme representative of the state in political terms before the international community, such as meeting with Kings, Presidents and Prime Ministers of other states. He also nominates his representatives and ambassadors and accepts the nomination of other states' ambassadors in Saudi Arabia.[156] In terms of internal affairs, the King has the power to manage and supervise the implementation of the general policy of state and Sharia

[153] Ibid.
[154] Basic Law of Governance 1992, Art 44.
[155] Ashalhoub (n. 131), 289-291.
[156] Basic Law of Governance 1992, Arts 56-63

provisions, he guarantees the Kingdom's security, as he is the supreme commander of the armed forces.[157]

The Shura Council

Before unifying Saudi Arabia, King Abdulaziz established the Shura Council in 1926. In 1992 the old Shura Council Law was replaced by the new law, which is almost similar to the old law. The function of the Shura Council is mainly the provision of suggestions and advisory opinions regarding internal and external affairs of state, such as draft new laws or amend existing laws, international laws that include international treaties, agreements and concessions, the general plan of social and economic development, annual reports submitted by governmental institutions and the interpretation of laws and regulations.[158]

The Shura Council consists of 150 members, including Chairman of the Board, his Deputy, Assistant to Chairman and the Secretary General of the Council. All of them are appointed by royal order. In addition, the membership of the Shura Council was limited to men until the sixth session, when King Abdullah issued a royal order to involve women as members of the Council with a participation rate of not less than 20%. The membership in the Shura Council is for four years.[159]

The Cabinet

The Cabinet is considered as one of the legislative institutions in addition to being represented to the executive Authority in Saudi Arabia. As mentioned before, the members of the Cabinet are the Prime Minister, who is the King, the Deputy Prime Minister, who is the Crown Prince, Ministers and the King's counsellors. The function of the Cabinet is not only to manage the internal and external affairs of the state and to oversee the implementation of laws but also, to review the laws and regulations that are submitted to the cabinet. For instance, the Competition Act in

[157] Ibid Arts 55-60.
[158] Al-Jarbou (n.113), 74-76.
[159] Ashalhoub (n. 131), 303-305

2004 was issued after the approval of the Cabinet and the Shura Council; it was amended in 2014 by a Cabinet's decision.

Stages of Issuing Laws or Amendment in Saudi Arabia

The enactment of the laws in Saudi Arabia through the Cabinet needs several stages before it enters into force.[160] These stages are the following: Firstly, the proposal stage; in this stage the Cabinet law gives a right to the Cabinet members to propose the bill, however it should be relevant to their ministry task. Also, a bill can be proposed by the Shura Council. Secondly, the discussion stage; in this stage all debates within the Cabinet are not public. When Cabinet accepts to discuss the bill, it is transferred to the General Committee to study and discuss it and then forward it to the Experts Commission. It will then be examined and discussed with the participation of representatives of the Ministries related to the contents of the bill and returned to the General Committee after the drafting of the bill. Thirdly, the voting stage; in this stage the Cabinet members shall vote about the bill. Sometimes the King forwards the bill to the Shura Council for voting as well. Fourthly, the adopting stage that comes after voting of the bill. The bill should be passed to the King to get his approval. Finally, the publishing stage, which is considered as a final stage of adopting of law, because the publication is an essential condition for a law to enter into force.

It can be argued that the length of these stages may be considered as a defect of the Legislative procedure, because rapid developments require the issuance of new laws that keep pace with these developments evolution in the real world, as well as require an amendment to the existing laws expeditiously.

In fact, the length of these stages is designed to avoid manipulation or change the course of justice, as happened in one case that before the committee for settlement of violations of competition law, where the Head of the Committee proposed to the board of directors of the Council of Competition Protection to amend an article of the implementing regulation where that article would have been in favour of an

[160] Ibid. 323-326

opponent. Even though, the Council of Competition Protection does not the right to amend any articles of the law except making proposals for changing, as Article 9 of the Saudi Competition Law states.[161]

2.3.3.3 Judicial Authority

There are three branches of the judicial authority. Firstly, ordinary courts (Sharia courts), which hear cases that related to civil rights, the criminal and the personal cases. Secondly, Administrative courts (the Board of Grievances), which hear the cases that the government is one of litigants. Finally, the quasi-judicial committees, which address specific disputes, such as the committee for settlement of violations of competition law, stock market disputes committees, the tariff committees, the committee of labour and adjudicating disputes and the banking disputes settlement committee.

The Royal Decree No. (A / 90), dated 1 March 1992 and issued by Basic Law of Governance in Saudi Arabia, states that the courts, in their many different types and grades, shall have jurisdiction to decide with respect to all disputes and crimes.[162]

In order to keep a Semitic pace and enable the Kingdom of Saudi Arabia to overcome the barriers that judges and litigants are facing, the law of the judiciary No. (M / 64) dated 23 July 1975 was cancelled. A new system was initiated to keep pace with modern systems around the world and to achieve sustainable development in the Ministry of Justice in all its stages and at all its levels. This was done through the Royal Decree No. (M / 78) dated 30 September 2007, which made modifications to the provisions of the old system and introduced new articles in a way to facilitate litigation and accelerate dispute resolutions.[163]

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[161] Saudi Competition Law 2004, Art.9.
[162] Ministry of Justice, <http://www.moj.gov.sa/ar-sa/Courts/Pages/StructureCourts.aspx > Accessed 20 May 2019
[163] Ibid

2.3.3.3.1 The Supreme Judicial Council

The Formation of the Supreme Judicial Council

The Supreme Judicial Council is composed of a Chairman, who shall be appointed by Royal Order and ten members in the following manner: The Chief Justice of the Supreme Court, four full-time judges of the rank of chief justice of the Court of Appeal, who shall be appointed by Royal Order, the Deputy Minister of Justice, the Chairman of the Bureau of Investigation and Public Prosecution and three members satisfying the conditions required for an appeals judge, who shall be appointed by Royal Order.[164]

Since March 2012 the minister of Justice has been assigned by the King to be a chairman of the Supreme Judicial Council for developing judicial authority with considering that the Supreme judicial council is the head of the judicial authority in Saudi Arabia.

The Jurisdiction of the Supreme Judicial Council

In addition to the jurisdiction set forth in this law, the Supreme Judicial Council shall look into the matters of judges' personal affairs, such as nominations, promotions, discipline, assignments, secondments, training, transfers and terminations of service etc, according to the rules and procedures, in such a way as to ensure the independence of the judiciary, issue regulations relating to the judges' personal affairs after the approval of the King, issue a regulation for judicial inspection.[165]

Moreover, it can establish courts in accordance with the nomenclatures set forth in Article 9 of this law, merge or cancel them, and determine their venue and subject jurisdiction without prejudice to Article 25 of this law and constituents of panels therein. It also provides supervision of courts, judges, and their work within the limits set forth in this law, naming chief judges of the Courts of Appeal and their deputies from the appeals judges and chief judges of first class courts and their assistants, issue rules that organise the jurisdiction and powers of chief judges of

[164] The Law of the Judiciary 2007, Art 5
[165] Ministry of Justice, https://www.moj.gov.sa (Accessed 20 May 2019)

courts and their assistants and issue rules indicating the method of selecting judges.[166]

In the past, this Council had the power to review the verdicts issued by the Courts of Appeal without hearing cases. Under the new judicial system, the review of verdicts of courts of appeal is part of the jurisdiction of the Supreme Court.[167]

2.3.3.3.2 The Shariah Courts and their Levels and Jurisdictions

The new judiciary system is based on the multiplicity of general judiciary courts and their diversity within the judicial law of the state. It is mentioned in Article 9 that the system, which reordered ordinary judiciary courts, organised, and divided them into three types: on the top is the Supreme Court, in the middle are the Courts of Appeal and the first-class courts are at the base of the judicial structure.[168]

I. Supreme Court

The seat of the Supreme Court shall be in the city of Riyadh.[169]

The Formation of the Supreme Court

A Royal Order shall appoint the Chief of the Supreme Court from the rank of the Minister. A Royal Order shall terminate him of any prior service, and he shall fulfil the requirements stipulated for the rank of chief of court of appeal. The Supreme Court shall be composed of a chief and a sufficient number of judges of the rank of chief of the appellate court, who shall be appointed by Royal Order on the suggestion of the Supreme Judicial Council.

Without prejudice to the provisions of Article 13 of this law, the Supreme Court shall undertake its jurisdictions through specialised panels, as needed. Each panel shall be composed of three judges, except in cases involving death, stoning, and amputation

[166] The Law of the Judiciary 2007, Art 6.
[167] Ministry of Justice, https://www.moj.gov.sa (Accessed 20 May 2019)
[168] Ibid.
[169] The Law of the Judiciary 2007, Art 10.

sentences; in these cases, five judges shall render the decisions and each panel shall have a chief.[170]

- **Jurisdictions of the Supreme Court**

In addition, there are jurisdictions set forth in The Law of Procedure before Shariah courts and the Law of Criminal Procedure. These include watching the safety of the enforcement of Islamic law and regulations issued by the King, which do not interfere with them in cases that fall within the mandate of the general judiciary, as in the following functions.

Firstly, review sentences and decisions that are issued or supported by the Courts of Appeal in death, amputation, or stoning sentences or in cases other than death. Secondly, review sentences and decisions that are issued or supported by the courts of appeal concerning cases that are not mentioned in the previous paragraph and so on, and, without dealing with the proceedings of cases, when the subject of objecting to the provision is one of these: violation of Islamic law provisions and regulations issued by the King, which do not interfere with them, issuance of sentences from a court that is not properly constituted, according to the provisions of this system or other systems, issuance of sentences from a non-competent court or panel or error in adapting a case or describing it improperly.[171]

[170]Ibid Art 10.
[171] Ibid Art 12.

II. The Courts of Appeal

➢ The Formation of the Courts of Appeal

In every region of the Kingdom, there has to be one or more of courts of appeal, and in practicing their jurisdictions through specialised panels, each panel shall be composed of three judges. This excludes criminal panels, which look into the cases of death, amputation, stoning, the death penalty, or in cases other than death. Criminal panels shall be composed of five judges.[172] The panels of Courts of Appeal are divided into five: the civil rights panels, the criminal panels, the personal status panels, the labour panels and the commercial panels.[173]

➢ The Jurisdiction of the Courts of Appeal

The Courts of Appeal shall look into sentences that are susceptible to be appealed and that were issued by first class courts. They then judge after hearing the statements of adversaries, in accordance with the procedures established in The Law of Procedure before Shariah courts and the Laws of Criminal Procedure.[174] For more clarification see below.[175]

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[172] Ibid Art 15.
[173] Ibid Art 16
[174] Ibid Art 17
[175] First class courts are established in regions, provinces, and centres throughout the Kingdom, as needed. See, The Law of the Judiciary 2007, Art 18. The general courts in regions constitute specialised panels, within which there are panels for execution and affirmations beyond the jurisdictions of other courts and public notaries. General courts decide in lawsuits arising from traffic accidents or violations set forth in the traffic law and they implement regulations. Each panel must have a single judge or three judges, as determined by the Supreme Judicial Council. See The Law of the Judiciary 2007, Art 19. In addition, the general court in the province or the centre constitutes a panel or more; each panel must have a single judge or three judges, as determined by the Supreme Judicial Council. See, The Law of the Judiciary 2007, Art 23. Criminal courts shall be composed of specialised panels, as follows: Panels of hadd cases ('Qur'an-prescribed punishment') and penalty cases, Panels of discretionary cases and Panel of juvenile cases. Each panel must have three judges, with the exception of cases determined by the Supreme Judicial Council and those being considered by a single judge. See The Law of the Judiciary 2007, Art 23. The Personal Status Courts: Personal status courts shall be composed of a panel or more and must have a single judge or more, as determined by the Supreme Judicial Council. In addition, it is permissible to have specialised panels among them, as needed. See, The Law of the Judiciary 2007, Art 21. Labour and Commercial Courts: Labour and commercial courts shall be composed of specialised panels, and they must have a single judge or more, as determined by the Supreme Judicial Council. See The Law of the Judiciary 2007, Art 22.

2.3.3.3.3 The Board of Grievances

Each country has its own methods of judicial control over management activities. Some countries apply a unified judicial law under a single judicial authority via its courts (of different types and grades) to resolve all disputes, whether arising between individuals themselves, or between individuals and administrations. The most prominent countries that employ this law are the UK and the United States of America.[176]

On the other hand, there are countries that apply dual judicial laws, which are based on the existence of two judicial authorities: one of these judicial authorities shall look into proceedings between individuals themselves or between individuals and administrations, without having the capacity to be the public power. The other judicial authority specialises in looking into proceedings between individuals and administrations as a public authority. France is the cradle of this law, establishing the Council of State in 1791 and heading its transformation in 1872 to an administrative judiciary to protect citizens from the arbitrariness of public authorities. This law has been applied by many countries such as Italy, Belgium, Egypt, and Saudi Arabia.[177]

The Establishment of the Board of Grievances

The Board of Grievances experienced several stages before ending up in its new form.

In 1954, the Board of Grievances was established as one of the chapters of the Law Cabinet. During that time, the Law Cabinet stated that it would create public administration called the Board of Grievances, whose jurisdiction was to receive all complaints submitted to the Cabinet, check them, and submit a report to the King with proposed actions.[178]

In 1955, the Royal Decree No. 9659/3/2 enacted the Board of Grievances law, granting more jurisdiction and independence.[179] In spite of the issuance of this law,

[176] Ashalhoub (n. 131).
[177] Ibid
[178] S Al-Durreb, 'The Judicial Regulation in The Kingdom of Saudi Arabia According to Shariah Law and Judicial Authority' (1999) Imam Mohammad Bin Saud Islamic University Press 485
[179] Ashalhoub (n. 131).

during that period, it was not a judicial authority in the strict sense because it did not have the power to issue provisions in cases filed before them. Only in investigations could the Board propose action that could be taken and submitted to the King.[180] In 1982, the Board of Grievances became, at this stage, an independent judicial body linked directly to the King, according to its law issued by Royal Decree No. (M / 51) dated 10 May 1982.[181] The current Board of Grievances law was adopted by Royal Decree No. (M/ 78) dated 30 September 2007.

The Formation of the Board of Grievances

The Board of Grievances is composed of a Chairman of the rank of minister who shall be appointed by Royal Order and one deputy or more who shall also be appointed by Royal Order and who shall fulfil the requirements stipulated for the rank of appeals court chief. In addition, the Board will include sufficient numbers of judges as well as researchers, technicians, and administrators.[182] The Chairman of the Board of Grievances shall practice administrative and financial supervision and he has authority as the Minister of Justice, which is stipulated in the law of the judiciary and regulations and the decisions implementing it and which is for the staff and users of the Board of Grievances.[183] The deputy Chairman shall do work assigned thereto by the chairman and he shall be replaced by the oldest of his deputies in his absence. Otherwise, the post is vacant, with the exception of the presidency of the administrative Judicial Council, who is replaced by the Chairman of the Supreme Administrative Court.[184]

The Administrative Judicial Council

The Administrative Judicial Council was established in accordance with the law of the Board of Grievances in 2007. The Council is composed of the Chairman of the Board of Grievances as a chairman of the council, the chairman of the Supreme

[180] Ibid
[181] The Board of Grievances <https://www.bog.gov.sa/en/AboutUs/Pages/Engender.aspx> accessed 10 May 2019.
[182]The Board of Grievances 2007, Arts 1 and 2.
[183]Ibid Art 18
[184]Ibid Arts 6 and 19.

Administrative Court as a member, the oldest deputies of the Chairman of the Board of Grievances as members, and four judges at the rank of judge of appeals. All shall be appointed by Royal Order. The council has a general secretariat and chooses the general Secretary among the judges.[185]

The Administrative Judicial Council, with regard to the Board of Grievances, has the same jurisdictions as the Supreme Judicial Council, which were included in the law of the judiciary. In addition, the chairman of the Administrative Judicial Council, with regard to the Board of Grievances, has the same jurisdictions as the Chairman of the Supreme Judicial Council.[186]

The Jurisdiction of the Board of Grievances

Article 53 of the Basic Law of Governance has forwarded arrangement and jurisdictions of the Board of Grievances to a law of its own.[187]Article 13 of the Law of the Board of Grievances has determined its jurisdictions, in adjudication with cases relating to the rights established in civil service and military systems or pension laws for employees of government and their heirs and claimants, objection cases that are filed by the concerned parties against administrative decisions.

This includes cases where the cause of the objection is the lack of jurisdiction, the presence of a defect in form, a violation or error in its application and interpretation of laws and regulations, or an abuse of power, including disciplinary decisions and decisions issued by the quasi-judicial committees and disciplinary councils, compensation cases that are filed by the concerned parties against the decisions and actions of the government and independent public corporate entities, cases relating to contracts where the administrative body is a party thereto, disciplinary cases that are filed by the concerned authority, other administrative disputes and requests for the implementation of the provisions of foreign judgments and foreign arbitrators.[188]

The Board of Grievances courts shall not look into cases related to sovereign works or look into objections the courts have issued—which are not subject to this Law—of

[185]Ibid Arts 4 and 7.
[186]The Board of Grievances 2007, Art 5
[187]Ashalhoub (n. 131)
[188]The Board of Grievances 2007, Art 13

the provisions that are under its mandate.[189] However, the Law of Board of Grievances did not specify which could be considered 'sovereign works', as sovereign works can include the security of the state, foreign affairs, international relations, and the orders of the King to declare war or peace. As well, it can include the appointment of senior staff, the issuance of regulations, and others that can be included in the scope of sovereign works.[190]

2.3.3.3.4 Administrative Courts

The Administrative Judiciary Council in the Kingdom of Saudi Arabia is composed of three courts, as follows:

I. Administrative Courts

Administrative courts are composed of a Chairman and a sufficient number of judges; these courts practice their jurisdictions through specialised panels, each composed of three judges. Panels of courts are constituted by the Administrative Judicial Council on the suggestion of the chiefs of courts.[191] Even though all judges in this type of courts are qualified in Shariah (Islamic law) only, the cases that hear in these courts deal with laws and regulations that not derived directly from Sharia (Islamic law). Therefore, a question can be raised about the quality of the adjudication provided.

II. Administrative Courts of Appeal

Administrative Courts of Appeal are composed of a Chairman and a sufficient number of judges, whose rank is not less than the degree of judge of appeal. Panels of administrative courts of appeal are constituted by the Administrative Judicial Council on the suggestion of chiefs of courts. Administrative courts of appeal shall look into cases that are susceptible to be appealed and that were issued by the

[189]Ibid Art 14
[190]Ashalhoub (n. 131)
[191]The Board of Grievances 2007, Arts 8 and 9

Administrative courts. Then, a judgment is made after hearing the statements of the adversaries.[192]

III. Supreme Administrative Court

The Supreme Administrative Court is situated in the capital city of Riyadh. It is composed of a Chairman and a sufficient number of judges of the rank of chief of the court of appeal. The chairman of the supreme administrative court shall be appointed by Royal Order from the rank of minister. A Royal Order shall terminate him of prior service, and he shall fulfil the requirements stipulated for the rank of chief of court of appeal. Members of the supreme administrative court shall be appointed by Royal Order on the suggestion of the Administrative Judicial Council. The Supreme Administrative Court operates through specialised panels andeach panel being composed of three judges.[193]

The Supreme Administrative Court shall look into objections of provisions issued by administrative courts of appeal, where the reasons of such objections are violation of the provisions of Islamic law, regulations that are inconsistent with it, or errors in its application and interpretation, including the principle of judicial that decides issues in the provision of the supreme administration court, issuance provision from a court that is not competent, issuance provision from a court that is not constituted according to the law, error in adapting a case or describing it improperly and Conflict of jurisdiction among the courts of the Board of Grievances.[194]

2.3.3.3.5 The Quasi-Judicial Committees

After adopting the commercial court law in 1931, the Saudi regulator was faced with disagreement by judges and religious scholars about applying that law in General courts (Sharia courts) because as they believed that was not compatible with the Sharia principles. Therefore, the Saudi regulator was forced to find a solution to that problem by creating alternative quasi-judicial committees specialised in some fields that cannot be considered by the General courts (sharia courts). There are many

[192]The Board of Grievances 2007, Arts 8, 9 and 12
[193]The Board of Grievances 2007, Art 9 and 10
[194]Ibid Art 11

quasi-judicial committees, for example the committee for settlement of violations of competition law, the stock market disputes committees, the tariff committees, the committee of labour and adjudicating disputes and the banking disputes settlement committee.[195] Most of these committees' decisions can be appealed before the Board of Grievances.

2.4 Conclusion

This chapter dealt with competition law from the Islamic perspective and defined Shariah (Islamic law) and then the sources of Shariah and competition rules have been explained. It was clear there was no model of competition law under Shariah rules. However, there were some principles that have been known for fourteen centuries related to Islamic economics. These principles regulate the market and the relationships between traders and consumers.

Moreover, there are principles related to fair competition and antitrust. After that chapter moved to provide an overview of the legal and judicial structure in Saudi Arabia, including the Basic Law of Governance, Executive Authority, Legislative Authority and Judicial Authority. Indeed, the development of the judicial structure was necessary to keep pace with the economic growth of Saudi Arabia as shown by the statistics of exports and imports to enhance the business environment and attract more investment through the existence of a sound legal and judicial system that can provide protection to investors.

Nevertheless, there are two issues that should be taken into consideration by Saudi legislator in near future. Firstly, the independence of three authorities, where the Minister of Justice, who is a representative of the Executive Authority, has been assigned as the Chairman of the Supreme Judicial Council, which is in the top of the Judicial Authority, while keeping his position, this appointment for developing the Judicial Authority. However, it may lead to overlapping of jurisdiction between the executive and judicial authority which may reduce the level of independence among the authorities. Secondly, as mentioned before, there are two types of laws in Saudi

[195] Alkahtani (n. 144)

Arabia: the first is the laws derived directly from Sharia (Islamic law) and the second is the regulations that have been issued to cover all aspects of life that have not been mention in Sharia (Islamic law) in addition, all judges are qualified in Shariah (Islamic law). Therefore, judges might be faced problem with applying the second type of laws which require judges who have a degree in law.

Chapter Three: The role and competence of the Council of Competition in Saudi Arabia

3.1 Introduction

The previous chapter discussed the Saudi legal structure and analysed its foundation based upon the provisions of Islamic law (Sharia) which is stated in the basic Law of Governance. Islamic law (Sharia) includes many principles for trade transactions in general and freedom of the market, with antitrust and consumer protection. In addition, the previous chapter explained the composition of the Saudi authorities and their powers to adopt new laws or reform existing ones, the role of the judicial authorities in settling disputes that arise from the infringement of those laws.

All companies that operate in the Saudi market are subject to Saudi competition law, whether local or foreign ones, with the exception of state-owned enterprises.[196] Even though the Saudi legislator always gives a clear and accurate statement when adopting a new law in the last clause of the law about the abolition of the old law, as well as in the case of conflict between laws, it is indicated which of these laws has primacy over the others. However, in competition law the Saudi legislator does not make any reference to this matter. Also, he does not differentiate between companies that are subject to competition law, whether from regulated sectors or non-regulated sectors. This problem can be shown once a violation of competition occurs in any of the regulated sectors that are subject to regulation and supervision by the relevant regulatory body.

The institutional framework of competition plays a significant role in the enforcement of competition law[197], which aims to promote competition in the market

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[196] Article 3 of Saudi Competition Law (2004). In 06/03/2019 the Saudi Competition Law has been changed by the Royal decree No. (M/75), also, in 10/10/2017 the name of the Council of Competition has been changed to "General Authority for Competition" (GAC) by the Council of Ministers resolution No. (55), available at (https://www.gac.gov.sa/CouncilSystem_en.aspx?id=15) accessed in 20 April 2020.

197 Mark Furse, *The New Law Competition and the Enterprise Act 2002*, (Jordans, 2003), 7-8.

and protect all participants. The Saudi competition law provides for the establishment of the Council of Competition (CC)[198] to facilitate the protection and promotion of competition in the Saudi market.[199]

In order to reach a comprehensive understanding of the formation and the functions of the CC, this chapter will discuss the relevant institutional framework, its functions in the Saudi market with emphasis placed on the drawbacks that can be identified in relation to its structure and role.

Thus, this chapter will be divided into three sections. The first section presents the institutional framework of the Saudi competition authority. The second section explains the enforcement procedures as applied by the Competition Council. Finally, the third section will focus on prosecution and litigation.

3.1.1 The Emergence of Competition Law

The emergence and development of Saudi competition law had to pass two stages until it was adopted and implemented. The first stage concerns the stage before adopting the law and the factors that contributed to its introduction and the second stage that covers the post-adoption era.

With regard to the first stage, which is before adopting the Saudi competition law, there were already some rules and regulations that dealt with competition issues. These included some articles regarding competition regulation in the Saudi market, such as, for example, in 1931 the Law of Commercial Court was adopted by the Saudi government and Article 5 of this law included a prohibition of some practices, anti-competitive behaviours and any types of violations that may impact the market's principles and commercial activities, such as deceit, fraud and betrayal. According to Article 147 of this law, there is a punishment for those who infringe Article 5, which includes imprisonment or fine.[200]

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[198] The Saudi competition law 2004, Art 8(1).

[199] Ibid. It needs to be noted that the name of the national competition authority in Saudi Arabia was Council of Competition Protection (CCP). However, it has been changed to Council of Competition according to Saudi Ministers Council's decision in 22/07/2013 http://www.alriyadh.com/854294 ((Accessed 20 May 2019).

[200] The Law of Commercial Court 1931, Arts. 5 and 147.

Also, there are other laws enacted by the Saudi government that include articles that refer indirectly to competition regulation, such as the Law of Trademarks 1939, the Law of Patents 1989 and the Law of Trade Names 1999. All of these laws provided protection for the owners of trademarks, patents and trade names from violation through punishment, whether imprisonment or fine.[201] Furthermore, in 1965 Saudi Company Law was enacted. Articles 213 to 215 of this law concern the regulation of mergers between firms.[202] Also, after the Privatisation of the telecommunications sector in 2001, the Saudi government enacted a Telecommunications Law that includes some articles that deal with competition issues.

As it is well-known, Saudi Arabia relies on the principles of Islamic law which respects and protects people's rights. Therefore, the right to litigate is guaranteed for any person or merchant, who is damaged by other people's conduct or behaviour. Irrespective of whether a relevant provision is included in the existing statutes, any person is allowed to submit a complaint before the administrative authorities or the judicature.

The Saudi government enacted the competition law with view to achieve consistency with its economic policy which is based on the principle of competition in the market, large developments that take place in the economic sphere and a desire to promote and emphasise the climate of competition in the business sector. There are three main factors that contributed to enacting the Saudi competition law: joining the World Trade Organisation (WTO), encouraging foreign investment and converting to privatisation. All these factors will be discussed below.

Firstly, Saudi Arabia joining the World Trade Organisation (WTO). In 2005, Saudi Arabia become a member of the WTO after 12 years of negotiations. Various requirements for joining the WTO were set. Firstly, since Saudi Arabia's legal system is based on Islamic law, it was necessary to amend some of these laws and adopt new ones to keep pace with the modern developments in the global trading system, such as restructuring its judicial system and establishing specialised commercial courts. Secondly, the liberalisation of markets for local and foreign investors in the Saudi

[201] Ministry of Commerce and Industry, www.mci.gov.sa (Accessed 20 May 2019).
[202] Saudi Company Law 1965, Art 213-215.

economy was essential. In 2000 the Foreign Investment Law was enacted. Even though this enabled liberalisation of the Saudi market to encourage foreign investment, there are some commercial activities that are excluded from foreign investment which are illustrated in the law.[203] Thirdly, Saudi's economic goals had to be expanded.[204]The Saudi government privatised some sectors of the economy, such as telecommunications and electricity. Although privatisation was one of the means to open the Saudi market to domestic and foreign investors and is one of the major reasons for adopting the Saudi Competition Law, current privatisation is an obstacle for achieving fair competition in the Saudi market due to 70% of the shares of firms that have been privatised as basically owned by the Saudi government.[205]

3.2 General Overview of Saudi Council of Competition (CC)

This section provides an overview of the institutional framework in relation to the Council of Competition. Even though Saudi Competition Law was adopted in 2004 and provided for the establishment of the CC, the establishment of the Council was delayed for more than a year.[206] The Council of Competition consists of the board of directors, the general secretariat and the committee for settlement of violations of competition law.

3.2.1 The Board of Directors of the Council of Competition:

The board of directors is considered as the head of the Council of Competition. According to Article 8(2), the board of directors consists of the Chairman (the Minister of Commerce and Industry) and eight members, half of whom are representatives of three ministries and one authority: the Ministry of Commerce and Industry, the Ministry of Economy & Planning, the Ministry of Finance and the General Investment Authority. The other half of the council members are nominated by the Chairman among experienced and competent persons from the private sector.

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[203] The Saudi foreign Investment Law, www.mci.gov.sa (Accessed 20 May 2019).
[204] Loeffler Tuggey Pauerstein Rosenthal LLP, 'Terms of Saudi Accession' (2005) Middle East Policy Council Journal 12(4) < http://www.mafhoum.com/press9/276E17.htm> accessed 13 June 2019.
[205] The Saudi Stock Exchange, <http://www.tadawul.com.sa> accessed 13 June 2019.
[206] Alotaibi (n. 81).

All of these members are appointed by royal order.[207] One of these members is selected and appointed by the Chairman of the council to be his deputy.[208]
In practice, the deputy position is still empty, which is a problematic that will be discussed later in this chapter. The membership of the CC is for four years and it is renewable once. After their membership expires, the members of council shall keep their position until the appointment of their successors.[209]

In terms of the function of the board of directors, Article 9 of the Saudi Competition Law provides that the board of directors' tasks are divided into four categories: Firstly, it has a legislative function, which includes tasks, such as adopting the implementing regulations of competition law, proposing any amendments to the current competition law, drafting the relevant bills and adopting the financial and administrative regulations that are related to forming the CC by coordinating with the Ministry of Civil Service and the Ministry of Finance.[210]
Secondly, it has a regulatory and supervisory function. For example, the Chairman of the Council has to present an annual report of the Council's works and its plans to the cabinet.[211] Thirdly, it has a recruitment and appointment function. For instance, the appointment of enforcement officers and prosecution representatives from the general secretariat staff, the members of the committee for settlement of violations of the competition law, as well as experts and specialists in the competition field.[212]
Fourthly, it also has an administrative function, which includes tasks, such as approving requests for mergers and acquisitions between companies that can lead to a new company holding a dominant position in the market, approving the initiation of prosecution against breaches of Article 11 clause 5 of Saudi Competition Law and approving the initiation of the investigation and collecting of evidence for violations

[207] Article 8(2) of Saudi Competition Law 2004.
[208] Article 9(b) of the Implementing Regulation of Competition Law (IRCL).
[209] Article 8(3) of Saudi Competition Law 2004.
[210] Ibid Article 9 (4)-(6)
[211] Ibid Article 9.
[212] Ibid Articles 11 and 15.

of Competition Law ahead of prosecution proceedings before the committee for settlement of violations of competition law.[213]

In addition, the board of directors has other tasks. According to Article 16 of the Saudi Competition Law, once a violation of the competition law is confirmed, one or more of the following actions can be taken by the board of directors: Firstly, the violator must amend their position by removing the violation within a specific period of time. Secondly, the board of directors may allow the violator to dispose some of their properties, such as shares and assets, or take any action that may help to remove the violation and its effects. Finally, the board of directors may compel the violator to pay a penalty for each day until the violation is removed.[214]

3.2.2 The General Secretariat of the Saudi Council of Competition (CC)

In accordance with Article 10 of the Saudi competition law, the general secretariat was established.[215] The general secretariat is considered the main body of the CC because it includes the majority of the council staff among specialized experts such as legal and economist advisors, enforcement officers and prosecution representatives, and secretarial, administrative and technician employees. It is presided over by a secretary general who is appointed upon the fifteenth grade of the civil service system by the chairman of the board of directors.[216]

With regard to the function of the general secretariat, this has many aspects: firstly, the enforcing of competition law by investigating and studying all complaints that are received or by taking the initiative to study in a particular market or sector. Secondly, collecting the necessary evidence, documents, and requested information by the judicial investigation officers who have the right to enter any entity.[217] Also, the judicial investigation officers can interrogate any person in these entities. Thirdly, prosecution representatives before the committee for settlement of violations of the

[213] Ibid Article 9 (1)-(3).
[214] Ibid Article 16.
[215] Ibid Article 10.
[216] Ibid. See also Article 11 of Implementing Regulations of the Competition Law.
[217] Article 11 of Saudi Competition Law 2004.

competition law are employees in the general secretariat who have been selected by the Chairman of the Council.[218]

As stated above, the general secretariat headed by the secretary general has two main tasks: The first task is administration of the general secretariat and its staff. The second task is preparation of the agenda of meetings for the board of directors and notifying the members of the board of directors about meetings' dates and the implementation of the decisions that are issued by the board of directors of the CC.[219]

3.2.3 The Committee for Settlement of Violations of Competition Law

According to Article 15 of the Saudi Competition Law, the committee for the settlement of violations of competition law has been formed. This committee consists of a Head and four members, one of which should be a legal advisor and all members must be appointed by the Chairman of the council. The same procedure is followed when it is time for a new council to be formed.[220] In terms of its jurisdiction, this committee has the right to hear lawsuits about violations of competition law from the prosecution representatives and the violator and then make decisions on the existence of infringements or not of the law.[221]

3.2.4 Evaluating of the Institutional Framework of the Competition Council:

After reviewing the formation of the CC, some observations about its independence, capacity and the conflicts of interest need to be made.

i) The Independence of the CC

The evaluation of the independence of the competition authority as one of the criteria for having successful competition authorities is one the research objectives of the present Thesis. The first observation is that the CC is an independent body as indicated at the beginning of Article 8(1) of the Saudi Competition Law. However, it is not an independent council in practice for several reasons: firstly, Article 8(1)

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[218] Ibid.
[219] Article 11(1) of Implementing Regulations of the Saudi Competition Law 2004.
[220] Ibid Article 17.
[221] Article 15 of Saudi Competition Law 2004.

indicates that the CC is located at the Ministry of Commerce and Industry. Secondly, the Chairman of the CC is the Minister of Commerce and Industry.[222] Thirdly, according to Article 11(3), the Minister of Commerce and Industry has the right to assign some of the Ministry's employees to perform some functions in the CC. Finally, the CC can assign any experts from outside the Ministry and this is quite exceptional as the majority of the Council's staff were assigned from the Ministry of Trade and Industry.[223] Furthermore, the former secretary general of the CC confirmed that the CC is not independent on either an administrative or a financial level.[224]

In fact, independence is considered as a feature of success for competition authorities.[225] Dabbah believes that some competition authorities are not able to enforce the law effectively because of lack of independence.[226] In April 2007 some consumers complained to the Minister of Commerce and Industry about unjustifiable increments and price fixing for a bag of cement that had occurred through an agreement between all cement companies in the Saudi market. Such agreement is prohibited under Article 4(1) of the Saudi Competition Law. One month later, the Minister of Commerce and Industry made a mandatory decision to return to the previous price of a bag of cement without any involvement of the CC.[227] This case clearly shows that the CC is not an independent body and is influenced or even replaced by the Minister of Commerce and Industry. A question arises as to the fate of the council's chairman when the duration of the government's assignment is finished or he resigns from government; is the position that he was appointed to as the council's chairman based on his position as a minister of commerce and industry or on his person? If the former, this is clear evidence that the Saudi CC is not independent.

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[222] Ibid Article 8(1) and (2).
[223] Ibid Article 11(3) and (4).
[224] Alotaibi (n. 81).
[225] Stephen Wilks, 'Institutional Reform and the Enforcement of Competition Policy in the UK', (2011), European Competition Journal, Vol. 7, No1. 11-23.
[226] Maher Dabbah, 'Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime', (2010) 33 World Competition: Law and Economics Review 457.
[227] Alotaibi (n. 81) 156-157.

Lack of Capacity

To enforce competition law effectively, a competition authority needs to have sufficient human and financial resources. Human resources include expertise.[228] Even though Article 8(2) indicates that the Chairman of the CC should select and appoint four members of the CC, who should have experience and competence by royal order, in reality the Chairman selected four businessmen, who are part-time employees. Also, the rest of the CC members, who are representatives of three Ministries and one authority.[229] This clearly creates problems of efficiency as well as conflicts of interest. [230]

Human and financial resources are a necessity and a basis for the efficient implementation of the law, as Dabbah and others have pointed out.[231] New competition agencies suffer from this and it has been shown up both in competition law, where it is mentioned in a certain article assisted by the staff of the Ministry of Commerce and expertise, and in practice as a former Secretary said when he talked about independence and the lack of human and financial resources – therefore each called for independence focused on the human and financial resources to activate the application of the law.

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[228] Dabbah (n.226) 457–475.

[229] Mohammed Alshamri, The competition protection system in the Kingdom complies with international standards, (Al-madina, October 2011), available at <http://www.al-madina.com/node/335591> accessed 13 June 2019.

[230] Abdalaziz Alswad, Sometimes (the Competition Council does it interfere with the recruitment?) (Alhayat, November 2014) available at < http://www.alhayat.com/article/821221> accessed 13 June 2019.

[231] Dabbah (n. 226) 457–475.

In Saudi Arabia, the lack of independence of the Council is not completely a problem at present because the President of the Council is the Minister, who meets the King every Monday, as well as the Minister of Finance. This can be an opportunity to ask for more financial and human support, either through increasing the budget of the Council, through coordination with and support by other ministries, through scholarships by the Ministry of Education to students who are specialising in the area of competition or by obliging universities to provide curriculums related to competition or specialised programmes, such as Master's degrees in competition law or in economic studies related to markets and competition.

As well as the hoped-for role of the Ministry of Civil Service in establishing a mechanism to transfer Council staff to owners of the Council from the Ministry of Commerce or the Ministry of Labour for Recruiting experts, at least initially, coordination with the Ministry of Finance concerns the state treasury developing a mechanism to benefit from the fines imposed on offenders to support the entire budget of the Council.

Dabbah has stated that one of the obstacles that prevent the effective implementation of competition law is the short period of time that Ministers remain in office.[232] He gave as an example that, when the current Minister is busy with resolving a problem related to competition law and, before the issuance of the final decision on this problem, he is replaced by another Minister, who in turn may have a different opinion on this issue; as a result, this is not how legal certainty is promoted and achieved in the area of competition law.[233] Another problem is the fact that the Ministers and members of the Council can have their tenure renewed more than twice. In addition, there is no pressure for the administrator to try and develop his skills and enhance his knowledge in the area of competition law or in general.

In view of the representation of members of the Council from the Ministries or the external members, such as businessmen, it would be appropriate to stop the representation of businessmen in the Council in order to avoid conflicts of interest, and appoint representatives from the relevant sectors, such as specialists from the

[232] Dabbah (n. 226) 457–475.
[233] ibid

telecommunications sector, representatives from the aviation or the electricity sector and the Capital Market Authority. By taking advantage of the presence of personnel qualified in competition coming from the respective sectors, the CC will be more focused on the implementation of competition law in these sectors and the market as a whole. Besides, this would be a step towards creating a mechanism for coordination and cooperation between the CC and the sectors' regulators in the future.

With regard to the representation of the Ministries, it is a case of state intervention. In spite of strong opposition by researchers to the idea of state intervention either in terms of the administrative structure of the agency of competition or in terms of state policy in the field of the protection of competition, it should be taken into account that the benefit of state intervention and lack of independence of the Council at the moment is the relationship of the Minister of Commerce with other Ministers represented in the Council whereby they are encouraged to train their representatives in the field of competition to gain advantage.

The Conflict of Interests

According to Article 8(2), the other half of the Council members are nominated by the Chairman (the Minister of Commerce and Industry) from the private sector, amongst people who are experienced and competent, and are then appointed by royal order.[234] In fact, appointing these members from the private sector to the CC may create conflicts of interest, lack of neutrality and lack of integrity. For example, even though clause number 6 of the same article above provides that no member of the CC is allowed to participate in any deliberation of a case or subject in which he has an interest or family relationship with any of the case parties,[235] there was a member of the board of directors of the CC, who is the Chairman of a company in the same time.[236]

[234] Article 8(2) of Saudi Competition Law 2004.
[235] Ibid Article 8(6).
[236] Ibid.

Obviously, Article 8(2) focuses on the experience and competence of the members as the criteria for nomination and does not mention the private sector. On the other hand, when talking about the Saudi society, we need to highlight that social relationships and the overall culture may play an important role in the neutrality and integrity of the Council members, who are appointed by the Minister of Commerce and Industry from the private sector, and this is why conflicts of interests can occur.

The relationship between the CC and other agencies

According to the Competition Law 2004, there is no identified relationship between the CC and other agencies, such as regulatory agencies regarding the enforcement of Competition Law.[237] However, according to new Saudi Competition Law 2019, "In the application of the provisions of the Law, GAC shall have inherent jurisdiction over any matters arising there from, which may be inconsistent or overlap with the jurisdictions of other governmental bodies. The Regulations shall specify the controls to be observed in the application of this Article".[238] Also, as Article 5 of Implementing Regulations of Saudi Competition Law 2019 states

"1. Government agencies' supervision of any sector shall not prejudice GAC's power to enforce the provisions of the Law and the Regulations against firms operating in such

sector.

2. Any conflict or overlap of jurisdiction with other governmental bodies arising from the implementation of the provisions of the Law shall not prejudice existing or future provisions of other laws. In such cases, GAC shall have the primary jurisdiction. Subject to confidentiality, GAC may, if interest so requires, refer documents and investigative minutes of cases under its review to competent agencies to complete the procedures

according to their statutory tasks".[239] Indeed, the new reforms led to the promotion of the role of GAC by displaying its inherent jurisdiction, which means that the GAC

[237] Saudi competition Law 2004.
[238] Article 3 (3) of Saudi competition Law 2019.
[239] Article 5 (1&2) of Implementing Regulations of Saudi competition Law 2019.

has the primary jurisdiction over other agencies. However, these reforms do not provide clear and specific mechanisms to deal with any cases that can be found by the regulatory agencies and do not determine which law has the priority to be enforced and how.

3.3 The Implementation Procedures of Saudi Competition Law by the Competition Council

With regard to the enforcement of Saudi competition law, two approaches should be taken into account. Firstly, public enforcement, which is the main function of the CC, and secondly, private enforcement, which involves litigation before a general court for anyone, who has suffered damage from another party's behaviour in the market, with view to claim compensation for the damage suffered. As it is stated in Article 18 of the Saudi Competition Law, anyone, whether a layperson or a legal entity, who has suffered damage by practices that are in violation of the provisions of this law, has the right to apply for compensation before a specialist judiciary.[240] This section will focus on the public enforcement by the CC, which is the aim of this chapter.

According to Article 3 of the Saudi Competition Law, all entities and undertakings operating in the Saudi market are subject to the provisions of the Competition Law, except state-owned enterprises and any commodity that has its price fixed by a government decision in response to an emergency case, a natural disaster or extraordinary circumstances. Also, all kinds of activities, such as commercial, industrial and agricultural, taking place in the national market, are subject to the provisions of competition law, even if these activities occur abroad but their impact negatively affects fair competition in the national market.[241]

In addition, the CC is responsible for enforcing competition law on regulated sectors. For example, Saudi Competition Law can apply to the telecommunications and the electricity sector, even though these sectors already have their own laws that regulate their technical, economic and legal matters. As stated above, this section will discuss

[240] Article 18 of Saudi competition Law 2004.
[241] Ibid Article 3

the role of the CC in regulating competition in Saudi market as a whole in both regulated and non-regulated sectors.

3.3.1 The Procedures of Complaints and Initiatives in the Competition Council

With regard to the public enforcement of Saudi competition law, the CC has two methods of enforcing the law: the first method is the initiative – this means that if the Council finds any entity breaching the law, it will order an investigation procedure, which involves the collection of evidence and the interrogation of the persons involved, and then start the prosecution stage before the Committee for the settlement of violations of competition law. The second method is the receipt of complaints from individuals or bodies, either governmental bodies or other competitors in the market. Both methods can result in the same course of action against the violators, as it will be discussed below. [242]

With respect to the first method, this method is based on two routes: firstly, the General Secretariat can select any sector or activity to examine its level of compliance with the competition law provisions by calling for opinion from the public and experts on whether there is suspicion of a breach of competition law. Secondly, through finding any evidence confirming that there is an infringement of the provisions of competition law via an internal report. After that the General Secretariat requests approval from the board of directors to start the investigation and search procedures. When the investigation stage is completed and evidence has been collected, the General Secretariat requests the approval of the board of directors to start the prosecution before the Committee for the settlement of violations of competition law. This will be discussed in more detail later in this chapter.

In terms of the second method, which is the receipt of complaints from individuals or governmental bodies or other competitors in the market: when the General Secretariat receives a complaint, the complaint is reviewed to ascertain whether there is a breach of the provisions of competition law and whether this complaint is within the CC's area of competence or not. Within thirty days of the receipt of a complaint,

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[242] Clause 2 of the Rules of Governing the work of law enforcement officers in the Saudi Competition Law 2004.

the CC submits its recommendations to the board of directors. If the complaint is neither within the scope of the Council's work nor considered as a violation of competition law, the board of directors will order the General Secretariat to archive the complaint and inform the complainant about its decision to dismiss the complaint for lack of jurisdiction or absence of any violation of competition law.[243]

On the other hand, if the general secretariat finds the complaint is within its jurisdiction and is considered a breach of competition law, it will request approval from the board of directors to start the investigation stage based on its study of the complaint. Once the decision to start the investigation stage is approved by the board of directors, the general secretariat should inform the complainant and the entity that violated the law by written form that includes the competition council's decision about starting the investigation, collection of evidence and interrogation of the violator. Also, this form includes the names of the enforcement officers, the date and purpose of their visit, which is obviously to investigate the violation of competition law and to interrogate the violator.[244]

According to the rules of governing, the work of law enforcement officers in the area of competition law – the search, investigation and inspection procedures of the entity that has breached the law – will either be based on prior coordination with this entity regarding the visit or it can be a surprise visit, providing the required documents for inspection, such as the decision of the CC regarding the commencement of the investigation and showing the enforcement officers' identification.[245] Moreover, the enforcement officers, under the rules that govern the work of law enforcement officers in the Saudi competition law, are granted the right to access any building of the entity, investigate, interrogate and inspect any documents, whether hard copies or in electronic form on a computer disk or laptop, and keep these documents and anything else that could be used as evidence of a suspected violation.[246] When a violation of the law is confirmed, the CC may force the violator to stop the violation,

[243] Clause 2 of the Rules of Governing the work of law enforcement officers in the Saudi Competition Law 2004.
[244] Ibid Clause 4.
[245] Ibid Clause 4.
[246] Ibid Clause 4.

allow the violator to take any action that helps to mitigate the effect of the violation, or at least oblige the violator to pay a penalty for each day until the removal of the violation.[247]

Actually, this is one of the ambiguities of the Law, because the meaning of the confirmation of the violation is not clear, nor which stage this is – is it during the investigation stage or during the prosecution stage? Lack of clarity in this matter may lead the Council to interpret it incorrectly and its officials may exercise their authority during the wrong stage. For example, if 'confirmation of the violation' means after the prosecution stage, the damage could be worse for the consumers and other competitors in the market.

After the completion of the investigation, the collection of evidence and the interrogation of the suspects, the General Secretariat requests the approval from the board of directors to start the prosecution. The board of directors has already appointed some employees of the General Secretariat, either individually or as a group, as prosecution representatives before the Committee for settlement of violations of competition law, the administrative court and the appeal administrative court in the appeal stage.

[247] Article 16 of Saudi Competition Law 2004.

3.3.2 The Procedures of Economic Concentration, Mergers and Exemption Applications in the Competition Council

3.3.2.1 The Procedures of Economic Concentration and Merger Applications

In addition to the above duties, the Competition Council has another task connected to public enforcement. This task is based on the applications submitted from entities, which need the approval of the Council regarding economic concentration, mergers, and exemption applications of competition law, which will be discussed in this section. The Saudi Competition Law provides some conditions and procedures for companies involved in a merger or economic concentration, which should be followed in this regard. More specifically, it indicates that, in case any companies want to merge, economic concentration or to combine two or more joint managements, if this results in the new company obtaining a dominant position in the market, it must be reported to the CC within at least sixty days prior to its completion.[248] However, according to the new Saudi Competition Law 2019, there is no mention to merger in the new law however, it has been used the term (Economic Concentration) instead of it as stated in Article (1) "Economic Concentration: Any act that results in the total or partial transfer of ownership of assets, rights, equity, shares, or obligations of an entity to another, or the joining of two or more administrations in a joint administration, in accordance with the rules and standards set by the Regulations".[249] With regard to Competition Law 2019, Article (7) stated to "Entities seeking to participate in an economic concentration transaction must inform GAC at least ninety (90) days before completion if the total annual sales value of the entities seeking to participation the economic concentration exceeds the amount determined by the Regulations".[250] In additional, Article 12 of Implementing Regulations of competition law identifies "the total annual sales value of all firms intending to participate in the economic concentration exceeds SAR 100,000,000"[251]

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[248] Article 6 of Saudi Competition Law 2004.
[249] Article 1 of Saudi Competition Law 2019.
[250] Article 7 of Saudi Competition Law 2019.

[251] Article 12 of Implementing Regulations of competition law 2019.

Also, the law specifies the required documents and forms that should be included in the application as well as the administrative fees. Furthermore, the Council may request from the applicant additional information before making any decision regarding the application.[252]

The Competition Council via the General Secretariat examines these applications, and then evaluates their effect on the competition in the market. Also, the CC announces to the public through the media that they should give their opinion about these applications within fifteen days from the date of announcement. If sixty days lapse from the date of the application without the applicants having received any information about the Council's decision concerning their application, this equals to an implied approval of the application.[253]

With reference to these actions, Article 16 of the regulation of mergers and acquisitions contained in the Saudi Financial Market Law indicates commitment to the provisions of competition law regarding the applications of mergers and acquisitions that are received.[254] Therefore, there are two observations to be made with regards the CC procedures in relation to such applications.

First, Article 6 of the Competition Law states that any application that does not lead to a dominant position in the market does not need to be reported to the Council.[255]However, according to Article (7) of new Competition Law 2019 and Article 12 (1) the new Implementing Regulations of Competition Law 2019 define that entities intending to participate in either a merger, acquisition, takeover, or joint venture, must notify the GCA and obtain clearance prior to completing the transaction, if the total combined turnover of the participating entities exceeds 100 million Saudi Riyals (US$26.6 million).[256]

Nonetheless, this Article may allow companies to escape from their obligation to report to the Council about their operations. In particular if we keep in mind that the

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[252] Article 13& 14 of Implementing Regulations of competition law 2019.
[253] Article (7) of Implementing Regulations of the Saudi Competition Law 2004.
[254] Article 16 of the Regulation of mergers and acquisitions in the Saudi financial market law.
[255] Article (6-1-2-3) Competition Law 2004.
[256] Article (7) of new Competition Law 2019 and Article 12 (1) the new Implementing Regulations of Competition Law 2019.

Council suffers from lack of enough information about the market and the specific sectors and the overall lack of resources mentioned above. Also, the new law in this Article does not mention whether this operation may lead to a dominant position in the market without consideration if the total combined turnover of the participating entities is less 100 million Saudi Riyals (US$26.6 million).

Secondly, despite the limited resources in terms of employees and experts in the Council, the law specifies that the period for reviewing these applications is sixty days from the application date, and the applications shall be submitted to the Council at least sixty days before the completion of the deal. These deadlines can be abused by companies that delay the submission of the application until the end of the 60-day period, in order to push the CC to make a decision as soon as possible or take advantage of the implied approval if no decision is made within 60 days.

Moreover, such practices can undermine the quality and accuracy of the work of the Council and put undue pressure on the Council to make decisions within limited time, especially if another authority's decision about these deals depends on the approval of the CC, such as in the case of the Saudi Capital Market Authority that cannot authorise any mergers and acquisitions until it has received the approval from the CC.

3.3.2.2 The Procedure for Exemption Applications

In terms of applications for exemption from the enforcement of competition law, the CC can exempt any company that applies for exemption from applying Article 4 of the Competition Law concerning any anti-competitive agreements or behaviour. This can occur on the condition that these practices lead to the improvement of the performance of the company in question, advantages for the consumers and the benefits from these practices and agreements exceed their effect on the restriction of competition in the market.[257]

[257] Article 5 of Implementing Regulations of the Saudi Competition Law 2004.

With regard to the exemption applications, the CC via the General Secretariat receives, and examines these applications. After that, the Council makes a decision regarding these applications and either accepts or rejects them. Moreover, the CC may give specific details in its decision about the exemption period and its terms, and it may also reduce the duration of exemption or extend it further. The CC can cancel the exemption at any time through a decision that is justified.[258]

In addition, the general provisions of the rules governing exemptions and exceptions in competition law indicate that the period for reviewing the exemption applications should be within ninety days from receiving the applications. Furthermore, if ninety days lapse from the date of the application without the Council having responded regarding this application, the application is considered as being rejected.[259]

3.3.3 The defects of the Implementation Procedures of Saudi Competition Law by the Competition Council

With reference to the implementation procedures of Saudi competition law that are enforced by the Competition Council, some defects can be identified. Firstly, reference needs to be made to the ambiguity in Article 16. As stated before, Article 16 of Saudi Competition Law includes some actions that should be taken by the CC against the violator when a violation has been confirmed. However, this article does not specify when the confirmation of the violation of competition law takes place, so that to allow the CC to take these actions. For example, it can be after the litigation when the Committee for settlement of violations of competition law made its decision or it can be the investigation stage.

This ambiguity may lead to confusion, either for the CC or the violator, in terms of the interpretation of the stage of confirmation of the violation. If the confirmation of the violation occurs after the decision of the Committee for settlement of violations of competition law, it is worse for consumers and other competitors in the market because the violation took a long time to be removed. On the other hand, if the

[258] Ibid.

[259] Article 17 of the general provisions of rules governing exemptions and exceptions in Saudi competition law 2004.

confirmation of the violation occurs during the investigation stage, the violator can claim for compensation, and in the case of the defendant the "violator" is not convicted. As a result, this may force the Council to exclude these actions in practice to avoid paying compensation for the defendant if they are not convicted.

Secondly, as mentioned before, the period of time for making the decision by the board of directors of the CC with regard to giving approval for starting the implementation procedures of the Saudi competition law is considered a fundamental flaw. One of the shortcomings that faces any competition agency regarding the effective enforcement of competition law is the lack of regular meetings and the absence of some members of the board of directors from some meetings.[260] The board of directors of the CC plays a key role in enforcing competition law, where all implementation procedures in the Council must be approved by the board of directors of the CC. According to Article 10 of the Saudi Competition Law, the board of directors of the CC shall hold a periodical meeting at least once every three months or when there is need for it. Also, the meeting should take place in the presence of the Chairman or his deputy, who is also a member of the board of directors, and the presence of two-thirds of the members is required in order to have a quorum. Decisions are made on the rule of the majority. In the event of a tie, the vote of the Chairman of the meeting is taken into account.[261]

Although the Law provides for the appointment of a deputy by the Chairman of the board of directors of the CC and specifies that the deputy should be selected amongst members of the board of directors[262], if this position is still vacant, this may cause delays in the event that the Chairman is unable to attend. This is particularly important, considering that the Chairman is the Minister for Trade and Industry and is entrusted with numerous tasks and duties. This can cause the cancellation or delay of the meetings, taking also into account the fact that all council members are part-time and each of them represents a governmental agency, which means that they

260 Dabbah (n. 226), 457-475.
261 Article 8 of the Saudi Competition Law 2004.
262 Article 9 of Implementing Regulations of the Saudi Competition Law 2004.

have other duties and obligations to attend that may prevent them from attending. As a result, it is possible not to have a quorum for a number of meetings.

Thirdly, the period of time for making the decision by the board of directors of the CC in regard to giving approval regarding all implementation procedures may lead to perverting the course of justice by the violators through hiding or falsifying evidence, or through an agreement between the violators with regard to their confession during the interrogation stage, especially in cartel cases. On the other hand, the length of time may lead to more damage for consumers and other competitors. The length of the period of time is calculated based on two factors: the first one is the fact that every implementation procedure requires the approval of the board of directors of the CC and a specific period of time is specified for such decision. The second factor is the delays or cancellations of the scheduled meetings due to the absence of the Chairman or not reaching the required quorum.

Fourthly, once the CC has made a decision, the violator should be informed in writing before the beginning of the investigation or any interrogation by the enforcement officers.[263] However, this step may also contribute to further problems in the award of justice, because the CC loses the surprise element and gives the opportunity to violators to hide or destroy evidence. This can lead to unsatisfactory results of the investigation process and further delays.

Fifthly, as mentioned above, the competition law does not apply to wholly-owned state enterprises and to commodities whose prices have been determined by a Cabinet's resolution or a temporary decision by the Minister of Commerce and Industry in response to an emergency case or extraordinary circumstances.[264] To discuss the issue of exception for state-owned enterprises, the definition of state-owned enterprise should be given. Therefore, a state-owned enterprise is defined as an autonomous legal entity that is owned either wholly or partially by the government and participates in business activities.[265] There are those who believe

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[263] Clause 2 of the rules of governing the work of law enforcement officers in the Saudi Competition Law 2004.

[264] Article 3(b) Implementing Regulation of Saudi Competition Law 2006.

[265] OECD, *The size and Sectoral Distribution of SOEs in OECD and Partner Countries*, (OECD, 2014). available at < https://www.oecd.org> accessed 20 June 2019.

that the exception of Saudi competition law for state-owned enterprises is justified by the Saudi legal system and Islamic Law. More specifically, the Sharia principles can grant the government the right to monopolise some essential services and goods to ensure the provision of these services to citizens on a continuous basis.

Also, such monopoly is prohibited by monopolistic traders (private sector).[266] In fact, this is not true. According to the Islamic Law, the role of an Islamic country (government) in the market is to supervise and monitor, not to participate in commercial activities. The importance of state-owned enterprises in the Middle East is undeniable in terms of their contribution to gross domestic product (GDP), the creation of jobs and the overall achievement of the economic and strategic objectives of the state. For example, the development of any new and important sectors of the economy that cannot be developed by the private sector, because of the lack of incentive. Moreover, state owned enterprises have proved their ability to protect the markets during the emergence of violent fluctuations as well as their ability to restore trust to the market, when necessary.[267]

A study in Saudi Arabia confirmed that 86% of those surveyed trust the efficiency of state-owned enterprises and they stressed that these companies provide better services than private companies. Also, these enterprises have good and efficient administrative and technical staff. Therefore, these large industries must remain under state ownership. It is noted that the government's objectives in terms of keeping the ownership of some enterprises may differ from the private owners' objectives. It may be the goal of the acquisition is to achieve profits or maybe their goals combine profitability and the achievement of social, economic and development objectives.[268]

The existence of multiple or unclear targets regarding state ownership of enterprises leads to either excessive intervention in management of these enterprises or negative intervention. In both cases this may lead to conflicts or failure to achieve the goals

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[266] Alotaibi (n. 81).

[267] Governance expert, state-owned companies and global challenges, the economic newspaper, 13 October 2015, available at <http://www.alkhaleej.ae/analyzesandopinions/page/b2b4a170-1385-4fa6-8a74-6c450fbdbed0.> accessed 20 June 2019.

[268] Ibid.

they have been established for. Therefore, it is important to have a clear goals and priorities in each company, and profitability should be given primacy over social goals, so that the sustainability and stability of the company is ensured.[269]

As stated before, the promotion of competition and trade liberalisation in the market is one of the most important goals of privatisation. In this context, to create and maintain a competitive environment in the market, the privatisation of state-owned enterprises should be seriously considered. There are concerns that the privatisation of state-owned companies that operate in a monopolistic environment will lead to the creation of private monopolies that will abuse their dominant position against the public interest. Gradual reform may be the best solution through allowing these companies the time to adapt and change the way they are structured and operated. A good example is the privatisation of the electricity sector in Jordan, which began with the creation of multiple companies in the electricity distribution sector that allowed the development of a competitive environment.[270]

There are those who see justification in the exception of state-owned companies from competition law, considering the reluctance of the state in abandoning certain sectors using the argument that they protect the national economy and consumers, but this not a convincing argument. For example, an exception was granted to Saudi Airlines, in spite of the presence of other competitors whose participation in the market was recently allowed, as competition law and foreign investment rules were applicable to these companies. Despite the poor performance of Saudi Airlines and several consumer complaints for high prices and poor service, there are no signs that the government is planning to privatise the company and subject it to competition law. The argument of the Saudi government over the privatisation of Saudi Airlines is that its privatisation may lead to another monopoly of the private sector by virtue of the size of Saudi Airlines. However, privatisation is a better option compared to the current state of affairs where there is monopoly of service with higher prices and exclusion from the competition environment, which will have beneficial effects on

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[269] Ibid

[270] OECD, *State-owned Enterprises in the Middle East and North Africa: Engines of Development and Competitiveness*, (OECD, 2013) available at <https://www.oecd.org.> accessed 22 June 2019

the market and, most importantly, the consumers. One option is to allow it to be it may be partly privatised, which is acceptable, as it happened with telecommunications companies. In this case, to avoid the creation of a monopoly of the private sector to be created by virtue of the company's size, only a part of the shares was offered for subscription.

Finally, if the Saudi government does not have any intention to privatise Saudi Airlines, it should at least make it subject to competition law for protecting consumers and promoting fair competition in the market, especially after the withdrawal of one of the local operators in the civil aviation sector – Sama Fly – due to losses caused by the exception of state-owned enterprises from competition law. With reference to international experience, particularly that of developed countries, such as the UK, any public entity that participates in an economic activity is subject to the UK competition Act.[271]

The second exception is price fixing of some commodities by the Cabinet's resolution or a temporary decision by the Minister of Commerce and Industry. Government interference should be limited because such an exception may lead to collusion between companies and breaches of the law. For example, in the cement case where the Competition Council abandoned its responsibilities towards them when cement prices rose, the Minister of Commerce and Industry (and Chairman of the Council) met with the managers of the cement companies to resolve the problem, as companies relied on raising their price on the previous approval decision of the Cabinet to raise the price of cement to a certain price. The case was examined by the CC after the meeting, but it was decided that the price rise had been approved by the Cabinet and said that the cabinet had approved the higher prices, which led to another rise.

Indeed, this is one ambiguity of the competition law, as it does not indicate to what extent the exception decision can be extended. Also, the cement companies committed a violation bigger than price increases and have benefited from when the government approved it on exports too. Moreover, the cement companies have

[271] UK competition Act 1998.

targeted other markets and raised prices in those markets because of the large projects taking place during that period. Then they dumped cement with increasing prices on those markets, thus creating a scarcity in the local market. When consumers complained directly to the King about this issue, he made a decision to reduce the rate of exports to deal with the scarcity of cement in the local market. However, the cement companies reduced their production to create a scarcity in the local market, in order to raise the prices and this was a violation in itself, as cement was kept hidden in the warehouses and sold on the black market to distributors who took advantage of the consumers' needs and raised the prices.

Obviously, this is a breach of Article 4(2), which includes prohibition of storing or hiding the product to create scarcity in the market.[272] Some of those affected complained to the King again regarding the scarcity of cement, so the King issued a decision to stop exporting. The companies did actually comply with this decision but raised the price to the level of the prices on the black market. At this instance, the CC referred the case to the Consumer Protection Association, which was silent as usual. The reason is the agreements between the cement companies to raise the price and storing of the product.[273]

Furthermore, there are some factors that might have played a key role in regulating competition in the Saudi market by restricting or preventing competition. For example, the Commercial Agencies Law, the Foreign Investment law, the Consumer Protection Association and the Commercial Industrial Chamber.

Firstly, the Commercial Agencies Law is facing a big challenge and there is an ongoing debate among researchers, specialists and officials concerning the regulation of competition. There are claims to amend the Law and fix the problems and there are also claims that go further than that and propose to cancel it. However, the Saudi Competition Council confirmed that the Commercial Agency Law does not support the monopoly, as its opponents allege, and that a careful examination of its content

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[272] Article 4(2) of Saudi Competition Law 2004.

[273] Zamil Al-Qarni, 'Saudi Cement factories are preparing to throw 31 million tons in the sea' Arabian business new E-newspaper in (9 April 2009) <https://arabic.arabianbusiness.com/business/construction-industry/2009/apr/7/18880> accessed 23 June 2019

showed that the possibility of imports is available to anyone, and the current reality is the biggest proof that there are individuals or companies that import cars with the presence of exclusive agents in Saudi Arabia (the number and statistics exist on the Council site).

In fact, the agents are dividing the Saudi market, especially the exclusive agents for a particular product. For example, GMC has three exclusive agents, two of them in the Central and Eastern region and one in the Western region, and each one refrains from opening a branch in the other agents' areas. In addition, there are practices performed by the agent, which make him a monopolist of a product that manipulates the market with either consumers or distributors. For example, some agents store some types of cars, forcing customers to buy them from distributors at high prices to create a scarcity in the market and raise the price of the new models due to the previous model prices rising because of the scarcity resulting from the storage of the cars by the agents.

Therefore, there are those who see the need to consider the example of developed countries, such as from the European Union, where the Court of Justice of the EU has graduated commercial agencies from the competition because they consider that an agent is part of the producer and not independent. There was much opposition from those who argued that the agents compete with other agents in the market, either for the same or for similar items, as is the case in the car market where there are agents for Ford cars and the agents for Toyota.

Secondly, the Foreign Investment Law 2000, which was approved by the Royal Decree No. (M/1) dated 10 April 2000. It was an initiative by the Saudi government to support the economy through foreign investment and a necessary step to open the Saudi market as it was one of the essential requirements of joining the World Trade Organisation. It was also one of the steps that the Saudi government did to keep up with the rapid developments in the global economy, the effects of globalisation and the emergence of organisations of the world economy.[274]

[274] The Foreign Investment Law 2000.

Thus, the goals of opening up the Saudi market to foreign investment was sought to be achieved through creating more options for the consumers, raising the quality of the products and offering competitive prices, which in turn would benefit the consumers. Therefore, the Saudi government harnessed their potentials to do this by issuing a foreign investment law and a competition law, by restructuring the judiciary, establishing an authority for foreign investment and facilitating government measures in terms of licensing and providing information about the market to the consumers.

However, some of the government's initiatives and decisions may give the impression that there is either a lack of experts to offer proper advice or that the government has been forced to open up the Saudi market to foreign investment just to join international organisations. Some of the procedures that needed to be followed and some of the conditions that had to be met may be too difficult for entering the market and working in a competitive environment. Even those sectors that were selected for foreign investment included conditions that may be difficult to be met by foreign companies, such as that capital required was quite high and the number of workers in companies coming from the home country must be up to a certain number. Furthermore, fees were imposed, an annual 20% tax as a Zakat, when Zakat for the local companies is 2.5% as stated in Islamic law.

Also, the government has imposed that a certain number of Saudi citizens must be employed in the company and it can be understood that such a decision is one of the goals for attracting foreign investment, which is the employment of Saudi nationals. It is worth mentioning that many countries are doing the same to support the employment of nationals. However, what needs to be clarified here is that the citizens' salaries are much higher than those of foreigners. Another issue to consider is that this condition leads to lack of efficiency due to the scarcity of specialists in some areas of the economy, such as economists and engineers. Therefore, companies may have problems to comply with this requirement due to lack of options and this is an issue that the Investment Authority cannot address alone without the support of the government. However, this unwillingness of the government to solve such a problem hides an attempt to force the Ministry of Labour to reduce the requirements in the employment of foreigners, especially in cases where there is a lack of qualified nationals. Another solution would be to allow the employment of foreigners in

exceptional cases, where there is no other option but to bring in foreign labour, especially qualified labour, but only after the announcement of the official employment agencies, such as the Ministry of Labour, that there are no qualified citizens available for that job.

Thirdly, the Consumer Protection Association. Consumers has been the weakest link in the Saudi economy, as there were not any laws to protect and promote their interests until the decision to establish the Consumer Protection Association in 2007. It is a non-governmental body that specifies consumer rights and obligations of companies in relation to consumer protection. and yet there is no suggestion of any willingness on the part of the government to reform this. We can see unjustified higher prices on products, despite the government providing guidance to companies and supporting certain products, such as rice, milk, as well as a reduction of fees and administrative procedures for domestic and foreign investors, such as reduced VISA costs for foreign workers.

Additionally, the Consumer Protection Association does not perform its required duty in relation to consumer protection by monitoring prices across the market and combat monopolistic behaviours of certain companies. This is evidenced by the fact that we did not see any complaints raised or any cases presented to the CC by the Consumer Protection Association. For example, the Council referred the issue of the dairy companies to the Consumer Protection Association for consideration, so the Council basically gave up its responsibilities because the Consumer Protection Association is considered as an interested party for consumer protection issues. The case was lost between the authorities and the CC violated the law when the President of the Council met with the managers of the dairy companies to resolve the problem. After the meeting, he said that he did not consider the issue as a case that the Council was responsible for investigating.[275] This is an example of poor implementation of the law. So I would recommend the issuing of a strong consumer protection law and establishing an independent government agency to sponsor consumer protection or annexation to the council as is done in Britain.

275 Alotaibi (n. 81) 157-158.

Finally, the Commercial Industrial Chamber. In 1946, the Royal Decree No. 23/3/2558 was issued approving the establishment of the Commercial Industrial Chamber in Jeddah, as an institution working on improving commerce and industry in the country and protecting them against foreign competition. By virtue of this new system, the government had the right to monitor and supervise all commercial chambers and their accounts. The decision of the Shura Council No. 259 in 1948 was then issued to establish the Commercial Industrial Chamber in Makkah. This was followed, in 1949, by introducing the first commercial industrial chamber system, by the virtue of which the Eastern Region Prince issued letter No. 140806 in 1953, establishing the Commercial Industrial Chamber in the Eastern Region.[276]

At the beginning, the Commercial Industrial Chamber played a great role in helping traders and competitors in drawing up their policies and providing studies and statistics about the market to enable registered traders to improve their business. However, with the modern development of the economy, the Commercial Industrial Chamber has become a union of traders through which they standardise their policies and protect their interests against consumers, who are not equally protected and can easily be disadvantaged.

For example, there was a case of a car dealerships meeting about the problem of the high price of cars during the global economic crisis that started in 2008. The meeting of car dealerships took place at the Commercial Industrial Chamber to have a common decision on how to safeguard their interests, as during that period of crisis, car prices decreased around the world, which made some companies to offer with the purchase of a car another car for free. But in Saudi Arabia, car prices rose significantly, because the meeting resulted in all agents following the same tactic in the market.[277]

At this point, it is necessary to consider the Commercial Industrial Chamber Act 1980 and its role in repair or tighten censorship of it to prevent the meetings and agreements that are issued and cancellation of the committees or reduction of their powers for the protection of the consumer. The administrative procedures and

[276] The Commercial Industrial Chamber Law 1980.
[277] Alotaibi (n. 81) 158.

controls and standards in the Saudi Food and Drug Authority determined the shelf-life of milk in five days from the date of production. The Dairy Committee, which is affiliated to the Commercial Industrial Chamber claimed that the shelf-life of milk products has caused losses of up to 125 million litres of milk worth 500 million Saudi riyals, so the it called for a seven day shelf-life, which is still low compared to other countries of the world, such as the UK where shelf-life is up to 14 days.[278] This waste of energy, work force and production conflicts with the state's policy of rationalisation in the use of energy, as well as the adopted policy of other countries that seek to provide enough food for their people. Also the Committee called for adding a reference to the expiration date only, as many countries around the world, such as New Zealand, US, Canada and Australia, in their products have only a reference to the expiration date, instead of mentioning both the date of production and the expiration one, something that can create confusion to the consumer.

The refutation of such case

Firstly, it is clear that the Commercial Industrial Chamber put traders' interests above consumers' interests, as it became evident from the case of the dairy products and the price raise. Secondly, the administrative procedures might have an effect on competition, as it can be very difficult for companies to meet some of the criteria. Thirdly, in comparison to other countries, Saudi Arabia differs in many aspects, including climatic conditions which may affect several products during production or transportation. However, the Committee claimed that the quality of dairy products is considered to be the best in the world and studies have been provided by the Saudi Food and Drug Authority and other independent foreign bodies to support this assertion. Finally, prices in Saudi Arabia are higher than in other countries, so it may be appropriate to return to the previous prices or reduce production when shelves in large supermarkets and small shops in Saudi Arabia are full of milk and dairy products, so there is no shortage in the market.

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[278] 6 reasons why the date of production remain on dairy packages, Makkah news paper, 5 October 2015, available at https://makkahnewspaper.com/article/100156 accessed 15 May 2019.

3.4 The Prosecution and Litigation Procedures

3.4.1 The Prosecution Stage before the Committee for Settlement of Violations of Competition Law

As stated before, the Committee for Settlement of Violations of Competition Law was established under Article 15 of Saudi Competition Law. The role of this Committee is to hear lawsuits regarding violations of competition law and make a decision about them.[279] In terms of the procedure of the prosecution stage before the Committee, there are certain steps to be followed.

Firstly, the board of directors of the CC should approve the commencement of the prosecution and litigation procedures before the Committee. this step is considered as a response to the General Secretariat's request after the investigation, the collection of evidence and interrogation of the accused people have been completed. Secondly, once the Committee for Settlement of Violations of Competition Law has received the file of cause, the violators and the prosecution representatives should be notified regarding the date of the hearing of the case before the Committee at least fifteen days before the hearing. In addition to the hearing date, this notification includes the violation details and requests all parties' attendance so that all arguments and relevant documents are presented before the Committee.

As mentioned before, the Committee consists of a Head and four members.[280] The session before the Committee does not take place unless the Head and at least three members are in attendance. In the case of absence of the Head, the role of the Chairman of the panel in the session will be taken by one of the Committee's members, who is chosen by the Head. The Committee's decision shall be made by a majority vote and in the case of a tie, the Chairman's vote is taken into account.[281]

All kinds of violations of competition law can be litigated before this Committee, including the offence of confidential disclosure of information or documents or achieving benefits directly or indirectly that might be committed by the officials of the CC in the course of their duties. The Competition Law includes two types of

[279] Article 15 of Saudi Competition Law 2004.
[280] Article 17 Implementing regulation of Saudi Competition Law.
[281] Ibid Article 18.

punishment. Firstly, a general punishment against violators, who breach the provisions of competition law. Such violators will be punished with a fine that does not exceed 10% of the total turnover or ten million Saudi Riyals. In case of repetition, the fine would be doubled. Also, if the violation was not removed after the Committee's decision, the Committee may suspend the activity of the company for a period of time, but not more than one month, or may withdraw the company's licence permanently. In addition to these punishments, since the decision will be published and the violator has to pay for the publication costa, as well as reimburse all profits that were achieved via that violation of law.[282]

Secondly, there is special punishment for officials in the CC, who breach the provisions of Article 11(5) regarding the offence of confidential disclosure of information or documents or achieving benefits directly or indirectly through the course of their duties.[283] Therefore, any officials in the CC, who disclose confidential information or documents, are subject to the punishment under Article 13 of the Saudi Competition Law. There are three types of punishment for these officials: a fine that does not exceed five million Saudi Riyal, imprisonment for a period that does not exceed two years, or both.[284]

According to Article 20 of the Implementing Regulation of Saudi Competition Law, the Committee shall make the decision expeditiously, which means during the first session unless there is a need for more sessions. In this case, all parties should be notified about the next sessions.[285] Moreover, the Committee may need more information or extra evidence, therefore IT might have to repeat some of the investigations, collect more evidence and interrogate more suspects. This takes place either by all the Committee's members or by one or more of the Committee's members that are authorised to conduct the investigation and submit any evidence or information to the Committee.[286]

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[282] Article 12 has been amended in accordance with Royal decree No. M/25 on 11/02/2014. The previous punishment was that the violator will be punished by a fine that does not exceed five million Saudi Riyal. In case of repetition, the fine would be doubled.
[283] Article 11(5) of Saudi Competition Law 2004.
[284] Ibid Article 13 of Saudi.
[285] Article 20 of Implementing regulation of Saudi competition law IRCL.
[286] Ibid Article 19.

The violators should remove the offence once the notification of violation is received, even though removing the violation does not exempt the violator from a punishment under the provisions of Saudi Competition Law. In spite of this reference in Article 16 of Implementing Regulation of Saudi Competition Law, it is not clear at which stage this needs to happen. This can create ambiguity for both the Council and the accused people, as the confirmation of the violation could be either after the Committee's decision or after the completion of the investigation stage, which is before the prosecution and litigation stage.[287]

If the Committee considers that the violation requires punishment by imprisonment, it will refuse to review the case and submit the case file to the Chairman of the CC with the recommendation to refer the case file to the Board of Grievances (Administrative Court). The Board of Grievances will review it and hear the case from the beginning by the representatives of the prosecution appointed by the CC and the violator(s).[288]

It can be clearly seen that there is no other case of imprisonment under the provisions of Saudi Competition Law except the punishment provided under Article 13.[289] It will be imposed on whoever breaches Article 11 regarding the offence of the confidential disclosure of information or documents or achieving benefits directly or indirectly by the officials in the CC via their jobs.[290] It is unreasonable that the Committee, which is responsible for applying the Saudi competition law, cannot apply the law on the officials who breach the law. Also, as stated before, the punishment for the officials are of three types: a fine that does not exceed five million Saudi Riyal, imprisonment for a period that does not exceed two years, or both of these punishments.[291] However, according to Article 24 of new Competition Law 2019, the punishments have been changed as the fines have been and imprisonment has been abolished. More specifically, "Without prejudice to any severer penalty provided for by the Law or any other law, a fine of not more than SR

[287] Article 16 of Implementing Regulation of Saudi Competition Law.
[288] Ibid Article 20.
[289] Ibid Article 13 of Saudi Competition Law 2004.
[290] Ibid Article 11(5).
[291] Article 13 of Saudi Competition Law 2004.

(1) million shall be imposed on anyone who discloses a secret related to his work from the members of the Board or the employees of GAC for the purpose of achieving material or moral benefit".[292]

According to Article 15, the jurisdiction of the Committee is to review and make a decision about the violations that are subject to fines.[293] This might be for one of the following reasons: either due to lack of competence of the Committee's members or a matter of integrity, as the officials of the CC are considered as colleagues. Furthermore, as discussed in chapter two, the Board of Grievances (Administrative Court) represents the administrative judiciary in Saudi Arabia. It has many functions as an appeal court for all administration decisions against individuals or bodies. Also, the Board of Grievances (Administrative Court) does not hear cases at the first instance, because it is an appeals court. Therefore, it is not acceptable to impose upon any institution, especially judicial institutions, another jurisdiction outside the function that they are established for.

Once the decision has been made by the Committee, it should be approved by the Chairman of the CC.[294] All parties of the case should be informed about the decision that includes the notification about their right to appeal before the Board of Grievances (Administrative Court) within sixty days from the date they are informed about the decision.[295] The Committee's decision is not considered as a final judgement even if it is approved by the Chairman of the CC, unless the period of appeal has expired without the filing of an appeal before the Board of Grievances (Administrative Court) or the judgement has been issued by the Board of Grievances (Administrative Court) after the exhaustion of all levels of the litigation. This will be discussed in the following section.[296]

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[292] Article 24 of Competition Law 2019.
[293] Ibid Article 15
[294] Article 22 of Implementing regulation of Saudi Competition Law.
[295] Ibid Article 21.
[296] Ibid Article 22.

3.4.2 The Appeal Stage of the Committee's Decision before the Board of Grievances

Administrative Court

With reference to Article 21 of the Implementing Regulation of Saudi Competition Law regarding the notification for all parties concerning the Committee's decision and their right to appeal before the Board of Grievances (Administrative Court) within sixty days from the date of the decision and its notification, there are three actions that could be taken by all parties after the notification. Firstly, parties may accept the decision and do not appeal before the Board of Grievances (Administrative Court). Secondly, a violator appeals before the Board of Grievances (Administrative Court) within sixty days from receiving the notification of the Committee's decision. Thirdly, the Council of Competition may appeal through its representatives of prosecution before the Board of Grievances (Administrative Court), if it does not agree the decision of the Committee. This last action could be taken once the Committee has decided in the violator's favour.[297]

According to Article 17 of the Saudi Competition Law, once the committee has issued a decision it can be appealed before the Board of Grievances (Administrative Court); the appeal procedures should be in accordance with the Law of the Board of Grievances and its regulations. The Board of Grievances (Administrative Court) has some circles, and each circle has a certain jurisdiction.[298] According to Article 12(1) of the Law of the Board of Grievances, the Administrative Court shall have jurisdiction to hear cases and appeals regarding the annulment of the final administrative decisions issued by quasi-judicial committees, such as the Committee for Settlement of Violations of Competition Law and the Committee for Settlement of Violations of Telecommunications Law.[299]

After the appeal stage before the Board of Grievances (Administrative Court), the Board of Grievances will issue its judgement. All parties can appeal before the Administrative Court of Appeal against the judgement issued by the Board of

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[297] Article 21 of Implementing regulation of Saudi Competition Law.
[298] Article 17 of Saudi Competition Law 2004.
[299] Article 13 (1) of the law of the Board of Grievances (Administrative Court).

Grievances (Administrative Court) within thirty days from the date of receiving the judgement, otherwise the verdict is final.[300]

3.4.3 The Appeal Stage Against Judgements of the Board of Grievances (Administrative Court) before the Administrative Court of Appeal

As stated above, any party has the right to appeal against the judgement issued by the Board of Grievances (Administrative Court) within a specified period, as provided by Article 12 of the Law of the Board of Grievances.[301] The verdict of the Administrative Court of Appeal is considered to be final unless there is one or more defects in the procedure, which will be discussed in the following section.

3.4.4 Reviewing of the Judgement Stage by the Supreme Administrative Court

According to Article 11 of the Law of the Board of Grievances, the Supreme Administrative Court has the jurisdiction to review any objections about the judgements issued by the Administrative Court of Appeal, if the objection regards the following: if the judgment conflicts with the provisions of Islamic law or Saudi statutory laws. Secondly, if there is a mistake in the application or interpretation of the above laws. Thirdly, if the judgment is issued by a non-competent court. Fourthly, if the judgment is issued by a non-composed court and according to the system. Also, if the judgment is based on a mistake regarding the conditions of the violation or its description. Moreover, if the judgment regarding the case has been already considered and a previous judgment has been issued about it. Finally, if there is a conflict of jurisdiction between the courts of the Board of Grievances.[302]

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[300] Article 33 of the Pleadings law before the Board of Grievances.
[301] Article 12 of the law of the Board of Grievances (administrative Court).
[302] Ibid Article 11.

3.4.5 The Defects the Prosecution and Litigation Procedures

There are some defects in the prosecution and litigation procedures that can have a considerable effect on the protection of competition and should be taken into account once the Saudi legislator intends to proceed with a reform.

3.4.5.1 The Weakness of Penalties and Lack of Criminal Offence:

The imposition of financial sanctions and fines in any jurisdiction is not an objective in itself, but it aims to act as a strong deterrent for not breaking and violating the law. In the area of competition law there is a number of financial penalties provided for violations that are considered to be weak compared to the fines imposed on Council officials who violate the provisions of competition law.[303] According to Article 12 of the Saudi Competition Law, any breach of this law shall be subject to a penalty either by a maximum 10% of the sale volume or not more than 10 million SR.[304] In addition, the Act includes a penalty for Council officials, who breach confidentiality, that is either a fine of maximum 5 million SR or imprisonment for a maximum 2 years, or both.[305] However, according to Article 19 of the new Competition Law 2019 the penalties have been changed to the following:

'1) Without prejudice to the provisions of Article (24) of the Law, whoever violates any of the provisions of Articles (5, 6, 7, and 11) of this Law shall be punished by a fine not exceeding (10%) of the total annual sales value subject of the violation. When it is impossible to estimate the annual sales, the fine shall not exceed ten million riyals. The Committee may, at its discretion, impose a fine not exceeding three times the gains made by the violator as a result of the violation.

2) Without prejudice to any severer penalty provided for by the Law or any other law, and without prejudice to the provisions of paragraph (1) of this Article, whoever violates any provision of Article (16) of the Law shall be punished by a fine not exceeding (5%) of the annual sales value. When it is impossible to estimate the annual sales, the fine shall not exceed five million riyals.

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[303] Maher Dabbah, *Competition Law and Policy in the Middle East,* (Cambridge University Press, 2007), 205.
[304] Article 12 of Saudi Competition Law 2004.
[305] Ibid Article 13.

3) If the violator repeats the violation, the Committee may double the fine awarded in the first instance. The violator shall be deemed a recidivist if the same violation is committed within three (3) years from the date of the resolution of the first violation".[306]Also, according to Article 20 of the Competition law 2019, "Without prejudice to the provisions of Articles 12(1),19, and 24 of the Law, anyone who violates any other provision of the Law or the Regulations shall be punished by a fine not exceeding (2) million Riyals'.[307]

As it was mentioned earlier, a financial fine is not a goal itself, but a strict fine may be a strong deterrent that may prevent companies from infringing the Law, but this is an issue on which there were numerous opinions. Some of them think it should be determined at 10% of the violator company's sales, while others prefer the adoption of a specific amount with a threshold that may reached in the event of repeated violations. Moreover, there are those who consider that the penalty should be higher than the expected profits of the violator company had the violation not been committed.[308] However, there are those, who believe that imposing a large fine on companies that breach competition law will lead to the consumers and shareholders indirectly paying that fine, as these companies may raise their prices to recover the sum of the fine. Also, such companies may reduce the dividends that should be paid to the shareholders every year in order to make up for the value of that fine.[309]

Also, a large fine may be unfair to small and medium size companies, as opposed to large companies, which may lead small companies to incur losses and even exit the market. This of course would equal to unfair competition in the market and enhance the monopoly of large companies.

Therefore, two criteria must be taken into consideration: the size of the company and the size of the infringement and the level of intention of the reported company, which is trying to benefit from the Leniency programme. Each case should be decided

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[306] Article (24) of Competition Law 2019.
[307] Article (20) of Competition Law 2019.
[308] R. Shyam Khemani and others, *A framework for the design and implementation of competition law and policy*, (World Bank Group Publications, 1999), 149.
[309] Javier Tapia, 'Increasing deterrence in Latin American competition law enforcement regimes, in Richard Whish and Christopher Townley, *New competition jurisdictions shaping policies and Building institutions* (Edward Elgar 2012), 154.

individually, and the members of the Committee decide which criteria should be applied depending on the circumstances of the case and the company's status. Nevertheless, raising the fine from 10% of the total annual sales value up to maybe 20% and the amount of 10 million to 15 million riyals should be considered, with a further increase in the event of a violation being repeated, because some Saudi companies have large profits compared to other companies.

Also, the imposition of financial penalties will be borne by the company's budget, whereas the manager or employee in charge of the violation, which was an individual act, will only be exposed to dismissal as the ultimate penalty. Therefore, the inclusion of criminal sanctions must be considered as a strong deterrent for managers or employees that do not wish to be exposed to the jail penalty. When people know that they would be sent to prison or this would be recorded in their criminal record, they are more likely to refrain from being involved in the offence to protect themselves and their criminal record.

As the Saudi legislature has imposed sanctions on the staff of the CC, it can do the same to corporate executives, who are involved in violations of competition law, as the Council employees, when they commit this offence, they only cause harm to the award of justice process, whereas the violations of corporate executives have far more serious implications, because they can damage market competition and affect competitors and consumers.

3.4.5.2 Dividing of the Committee's Jurisdiction Among Two Institutions

There is no justification for partially diverting the Committee's jurisdiction to another institution, even if it is a court, because the Committee for Settlement of Violations of Competition Law, which is a quasi-judicial Committee responsible for applying the Saudi Competition Law on the violators, cannot apply the law on the officials who breach the law. In addition, the Board of Grievances (Administrative Court) does not consider any case at the beginning because it is an appeals court. Therefore, it is not acceptable to impose upon any institution especially the judicial institutions another jurisdiction outside the function that it was established for. This is evidence of the existing of conflict and overlaps between the judicial and governmental institutions in Saudi Arabia

3.4.5.3 Leniency Programme

There was no leniency programme in Saudi Competition Law 2004. However, the new Competition Law 2019 introduced leniency programme. According to Article 23 of Competition Law 2019, 'The Board may decide not to refer to the Committee the entity in violation of the provisions of this Law, if such entity proactively provides evidence to reveal its partners in that violation. The Board may also accept settlement with the violating entity. The Regulations shall specify the necessary controls and requirements therefore, and the mechanisms for compensating aggrieved persons'.[310] Thus, if any company provides evidence on a proactive basis the committee will consider to exonerate it from the penalty. However, it is not clear whether it will be full le exoneration or what are the criteria and the factors that the committee will consider in deciding about the abovementioned exoneration.

Several studies have illustrated its importance in order to deter offenders and highlight the lack of cooperation and coordination with each other that creates an environment of distrust among them. This in turn encourages them to consider breaking the law through anticompetitive agreements that harm consumers and other competitors in the market. Leniency programme is a system that exonerates a cartel member from a fine when they inform the competition authority about a violation of competition law, either fully or partly.[311] The problem is how to implement this programme. For example, most South American countries have adopted this programme in their competition law. However, it has been successful in Brazil but not in Mexico. This might be due to how it was designed or how it was applied. There are those who believe that reducing the penalty by using this programme could lead to raising the level of deterrence and reducing the efforts spent on the investigation of one violation to another violation's favour.[312]

In addition, there are those who argue in favour of the complete exemption of an offender from a fine when the offence is reported at the beginning of the agreement and the gradual reduction as the procedure of investigation continues up to the point

[310] Article 23 of Competition Law 2019.
[311] UNCTAD report, (n. 38).
[312] Tapia (n. 305) 156.

of the case hearing and the conviction. Another proposal is based on the idea that if the offender reports the violation, the fine shall be reduced by 50%.[313] It may be appropriate to take full leniency before the start of the offence or before the detection and investigation of it, and part exemption during the investigation and before litigation in order to help the offender confess and assist the authorities in the prosecution of the other offenders, thereby assisting the competition agency to complete the investigation. Part exemption him during the investigation is a tempting option because of the proximity to the conviction, which means that there are less chances of getting away with it. A leniency programme could be used as an opportunity for some companies to implicate other companies in a breach of the law, only to exclude them from the market, because they will not be able to bear the burden of the fines. Therefore, it is important that the authorities are very vigilant in the application of this programme.

[313] Ibid

3.5 Conclusion

In this chapter, the institutional framework of the Council of Competition in Saudi Arabia has been discussed, including its formation and functions as the first objective of the research. The evaluation of the institutional design of the Council of Competition was through four elements that are considered as the characteristics of successful competition authorities. Specifically, the independence, the leadership, the structure and processes and the relationships with regulatory agencies. The evaluation of the institutional design of the Council of Competition would give the researcher a clear vision and help in selecting the authority that has the capacity and sufficient recourses to be superior hierarchically or at least to help in choosing the workable model for the relationship between the Council of Competition and the regulatory agencies.

Also, the enforcement procedures and their defects have been explained. Moreover, the prosecution and litigation stages have been analysed. It can be clearly seen that there are some defects in the design of the CC and its implementation, which may negatively impact the competition in the Saudi market in general and the regulated sectors in particular. The CC does not have the efficiency and capacity to perform its role in the Saudi market. Thus, the Competition Law needs to be reformed in order to deal with some ambiguity points in it and the institutional framework of the CC needs to be amended, in such a way to improve its competence and effectiveness.

The next chapter will focus on the regulation and protection of competition in the Telecommunications, Electricity and Civil Aviation market by the regulatory agencies.

Chapter Four
The role and competence of the regulatory agencies

4.1 Introduction

In Saudi Arabia, the establishment of regulatory bodies is a step that follows the adoption of sectoral regulations which must be applied by these bodies in order to regulate their sectors. Regulating competition in Saudi regulated sectors is a shared task between two separate bodies, namely, the competition authority which is the Council of Competition, established by the competition law,[314] and regulatory bodies which were established by sectoral regulations such as the Telecoms law, Electricity law and Civil Aviation law.[315] Both the competition law and sectoral regulations including competition rules make up the Saudi Arabia competition law regime. Having discussed the function of the council of competition in chapter three, this chapter focuses on regulating competition in Saudi regulated sectors by regulatory bodies.

The aim of this chapter is to discuss the role of regulatory bodies in Saudi regulated sectors as far as competition is concerned. The discussion includes evaluation of the performance of these bodies and to identify their capacity to regulate competition, as one of the most important roles of these bodies. The analysis is of the responsibilities of sector regulators by discussing the regulatory framework which includes the legal framework of sectoral regulations and the institutional framework of regulatory bodies, their obligations and to determine the current practises of regulating competition in regulated sectors by regulatory bodies. Also, the chapter explores

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[314] Competition Law promulgated under the Royal Decree No (M/25) dated 4/5/1425H 2004. http://mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/Documents/a26.pdf?AspxAutoDetectCookieSupport=1> Accessed 25 June 2019 (hereinafter 'Competition Law').

[315] Implementing Regulations of the Competition Law Promulgated under the Resolution of Competition Council No 126 Dated 4/9/1435 AH (1/7/2014 AD) http://www.wipo.int/edocs/lexdocs/laws/en/sa/sa007en.pdf> Accessed 25 June 2019 (hereinafter 'Regulations and Competition Rules').

challenges, obstacles or disadvantages of regulatory framework that may be faced by those bodies to perform their functions which then leads to prevent or restrict them to reach their targets. Through the current practices and applying the propositions that have been provided in chapter One, it will be examined these propositions in this chapter and find out if these bodies have the sufficient capacity to regulate competition in their sectors whether by their sole enforcement or by sharing task with the Council of Competition or even withdraw their power concerning regulating competition in their sectors if needed. At the end, one of these propositions will be adopted after discussing its mechanisms of application and the advantages and disadvantages. The associated proposed solutions or reforms at the end of this research would be based on a workable model whether from other countries' experiences or a special applicable model for the Saudi case that is in line with the legislation and political, economic and social systems and Saudi Arabia.

Regulation thrives within the institutional and political context of every state. The scope of this chapter to analyse the regulatory system in Saudi Arabia for the telecommunications, electricity and civil aviation sectors. These three sectors were chosen because they each represent three distinct types of functional relationships between sectoral regulators and the competition body within the regulatory framework in Saudi Arabia; therefore, this offers a representative spectrum of these relationships towards achieving a comprehensive analysis of the overall regulatory framework.

Towards achieving the aims of the present Thesis, the chapter is structured into seven sections. Section 2 presents a background of the sectoral regulation. Section 3 analyses the functions of the regulatory bodies. Section 4 provides an overview of the regulated sectors in Saudi Arabia, which are the telecommunications, electricity and civil aviation sectors including of the development stages of these sectors. Also, this section presents a background of the sectoral regulation and the systematic design of the Saudi regulated sectors. Specifically, section 5 focuses on the telecommunication sector and includes an analysis of the different functions of the Ministry of Communications and Information Technology and the Communications and the Information Technology Commission (CITC) as the independent regulator for the telecommunications sector. Section 6 is concerned with the institutional framework in the electricity sector. This section traces the trajectory of Saudi

Arabia's proposed privatisation programme of the electricity sector. It analyses the Electricity and Cogeneration Regulatory Authority (ECRA), the regulatory body responsible for the provision of adequate, high quality and reliable services. Section 7 analyses the civil aviation sector in Saudi Arabia.

4.2 Background of the Sectoral Regulation

The significance of sectoral regulation has emerged after the introduction of privatisation and regulatory reforms in many countries. There is a link between sectoral regulation and competition law and policy, where there are special competition regulatory tools that have been adopted in some sectors in many regulatory systems around the world. Also, there are some measures that have been adopted as fundamental pillar for the regulatory framework of these sectors such as the establishment of regulatory bodies and/or empowering the associated minister with sectoral regulatory authorities. Regulatory frameworks are necessary for a number of reasons which include to undo state control and planning, the fact that there are naturally emerging monopolies in all sectors and, finally, the need to increase competitiveness in these sectors.[316]

As stated before in chapter 1, regulation refers to a legal instrument that should be applied by an independent authority or non-ministerial department in sectors by supervising, monitoring and regulating. Also, sector specific regulation is enforced on particular sectors only. Regulation can be seen as a tool for allowing a single company to secure the advantages of production widely, while at the same time protecting consumers from being abused by a monopoly company.[317]

Introducing competition in regulated sectors required the establishment of new regulatory bodies or at least a reconsideration of the role of the existing bodies. Also, in economic perspective the importance of designing the proper relationship between regulatory bodies and competition authorities has appeared widely. There is a comparative advantage for competition authorities over regulatory bodies, once anti-

[316] Maher Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) 70(1) Cambridge Law Journal 113.
[317] William Sharkey, *The Theory of Natural Monopoly* (CUP 1982) 1-20, 16.

competitive behaviours and mergers do not lead to increasing of competition in these regulated sectors.[318]

There are three different categories of regulation, namely, technical, economic and access regulation. Specifically, technical regulation is concerned with the processes and production methods for products, the associated administrative provisions, and compliance with safety and environmental requirements, which are mandatory by law.[319] A characteristic of technical regulation is the continuous monitoring, which is believed to require regulators that have the technical knowhow and resources, which are sector-specific and that these regulators also have the required time to monitor on an ongoing basis.[320]

Economic regulation is concerned with pricing and marketing practices, which include advertising.[321] As it is the case with technical regulation discussed earlier, economic regulation is also a continuous process, and other aspects that they share with technical regulators is that sector-specific regulators are the most appropriate to conduct economic regulation; the only difference is that competition authorities may also be considered appropriate for a managing economic regulation.[322]

Access regulation is concerned with making sure that access to public utilities is non-discriminatory.[323] An important characteristic of access regulation is that it involves the consideration of two or more complementary services[324], which include, for example, aircraft engines and airframes or wine and glass bottles and wine, basically two or more inputs in production are considered complementary.[325] Complementary services are common in the telecommunications sector and include end-to-end

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[318] OECD, 'Relationship between regulators and competition authorities' 1998 <http://www.oecd.org/regreform/sectors/1920556.pdf> (Accessed 30 June 2019).

[319] Agreement on Technical Barriers to Trade (TBT Agreement) Annex 1. http://www.worldtradelaw.net/uragreements/tbtagreement.pdf.download#page=1> (Accessed 30 June 2019).

[320] Dabbah (n.312), 114.

[321] Ibid

[322] Ibid

[323] OECD, 'Access Pricing in Telecommunications', (2004) http://www.oecd.org/regreform/sectors/27767944.pdf> (Accessed 30 June 2019)

323 Ibid, 22, para 1.1

324 Ibid, 22, para 1.1

325 Ibid.

telecommunications service, via a telephone or the Internet and require a number of different components.[326]

In order to conduct access regulation a large amount of data may be required, so that access terms and monitoring of compliance can be determined by the appropriate operators.[327] Therefore, it would stand to reason that the sector regulators are the most appropriate bodies to manage access regulation. However, it is also important to note that there have been numerous competition authorities that have developed the ability and expertise in areas that are relevant to the access issues related to the context of 'abuse of dominance' and thus it is apparent that they also have advantage in managing access regulation.[328]

The three types of regulation that have been discussed in the above and not directly reflective of the competition law on which they may be derived because such regulation is designed to achieve something that is beyond the basic framework of competition law. Apart from where mergers are concerned, competition law is mostly dependent on *ex-post* regulation,[329] and sectoral regulation is pro-active, as opposed to competition law that is reactive.[330] Competition law is effectively concerned with protecting competition by stopping anticompetitive practices and sectoral regulation seeks to promote competition by structuring the market towards facilitating competition. There are differences between these two types of measures in terms of the ways in which they try to resolve issues. Specifically, with competition law the focus is on reliance market mechanism and market failure,[331] but

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[326] Ibid.
[327] Dabbah (n. 312), 115.
[328] See, for example, the European Commission's investigation and findings of 2004 against Microsoft in which it found abuse of dominance on the part of the company, due to its refusal to disclose interface information, available at <https://www.lexology.com/library/detail.aspx?g=42831e06-53a5-409d-9c68-60de01f5e4c0> Accessed 30 June 2019, See also the South African Competition Commission's investigation and findings against Telkom in 2009 for abuse of near-monopoly position by charging excessive prices for the basic infrastructure needed by its downstream rivals. Available at <https://mybroadband.co.za/news/business/10226-telkom-abused-its-monopoly-says-compcom.html.> Accessed 30 June 2019.
[329] In almost all jurisdictions around the world, mergers are assessed on an *ex ante* basis.
[330] Dabbah (n. 312), 115.
[331] F. Baton, 'The Anatomy of Market Failure' (1958) Q.J.E. 351.

with sectoral regulation the emphasis is on the regulator and the intervention is designed to be frequent in order to achieve the desired outcomes.[332]

Although it has been shown here that there are differences between sector regulators and competition authorities, the OECD said that both should be on the same page because they share many objectives and, if they work together in a complementary manner, then economic growth is achieved which would be unlikely if they worked separately.[333] Thus, it stands to reason that in the approaches to competition there is an overlap between competition law and sectoral regulation.

In the Saudi context, there are three different categories of sectoral regulations, namely technical, economic and access regulation. All of these types of regulations can be included in one law, such as the Saudi Telecommunications Law and the Saudi Electricity Law or might be two of them to be included in one law, such as the Saudi Civil Aviation Law. To illustrate these types of regulations, the definition of these regulations should be provided.

With reference to Saudi Arabia specifically, it has been shown that regulated sectors have emerged because the government have embarked on a policy of privatisation and liberalisation and regulatory reforms in order to meet the requirements of recent global economic development. The sections that follow present how three regulated sectors have emerged in the Saudi economy.

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[332] P. Weiser, 'Paradigm Changes in Telecommunications Regulation' (2000) U.C.L. Rev. 819.

[333] Organisation for Economic Cooperation and Development (OECD), 'Relationship between Regulators and Competition Authorities' DAF/COMP/GF (OECD, 2005), para 8 (hereinafter 'OECD Report 2005').

4.3 Functions of the Regulatory Bodies

The role of the state has been to deal with sources of market failure[334] whereby the most efficient outcomes are not achieved[335] and is caused by missing or incomplete markets due to the power held by the utility service provider, which in most cases is the government. Resulting problems of this situation include unavailability of supply of utilities or even governments withholding supply. Another well known reason behind market failure is referred to as the 'information asymmetry' whereby the industry has the advantage of holding information that is not available to the institution that is responsible for administrating the market intervention.[336]

A proposed solution is state regulation through the use of a dedicated agent[337] which was thought to be more suitable than the government for removing the sources of market failure because they are more adept at monitoring and controlling competitors.[338] Such regulatory agencies known as 'independent' authorities were established through statutes whereby governments gave the responsibility of market intervention to these regulatory bodies for the utility sectors.[339] In reference to the economic transaction issues cited in the above, there has been a clear motivation to establish regulatory bodies in order to establish a framework of transaction cost economies.[340] Other significant reasons that governments choose to delegate jurisdiction to regulatory bodies include resolve commitment problems, to impart blame where decisions are unpopular and to resolve information asymmetries.

It has been mentioned that a function of regulatory bodies is to provide and manage licensing for service providers. The establishment of regulatory bodies is considered

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[334] Thoralf Dassler, 'Combining Theories of Regulation – Proposing a Framework for Analysing Regulatory Systems Worldwide' (2006) 14 Utilities Policy, 31-43.

[335] T. Daβler, 'A Study of Performance and Regulation in Telecommunications in the European Union' (PhD Thesis, Aston University 2003)

[336] Dassler (n. 330), 32.

[337] D.E Sappington and J.E, Stiglitz 'Information and Regulation' in Bailey E.E (ed) *Public Regulation: New Perspectives on Institutions and Policie*s (MIT Press Cambridge 1987).

[338] ibid.

[339] Dassler, (n. 330), 32.

[340] Navrov Dubash and Narasimha Rao, 'Regulatory Practice and Politics: Lessons from Independent Regulation in Indian Electricity' (2008) 16 Utilities Policy, 321-331

as an integral part of the privatisation process.[341] Independence of regulatory bodies needs to be maintained in order for them to carry out their function. This independence will increase the confidence of stakeholders in this sector.[342]

The justification and requirement for regulatory bodies is to prevent dominant firms abusing their position through engaging in anti-competition behaviour.[343] Therefore, it is the role of regulatory bodies to encourage competition through controlling abusive behaviour where natural monopolies occur.[344]

Because regulators fall into two broad categories, namely, sector regulators and competition authorities, they each have their own mandate to regulate specific sectors and competition authorities have a mandate over competition issues.[345] However, despite these different mandates they both have the same goal which is to protect economic welfare.[346]

Overall, it is the main function of competition law is to protect and enhance market competition and to promote the maximisation of productivity, competition law is concerned with what market agents are not allowed to do and sectors regulators tell them what they can do.[347]

Different approaches to competition have led to differing outcomes which is not necessarily a positive point because a situation where there are multiple outcomes will cause confusion among the various parties.[348] Another cause for confusion in a regulatory system is the lack of a clear definition of jurisdiction and the relevant parties are confused about whether the competition body or the sectoral regulator is appropriate in particular situations, this is due to the subjectivity that arises from

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[341] For information about the privatisation strategy in Saudi Arabia, see the Saudi cabinet's decision No. 219 (11 November 2002) (Privatization Strategy) based on Supreme Economic Council Decision No. 1/23 (4 June 2002).

[342] Cornelius Dube, 'Competition Authorities and Sector Regulators: What is the Best Operational Framework?'(2008) CUTS <http://www.cuts-international.org/pdf/Viewpointpaper-CompAuthoritiesSecRegulators.pdf> Accessed 30 June 2019.

[343] Dube (n. 338).

[344] Ibid.

[345] Ibid

[346] Ibid

[347] Ibid

[348] Ibid.

ambiguity about jurisdictional matters.[349] Further, conflict that arises from the fact that there are two bodies is conflict that arises between the functions and decisions between them, such conflict often leads to regulatory authorities being forced by line ministries to reverse their decisions, this clearly leads to their authority being undermined which may lead to their authority being undermined.[350] Therefore, there is confusion between functionality of these bodies and thus, a corresponding need to delineate the boundaries between their mandates is required occurs. This can be achieved through understanding the competencies of each regulatory body and identifying the regulatory ability for each body and the challenges that might be faced in the implementation of their function to ensure an appropriate and suitable mandate is assigned at the end. Regulated sectors described above can refer to utility sectors that have been privatized, as these sectors are regulated by regulatory bodies through applying sectoral regulations.

4.4 An Overview of Regulated Sectors in Saudi Arabia

Liberalisation of markets and privatisation of industries are considered as the most vital development of global economy since the end of the last century.[351] Industries formally owned by the government have gradually become under the ownership of the private sector[352] either through full or partial privatisation. Following the privatisation of utilities, such as electricity, gas, water and telecommunications, natural monopoly of former monopolists changed to private monopoly.[353] This is because at the beginning of the process of privatisation, there was no effective competition as certain firms had the ability to prevent new competitors from entering the marketplace by increasing prices.[354] The argument against monopoly practices

[349] Ibid
[350] Ibid.
[351] Sandra Marco Colino, *Competition Law of the EU and UK* (8th edn OUP 2019) 1
[352] Richard Whish and David Bailey, *Competition Law*, (9 th ed, Oxford University Press, 2018), 977-978.
[353] Ibid.
[354] Ibid.

were increased prices, a reduction in quality and a reduction in the incentive to work.[355]

One of the most important obligations on former monopolists is to provide good services adequately. Therefore, former monopolists could be exempted from applying competition law to make profits that can be beneficial to perform their duties properly[356] and fulfil their obligations to shareholders. In addition, when the UK adopted its regulatory systems for industries such as electricity, telecommunications and aviation, the sector regulators have vital role for controlling prices and regulate the market. Also, these regulators were an alternative for competition until the development of effective competition in the marketplace.[357]

In Saudi Arabia the need to maintain regulatory control in industries, including the telecommunication industry, which is the most competitive industry in the country, is the fact that without control of the industry, there will be abuse from dominant position.[358] A dominant or monopoly position arises where certain firms engage in anti-competition behaviour.[359] Under Article 5 of the Saudi Arabia Competition Law, a company enjoying a dominant position is banned from any practice restricting competition.[360]

4.4.1 The Strategic Design of the Saudi Regulated Sectors

In 2002, a strategy for privatisation in Saudi Arabia was approved by the Supreme Economic Council, headed by Crown Prince Abdullah bin Abdul Aziz. This strategy included privatisation, which is defined as a process where the ownership or management of organisations and public services changes hands from governmental control to private sector control; such control was based on specific market mechanisms and fair competition, and was achieved through a number of different

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[355] Colino, (n347) 4.
[356] Whish and Bailey (n348) 978
[357] Ibid.
[358] Stéphane Straub, 'Book Review: Paulina Beato and Jean-Jacques Laffont, (eds.), *Competition Policy in Regulated Industries: Approaches for Emerging Economies*', (2005) Economic Development and Cultural Change 53, No. 4, 989-992, 989.
[359] Art 2 Competition Law 2004.
[360] Ibid Art. 5.

methods, which included contracts for management and operations, rental, financing and outright or partial sale of government assets.[361]

The strategy was designed to achieve eight goals, each of which contained a number of policy objectives intended to increase efficiency and competitiveness in the Saudi economy both regionally and internationally. Towards these goals the strategy aimed to make it attractive for the private sector to participate through investment which would lead to an increased citizen participation in productivity and an increase in national and foreign capital investment.[362]

As well as through revenue proceeds from sale of State for part of its stake and identified strategic administrative arrangements and operational strategy privatisation so the Economic Council oversees the privatisation programs and follow up on its implementation will be the priorities of the work of the committee privatisation to identify and propose institutions and projects and public services allocated to the target as well as determine the organisational and operational work to the process of privatisation started will be determined in the management, operation and rent, finance, sales and total assets partial decades has explained the strategic target implementation steps. The basic principles that must be observed in the implementation of the privatisation process are disclosure and clarity, execution speed and the change of management style.[363]

The regulatory framework is an essential aspect of the overall privatisation process, and regulation is especially needed whereby a single organisation enjoys rights that allows them to monopolise the market or at least dominate the greater share of a particular sector.[364] Thus, the country's privatisation strategy shares objectives with regulatory frameworks as follows:

a) Protect consumers from abuse from a dominant position held by service providers that increase prices or provide low quality services.

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[361] Saudi Privatization Strategy, Saudi cabinet's decision No. 219 (11 November 2002), Supreme Economic Council Decision No. 1/23 (4 June 2002)

[362] Saudi cabinet's decision No. 219 (11 November 2002) (Privatization Strategy) based on Supreme Economic Council Decision No. 1/23 (4 June 2002).

[363] Ibid.

[364] Ibid.

b) protect investors from government interference and protect investors from additional burdens that may negatively affect return on investment.
c) encourage production efficiency and promote competition.[365]

Regulatory bodies are responsible for granting licenses, managing coordination between service providers and ensuring that conditions for granting licenses are properly implemented. Three models of institutional framework for regulatory bodies have been proposed. The first independent regulatory bodies were those from each *pre* sector which included for example the telecommunications regulator *post* sector. The second type is an independent regulatory body designed for two or more sectors from similar areas, an example of which includes a regulator for the energy sector and another one for transportation. The third type of regulator is independent for regulating a number of different sectors which can include energy, telecommunications and transportation. In consideration of these different models of regulation, the Privatisation Committee in the Supreme Economic Council argued that the selection of the appropriate model should be conducted through careful selection based on a comprehensive study of the aims, advantages and disadvantages of each model and its appropriateness for the national needs.[366]

The independence of the regulatory bodies is an absolute requirement in order for them to be successful in achieving success and clarity in the distinction between rights and obligations and earning the trust and support of all stakeholders, which include the government, investors, operators and consumers. Moreover, independence is an essential characteristic whether the body is administrative or financial.[367]

Privatisation and its intended success depend on the effectiveness of sectoral regulation where the goal is growth in the private sector. In such an environment there are three essential aspects, which include capital markets, development of human resources and a regulated environment. The latter is relevant to the present Thesis, where regulations and procedures that related to investment and private

[365] Ibid.
[366] Ibid
[367] Ibid

sector activity and the efficiency of the competent agencies to apply them and the speed of decisiveness in the case of disputes are considered to be the most important issues that require revision and modernisation and integration for the purpose of developing them to provide the appropriate environment for the private sector to work efficiently and effectively in order to face the challenges and regional and international competition which will lead to clarity and transparency in procedures and regulations and ease of implementation them to reassure the investor and not having him to claim the state for more guarantees that are often required to be provided under the lack of clarity in procedures and Incompleteness regulations.[368]

There are three types of regulated sectors in Saudi Arabia that are considered in the present Thesis. The first is the telecommunications sector, which has sectoral regulation and includes competition provisions and a sector regulator. In this sector, there are competitors attracted by the opening of the Saudi Arabia's market both for domestic and foreign companies. The second sector to have sectoral regulation is the electricity sector including competition rules and a regulatory body. Although the electricity sector is an open market, as there are no competitors. The third sector is the Civil Aviation sector, and, although there is a regulatory body and sectoral regulation, competition is excluded from this regulation. Although the Civil Aviation sector is open for competition, the largest company in this sector is exempt from competition regulation as it is state owned.

[368] Ibid

4.5 Development Phases of Saudi Telecommunications Sector

The main objectives of the privatisation programme in Saudi Arabia included increasing the effectiveness and competitiveness of the national economy through the liberalisation of the services market and the opening up of the telecommunications sector for fair competition in particular. The liberalisation of the telecommunications sector was implemented in a number of different phases.[369] During the first phase the state-run telecommunications agency within the Ministry of Post, Telegraph and Telephones (PTT) was transferred to the Saudi Telecom Company (STC), a state-owned commercial entity incorporated in 1998 for the very purpose of this transfer.[370] The second phase, carried out in 2001, began with the required legislative instruments, which included the Telecommunications Act 2001, its associated bylaw of 2002 and ordinances, such as the Regulation of the Communications and Information Technology Commission (CITC) as the independent regulatory authority.[371] The third phase, in 2003, witnessed the partial privatisation of the STC, which was achieved through an issuance of approximately 30 percent of the company's stakes to the public. The fourth phase took place between 2004 and 2009, during which the process of issuing licences for data services provision and VSAT service provision was completely liberalised.[372] Further licenses were issued for the third-generation mobile services (3G), in addition to the existing second-generation mobile services (GSM) for STC, to two mobile service operators, Mobily and Zain, which launched their commercial activities between 2001 and 2008.[373] CITC as the regulatory body for telecommunications has the responsibility to issue these licences as part of its remit. Further developments in the fifth phase of the privatisation

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[369] Communications and Information Technology Commission (CITC) 'Facts & Figures' <http://www.citc.gov.sa/en/mediacenter/publicationsandbrochures/Pages/default.aspx> (Accessed 30 June 2019).
[370] Ibid
[371] Ibid
[372] OECD, 'Regulatory Frameworks in MENA' in OECD, *Private Sector Development in the Middle East and North Africa (MENA) Making Reforms Succeed: Moving Forward with the MENA Investment Policy Agenda* (OECD Publications 2008) 281. www.oecd.org/publishing/corrigenda> (Accessed 30 June 2019).
[373] Ibid, 281.

process included the consideration by the CITC to issue these operators with a Mobile Virtual Network Operators' (MVNO) licence. Another development in the fifth phase was for the CITC to allow the mobile service providers to launch temporary promotional offers without the need for prior consent from the regulator.[374]

4.5.1 General Overview about the Independence of Regulatory Body in Telecommunication Sector

An independent regulator is a sector-specific body that should be independent from the government and the telecommunications providers. Although the Ministry acts as a government agency responsible for policy development in the telecommunications sector,[375] it is the telecommunications regulator that is responsible for overseeing and implementing telecommunication regulations. Therefore, where the regulator is not independent in the telecommunications sector, responsibility for regulation falls to both the government and the regulator.[376]

In most OECD countries, the advent of regulatory reform began with operational functions being separated from policy functions in the telecommunication sectors.[377] During the late 1980s the government began introducing regulatory systems designed to be suitable for a telecommunications market where competition is promoted.[378] Therefore, there was an absolute necessity to establish a regulatory body that was

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[374] Ibid 281-282.

[375] OECD, *Convention on the Organisation for Economic Cooperation and Development*, Paris 14 December 1960, available at http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm> (Accessed 30 June 2019).

[376] Ibid

[377] The Organisation for European Economic Cooperation (OEEC) was established in 1948 to run the US-financed Marshall Plan for the reconstruction of a continent ravaged by war. The cooperation made individual governments to recognise the interdependence of their economies and it paved the way for a new era of cooperation that changed the face of Europe. Subsequently, in order to carry its work forward on a global stage, Canada and the United States joined members of the OEEC to sign the Convention of the Organisation for Economic Co-operation and Development (OECD) on 14 December 1960. The OECD officially entered into force on 30 September 1961, there are about 34 member states of the OECD, 20 states signed the convention in 1960 and subsequently about 14 other states have signed and ratified the Convention. See http://www.oecd.org/about/membersandpartners/list-oecd-member-countries.htm (Accessed 10 July 2019).

[378] OECD Convention (n. 62), 7.

separate and independent from all commercial parties having a vested interest in that sector to ensure fairness in competition among all market stakeholders.

There are two main methods that can ensure the separation of regulatory bodies from market stakeholders. Firstly, this separation can be achieved through full privatisation of the state-owned telecommunications provider. However, in most OECD countries the governments retain a significant shareholding in the telecommunications provider, and therefore, full privatisation is not really achieved.[379] With full privatisation the government can be a neutral agent when regulating the telecommunication industry, because they will have no established relationship with any specific market participant. The second method is the establishment of a telecommunications regulator independent from the industry, the Ministry and other government organisations that have a vested concern. This approach is commonly used in OECD nations.

The main advantage of an independent sectoral body is that conflicts of interest are kept to a minimum. For example, such conflicts of interest can arise where the regulator is also responsible for promoting its respective industry. Therefore, the solution is independent from the existence of sectoral regulators. Unfortunately, the functions of the Ministries and the regulators appear to overlap causing confusion due to the fact that there is a lack of an institutional framework where delineation of functions is established. Therefore, this is another justification for a complete separation of these bodies within the regulatory framework. The establishment of an independent regulator in Saudi Arabia has been enhanced by the WTO agreement pertaining to telecommunications services.[380] The regulatory body for telecommunications is completely independent from and does not answer to the

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[379] Ibid.

[380] WTO Press Release, 'The WTO Negotiations on Basic Telecommunications' 6 March 1997. https://www.wto.org/english/news_e/pres97_e/summary.htm (Accessed 10 July 2019) (The Agreement was signed on 15 February 1997 and came into effect on 5 February 1998); See also WTO Press Release, 'Ruggiero Congratulates Governments on Landmark Telecommunications Agreement' 17 February 1997. ttps://www.wto.org/english/news_e/pres97_e/pr67_e.htm> (Accessed 10 July 2019).

suppliers of telecommunications services, and there is complete impartiality in the decisions that are made.[381]

In countries that lack a system of checks and balances, which requires the separation of powers, lack government auditing bodies, and also lack an independent press, interest groups find it easier to exert influence on the government.[382] Moreover, where there is a lack of democracy and clear division of powers amongst political institutions, it is usually associated with uncertainty about the future of sectoral regulations and acts as an impediment to any long-term commitment by the governments.[383]

Telecommunications is a sector that is often sought to be privatised by many countries. This was the case for Saudi Arabia as well, as evidenced by the fact that the telecommunications sector was the first to be privatised.[384] Privatisation of this sector has led to the liberalisation of the telecommunications sector and as a result markets have been opened up to competition attracting domestic and foreign investment and promoting economic growth and development. The associated advantages include advancements in terms of technical support and provision of services, increased recruitment of manpower, and further economic development in Saudi Arabia.

A market structure that fosters competition is advantageous for both consumers and competitors, because it paves the way for a transition away from a monopolistic structure in telecommunications sectors globally. Historically, most developed nations have had specific regulation for telecommunications under the supervision of a sector-specific regulator. Initially, telecommunications companies were public-owned entities and a WTO agreement on Basic Telecommunications Services promoted the privatisation of these public-owned telecommunications companies

[381] OECD Convention (n. 62), 8.
[382] Straub (n. 354)
[383] ibid
[384] Communications and Information Technology Commission, www.citc.gov.sa (Accessed 10 July 2019).

together with encouraging liberalised markets where there is independence and transparency that are in turn conducive for competition.[385]

All nations that pursued this course of action in the telecommunications sector have faced issues related to their institutional framework design for this sector. The most commonly faced problem is the overlap between competition law, which is enforced by the competition authority, and sectoral regulation, enforced by the telecommunications regulators. Countries have addressed this issue in different ways using their individual experience and their strategic approach for their respective telecommunications sectors, as well as through managing the level of competition in their markets.[386]

[385] Laurence Dunbar, 'Competition Policy in Regulated Sectors: Focusing on The Institutional Design of the Relationship between Competition Authority and Sectoral Regulators: Division of Power and Interaction between Competition Law Authorities and Sector-Specific Regulators in the Telecommunications Sector', Korea Development Institute, KDI International Conference, Seoul, (2007) <http://www.kdi.re.kr/upload/9312/2-1.pdf> (Accessed 10 July 2019).
[386] Ibid.

4.5.2 The Institutional Framework in the Saudi Telecommunication Sector

It is commonplace to argue that regulation is influenced by political factors[387] resulting in decisions made by regulatory bodies and engagement with stakeholders being affected by a nation's political and institutional framework.[388] Justification of this idea that the national political and institutional context, where regulators operate, shapes the outcomes of regulation[389] is supported by Dabash and Rao, who argue that the regulatory process is shaped by the strength of political institutions, a credible judiciary and administrative capacity.[390] This context is essential in influencing matters related to the *ex ante* regulatory design but also for the *ex post* aspects of regulatory and decision-making processes.[391] Where laws and regulations impede private ownership of public services and foreign investment in infrastructure, this creates an obstacle for regulating competition effectively.[392] Legal frameworks relate to legal transparency for investment, regulations and judiciary practices and are relevant to regulatory bodies.[393] Even where legal frameworks are established, compliance is only achieved through the effectiveness of the law by its efficient implementation.

Saudi Arabia is an important example for exploring the possibility of transplanting its regulatory framework into different political and institutional contexts. A peculiarity of the regulatory system in Saudi Arabia is that independent regulators are used to regulate state-owned companies. It should be noted that independent regulatory bodies in the telecommunications, electricity and aviation sectors are not

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[387] Niamh Moloney, 'Resetting the Location of Regulatory and Supervisory Control over EU Financial Markets: Lessons from Five Years on' (2013) 62(4) International & Comparative Law Quarterly 955-965, 963; Niamh Moloney, 'The Regulation of Investment Services in the Single Market: The Emergence of a New Regulatory Landscape' (2002) 3(2) European Business Organisation Law Review 293-336, 300. See also Organisation for Economic Cooperation and Development (OECD), 'Telecommunications Regulations: Institutional Structures and Responsibilities' DSTI/ICCP/TISP (99)15/FINAL 26 May 2000, 7.

[388] Matthias Nnadi and Ovunda Okene, 'Merger Regulations and Ethics in the European Union: The Legal and Political Dimensions' (2012) 33(3) European Competition Law Review 124-131, 127.

[389] Moloney, 'Resetting the Location of Regulatory Control' (n. 353).

[390] Dubash and Rao (n. 336), 322.

[391] Ibid

[392] OECD, 'Regulatory Frameworks for PPP (Public-Private Partnership) International Good Practice' in OECD, Private Sector Development in the Middle East and North Africa Making Reforms Succeed: Moving Forward with the MENA Investment Policy Agenda (OECD Publications 2008) 269. www.oecd.org/publishing/corrigenda> (Accessed 10 July 2019).

[393] Ibid, 270-272.

properly developed and lack experience as they were only established a decade ago. Thus, the regulatory bodies in Saudi Arabia lack the required operational expertise. Because of this, discussions in Saudi Arabia about regulation have not advanced to the stage of discussing regulatory governance in relation to effectiveness, accountability, and its relationship with the legislature and the judiciary. Instead, the discussion remains at the level of narrow questions about options for alternative instrumental approaches to regulation.

In Saudi Arabia two institutions have the responsibility for regulating the telecommunications sector, namely the Ministry of Communications and Information Technology and the Communications and Information Technology Commission (CITC).[394] Although both of these organisations play a role in the telecommunications sector, only CITC is considered to be the sector regulator. Specifically, the Ministry of Communications and Information Technology is responsible for policy development, action plans and programs, and administrating the issuance of licenses by the Saudi Cabinet for the telecommunications sector. Moreover, the Ministry also administrates draft regulations and the required amendments submitted to the Cabinet, and the Ministry is the representative of the government for all organisations in the telecommunications sector.[395]

The CITC, as an independent body both in terms of administration and finance, is responsible for carrying out numerous tasks in the telecommunication sector.[396] Essentially the function of the Commission is comprised of two main roles. The first role involves issuing licenses, implementing sector development policies, the development of implementation regulation, promoting investment and ensuring that telecommunications services are provided at reasonable prices and reasonable levels of service to the consumer. The second role is focused on information technology and the policies for its development in the telecommunications sector as well as tasks

[394] Saudi Cabinet Decision No 74 of 2001; it was named the Saudi Communications Commission (SCC) and then the name has been changed to Saudi Communications and Information Technology Commission in 2003 in accordance with the decision of Saudi cabinet No 133 of 2003.
[395] Article 2 of Saudi Telecommunications Law 2001
[396] Article 2 of Communication and Information Technology Commission Ordinance 2001

related to the supervision and regulation for the provision of information technology services.[397]

The CITC is comprised of three main sections, which include the board of directors responsible for the leadership of the Commission,[398] the main body of the Commission, which is the governor and departments, and finally, the third is the quasi-judicial committee responsible for litigation and penalties in cases of violations.[399]

The ICT sector was the first sector to be privatised in Saudi Arabia. The Supreme Economic Council (SEC), itself only established in 1999, was responsible for the country's strategy for privatisation which included which sectors should be privatised and the overall supervision of the privatisation programme and its implementation.[400] The Saudi telecommunications sector became privatised using sectoral legislation for which the Communications and Information Technology Commission (CITC) was established in 2001.[401]

As an independent government agency, the CITC regulates the telecommunications sector as well as promotes IT activities towards the development of reliable, advanced and high quality telecommunications which are cost effective to consumers.[402] The mission of the CITC includes the creation of a fair, clear and transparent regulatory environment conducive for effective competition. It also includes the protection of consumer interests with respect to public telecommunications and IT services and the monitoring of the performance of licensed service providers, as well as the creation of a positive environment to

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[397] Ibid, Art 3.
[398] Ibid, Art 5.
[399] Article 38 of Saudi Telecommunications Law 2001
[400] See Decision of Council of Minister No 257 of 4 February 2001. Saudi Arabia's new privatisation strategy was approved by the SEC on 5 June 2002.
[401] OECD, 'Regulatory Frameworks in MENA' in OECD, 'Private Sector Development in the Middle East and North Africa Making Reforms Succeed: Moving Forward with the MENA Investment Policy Agenda' (OECD Publications 2008) 278.
[402] CITC, Communications and Information Technology Commission, www.citc.gov.sa (Accessed 10 May 2020).

encourage investment and promote the growth of the communications and IT market.[403]

4.5.2.1 The Legal Framework of the Saudi Telecommunication Law 2001

As a response to the transition to privatisation in the country, the Saudi Telecommunications Law for governing the sector was introduced in 2001.[404] This was required for the fourth phase of development, which resulted in the sector being partially privatised in 2003 through the selling off a 30 percent stake to the public leading the way for an open market and competition.

The objectives of the privatisation programme were outlined in Article 3 of the Telecoms Law. These objectives included that telecommunications services were provided with quality and reasonable prices within a competitive environment through the promotion of fair competition. The Telecoms Law also served to ensure that there was free and fair access to telecommunications networks as well as user confidentially through the protection of these networks. The Law was also concerned with ensuring that the sector was in line with international requirements, which included technology transfer and that international standards were adhered to, especially in terms of equality, transparency and non-discrimination.[405]

The Saudi Telecoms Law is comprised of eleven chapters, which cover the economic, administrative, technical and legal aspects of regulation in the sector. The first chapter is concerned with definitions, such as defining what is a dominant operator. The second chapter is concerned with provisions for supervising the telecommunications sector and what should be achieved in regulating the sector. Chapters three and four offer definitions of and details about the key concepts, including among others the meaning and regulation of frequencies and the Commission's management of the national numbering plan. Chapter five is concerned with classifying different types of licences, the requirements for a license

[403] Ibid
[404] See Saudi Telecommunications Law, Saudi Cabinet Decision No 74 of 2001
[405] Article 3 of Saudi Telecommunications Law 2001.

and procedures for renewal. Chapter six is about competition and how competition is to be regulated in the sector, more specifically prohibited practices that could lead to competition being impeded. Chapter seven is concerned with the rights of operators in terms of the interconnection of telecommunications networks and services. Chapter eight is concerned with the achievement of compliance in relation to equipment and facilities. Chapter nine covers the procedures for assessing properties, both public and private, to ensure efficient telecommunications services. Chapters ten and eleven are concerned with violations, penalties and enforcement.

4.5.2.2 Competition Provisions in the Saudi Telecommunication Law 2001

This section will present the regulation of competition by the Telecommunication Law 2001 in pursuit of the aim of this Thesis, which is to study and analyse the regulation of competition in regulated sectors. As noted in the section above, chapter six of the Law is concerned with the rules for governing competition. Although competition is something that is considered throughout the provisions of the Law, the fact that an entire chapter is dedicated to competition highlights its importance for the telecommunications sector.

Agreements between operators that impede competition through, for example, one operator gaining a dominant position is prohibited by Article 24 of the Law. This includes the voiding of any clause or agreement the application of which would lead to restriction of competition.[406] A dominant operator has been defined in chapter one as an operator with 40 percent or more share in the telecoms market, although the Commission reserves the right to change this percentage based on the market conditions.[407]

It has been stated above that one of the most important aims of the Saudi Telecoms Law is to ensure that the telecommunications market remains competitive through ensuring that competition remains fair.[408] Consequently, prior to the determination of

[406] Ibid Art 24.
[407] Ibid Art 2.
[408] Ibid Art 3(3).

the tariff for the provision of telecommunications services, the Commission is mandated to take into account the state of competition in the telecommunications market and, where necessary, to adopt certain measures to achieve this goal.[409]

Article 25 requires that, if operators wish take part in a merger, they need to gain consent from the CITC and inform them of any relevant deals with other operators, local or otherwise, within five days.[410] Although it should be noted that mergers that involve landlines or mobile phones not only have to be approved by the CITC but by the Minister of Communications and Information Technology as well.[411] Article 25 also prevents any entity from gaining a dominant position through requiring that operators inform the CITC and gain their approval, if they wish to purchase a 5 percent or greater share in another operator.[412]

The Telecommunications Law prohibits the abuse of dominant position through any activities or practices by any operator.[413] One such behaviour that is considered in this respect is the transfer of numbers, this is where a consumer switches from one telecommunications provider to another, while at the same time keeps the same telephone number, something allowed under the law, but operators are required to conduct this procedure in compliance with specific requirements.[414]

Competition in regulated sectors is subject to competition law and sectoral regulation. The telecommunications sector, as shown above, is subject to competition law and telecoms law and in terms of regulation subject to the CITC. Unfortunately, in Saudi Arabia there is an overlap between the law and regulation in the telecommunications sector.

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[409] Ibid Art 7.
[410] Ibid Art 25.
[411] In 30 April 2003 the Royal Order No. (A/2) has been issued regarding to change the name of the Ministry of Post, Telegraph and Telephone to the ministry of communications and information technology.
[412] Saudi Telecommunications Law 2001, Art 25.
[413] Ibid, Art 26.
[414] Ibid Art 27.

4.6 Contextual Background of the Saudi Electricity Sector

For the electricity sector in Saudi Arabia regulation was the product of a wider program of restructuring and reforms, as it was the case with other developing countries.[415] The electricity sector provides services that include the generation, cogeneration, distribution, supply and transmission of electricity.[416] With reference to the party composition of the electricity sector it includes the Ministry of Electricity and Water, the regulatory authority, the consumers and all other associated parties.[417]

Prior to 2005 Saudi Arabia had adopted the commonly accepted global model where power generation is vertically integrated as well as being publicly owned. Initially, there was a plan to open up this sector to private investment during the 1990s. Internally the sector suffered from deficient quality of supply in addition to severe increases in financial loss together with a high amount of electricity theft. Externally, there was a decreasing amount of available finance from donors and the advent of a global approach to electricity that advocated competition and private ownership.[418] These events led to the introduction of reforms in the industry spurred by the World Bank, which encouraged reforms through providing support to those countries, who carried out reforms. In these reforms independent regulation was a key component.

The privatisation of the Saudi Electricity Company (SEC) in 2009 was seen as the solution for the country to meet its long-term electricity demand.[419] Towards achieving the goal of privatisation a complete restructuring of the SEC was carried out by the Electricity and Cogeneration Regulatory Authority (ECRA). Although it was not a privatisation process as such, it was a consolidation of 10 regional

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[415] Electricity & Co-Generation Regulatory Authority (Electricity Law) Issued by Royal Decree No. M/56 20 Shawwal 1426/ 22 November 2005.
[416] Electricity Law 2005, Art 1.
[417] Ibid.
[418] The History of Electricity Reform in the 1990s is summarised by Said Nachet and Marie-Claire Aoun, 'The Saudi Electricity Sector: Pressing Issues and Challenges' (2015), 1-33, available at .https://www.ifri.org/sites/default/files/atoms/files/note_arabie_saoudite_vf.pdf (Accessed 10 July 2019)
[419] Oxford Business Group, The Report: Saudi Arabia 2009 (OBG 2009) Energy & Utilities Interview 135.

electricity companies, which became responsible for generating, transmitting and distributing electricity.[420]

In 2010, after the consolidation of the regional companies, the ECRA proposed that the electricity sector should be divided into four companies and this was seen as a prelude to an anticipated three-phase restructuring designed to transform the power sector into a liberal competitive market by 2015.[421] This restructuring was necessary due to a number of reasons, including an increase in demand in energy consumption spurred by a growing population of approximately 2.5%.[422] A 10-year plan (2008-2018) was approved by the SEC's board, in order to meet the growing demands of the industry. The plan was part of the long-term strategy for the electricity sector and it included specific requirements for the generation, transmission and distribution of sufficient electricity to meet the rising demand.[423] Nevertheless, the debate about the privatisation of SEC is still on-going, as the proposed restructuring is yet to be fully implemented.[424]

4.6.1 Structure of the Saudi Electricity Sector

Due to the aforementioned reforms, the electricity sector presently involves a myriad of players. The increase in participation in the electricity sector has been spurred by an increase in demand where the government had to urgently attract more private investment.[425] The idea was that, where there was increased competition, this lead to increased efficiency, which at the same time reduces the financial burden on the government.

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[420] Electricity Law 2005, Arts 11 & 12.

[421] Oxford Business Group, The Report: Saudi Arabia 2009 (OBG 2009) Energy & Utilities Interview 135.

[422] Ibid. According to IMF calculations, the population of Saudi was expected to increase from its 28 million as of 2012 to 31 million in 2015 and hit a 37 million by 2020.

[423] 'Electrifying Developments: OBG talks to Ali Al Barak, President and CEO, Saudi Electricity Company (SEC)', cited in OBG (n. 385), 137.

[424] John Parnell, 'Saudi Arabia's Electricity Privatisation Plans Preparing Ground for Solar' 4 March 2016. http://www.pv-tech.org/news/saudi-arabias-electricity-privatisation-plans-preparing-ground-for-solar> (Accessed 10 July 2019) (noting that SEC plans to split into four units with local and international companies able to take stakes in the new firms and that an official from SEC told Saudi news network Al-Arabiya that the break-up of SEC would be completed by the end of 2016).

[425] Said Nachet and Marie-Claire Aoun, 'The Saudi Electricity Sector: Pressing Issues and Challenges' ' (2015). <https://www.ifri.org/sites/default/files/atoms/files/note_arabie_saoudite_vf.pdf> Accessed 15 July 2019.

Prior to the current state of affairs, the electricity sector was comprised of four regional companies, namely the Saudi Consolidated Electricity Companies (SCECOs), one for the east, one for the south (SCECO-south), one for the south west and one for the central region (SCECO-central).[426] The General Electricity Corporation (GEC), as a central organisation, was responsible for the electricity sector overall and was also responsible for the electricity supply in rural areas that were not serviced by the consolidated companies.[427] The GEC was the government representative in terms of equity holdings in the independent electricity companies and also provided those companies with finance for capital requirements. Other electricity producers in the country were the Saline Water Conservation Corporation (SWCC) accounting for 7 percent of electricity generation and the Jubail Water and Power Company holding accounting for 4 percent. Moreover, in 2013, the Authority permitted Saudi Aramco to sell any excess electricity it produced through an intermediary of the SEC.[428]

As a result, the Water and Electricity Company (WEC) was established as an independent entity with a legal character to buy water and electricity from the companies that are responsible for the production of both water and electricity.[429] It was intended that the WEC will then sell water to the Saline Water Conversion Corporation (SWCC) and sell electricity to the SEC.[430] Except in two areas operated by Marafiq in Jubail and Yanbu, the SEC has the monopoly of electricity distribution in Saudi Arabia. The National Electricity Transmission Company (NETC) is wholly owned by SEC and is responsible for the planning, building and operating the transmission system.[431]

Although the Saudi government planned to restructure the SEC into four separate organisations responsible for the generation, transmission and distribution of electricity, at present this is carried out under the responsibility of the SEC as a

[426] These were created between 1976 and 1979.
[427] Nachet and Aoun (n. 421), 17.
[428] Ibid18.
[429] Ibid.
[430] Ibid
[431] Ibid

monopoly.[432] Furthermore, the government plan to open up the domestic power chain allowing entry to new producers and leading to more efficiency.[433]

This consolidation of the electricity sector, which resulted in the creation of the SEC, was designed to create more competition in the electricity sector in Saudi Arabia.[434] Two problems were hoped to be resolved by this, firstly the investment will be lifted from the public sector, and secondly the increase in electricity demand will be met. Towards achieving a more efficient electricity system the government has recently initiated a number of regulatory changes in the electricity sector, some of which are discussed below, however, before these changes are discussed, the regulatory body responsible for regulating the electricity sector will be examined.

4.6.1.1 General Overview of the Electricity Sector

In the last two decades many countries', both developed or developing, electricity sector has been subject to restructuring of the market structure and the institutional framework to allow competition. Such reforms were aimed to increase the participation of the private sector in the electricity sector. In developed countries these reforms of the electricity sector, which included privatisation, regulation and competition, were successful. However, in the developing countries these reforms faced some challenges for several reasons, including weaknesses in the institutional framework, slow and complex process for establishing competent regulatory bodies and limited entry of investors in the electricity sector.[435]

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[432] Ibid
[433] Ibid 19.
[434] Ibid
[435] Yin-Fang Zhang, David Parker and Colin Kirkpatrick, 'Electricity sector reform in developing countries: An econometric assessment of the effects of privatisation, competition and regulation', (2008) Journal of Regulatory Economics Vol. 33, No. 2, 159-178.

4.6.1.2 The Institutional Framework of Sector regulator in the Saudi Electricity Sector

The electricity sector in Saudi Arabia is regulated by the Electricity and Cogeneration Regulatory Authority (ECRA). The ECRA, which is administratively and financially independent, is responsible for regulating not only electricity but also the water desalination industry. The ECRA is responsible for ensuring that these industries provide sufficient, reliable and high-quality services at a reasonable cost.[436] The main mission of the ECRA is to develop and implement a regulatory framework to ensure that the sector conforms to governmental, legal and regulatory policies and standards and international best practices.[437]

The ECRA was established in 2001 by the Council of Ministers and it was initially called the Electricity Regulation Service, which implied that it was responsible for regulating electricity services.[438] However, in 2004, the Council of Ministers added a new role, which was the regulation of cogeneration[439] activities, and thus the name was changed to the current one.[440] Pursuant to a Council Decision in 2007, a revised charter was issued for ECRA[441] to include the regulation of water desalination[442], which includes water transportation and the trade in desalinated water.[443]

ECRA is supervised by a Board of Directors chaired by the Minister of Water and Electricity with the Governor of the Authority as deputy Chair.[444] Six senior government officials are drawn from the Ministries of Water and Electricity, Finance, Petroleum and Mineral Resources, Commerce and Industry, Economy and

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[436] Electricity Law 2005, Art 1. See also The Electricity and Co-generation Regulatory Authority, 'The 12th Saudi International 2016 WEPOWER Water, Electricity and Power Generation Forum' 21-23 November 2016. http://www.wepower-sa.com/sponsor/the-electricity-co-generation-regulatory-authority/> (Accessed 18 July 2019).

[437] Saudi Electricity and Cogeneration Regulatory Authority (ECRA) http://www.ecra.gov.sa/en-us/AboutECRA/pages/Mission.aspx (Accessed 18 July 2019).

[438] ECRA was formed on 27/8/1422AH in 13 November 2001 by the Council of Ministers Decision No 236.

[439] Cogeneration is the simultaneous production of electricity and desalinated water or steam used in other production processes. See Electricity Law 2005, Art 1.

[440] See Council Decision No 163 17/5/1425AH 5 July 2004.

[441] See Council Decision No 154 of 4/5/1428AH of 21 May 2007 'Electricity and Co-generation Regulatory Authority: Activities and Achievements 2007' 42.

[442] Water desalination is the production of desalinated water, through treatment of saline water, without simultaneous generation of electricity. See Electricity Law 2005, Art 1.

[443] ECRA (n. 433).

[444] Electricity Law 2005, Art 1.

Planning, and the Saline Water Conversion Corporation (SWCC), while five other members are selected on their own merits.[445]

The 16 specific duties of the ECRA are listed in the revised charter of Article 3 of ECRA and can be divided into four categories. The first category relates to the issuance of licences and making sure licence holders are compliant, the development of accounting procedures and the coordination of infrastructure. The second category is concerned with consumer issues, which include determining and reviewing tariffs, protecting stakeholders, complaint investigation and resolution, the improvement of sector performance with the Ministry of Water and Electricity and promoting conservation of energy. The third category relates to technical standards for the performance of all activities. Finally, the fourth category is concerned with administrative and organisational tasks, which include defining public interest, regulations for infrastructure development, the promotion of private sector investment and the monitoring of licence fees and penalties for non-compliance with licence terms and conditions.[446]

4.6.1.3 Competition Provisions in the Saudi Electricity Law (2005)

The Saudi electricity sector is governed by sectoral regulations, which include the Saudi Electricity Law 2005, its implementing regulations, the regulator's charter and the associated implementing regulations. The Saudi Electricity Law was adopted in 2005 and is comprised of 8 chapters, which include a total of 17 Articles. The first chapter provides definitions, the second chapter relates to general provisions, the third chapter is concerned with licensing, the fourth is concerned with tariffs, the fifth with competition rules, the sixth with the restructuring of the electricity industry, the seventh with disputes and violations, and, finally, the eighth chapter includes concluding provisions.[447]

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[445] Energy Regulators Regional Association (ERRA), 'Saudi Arabia Electricity & Co-Generation Regulatory Authority (ECRA) Key Statistics (2015)' http://erranet.org/AboutUs/Members/Profiles/SaudiArabia> (Accessed 18 July 2019).

446 Energy Regulators Regional Association (ERRA), 'Saudi Arabia Electricity & Co-Generation Regulatory Authority (ECRA) Key Statistics (2015)' http://erranet.org/AboutUs/Members/Profiles/SaudiArabia> (Accessed 18 July 2019).

447 See Saudi Electricity Law, Saudi Cabinet Decision No 254 of 2005.

The Saudi Electricity Law is designed to ensure that consumers rights are protected and that consumers have a free choice of providers from a number of licensed companies. Moreover, the Law aims to create a suitable environment, including infrastructure and regulatory framework, to promote competition and encourage private and foreign investment in the electricity sector.[448]

As mentioned above, chapter five of the Saudi Electricity Law pertains to competition rules through 7 clauses in Article 10. Article 10 provides that the competition law must be adhered so that its aims and requirements are met. These requirements include providing consumers with a choice of electricity services in a competitive market and that the Ministry and the Authority shall encourage investment through creating a competitive environment in the Saudi electricity sector.[449]

Any abuse of a dominant position is strictly prohibited by law in Saudi Arabia and any mergers or acquisitions between licensees needs approval from the Authority. This also applies where there is an initial agreement, in which case the Authority should be informed. Approval is also required by the Authority where a licensee wishes to purchase a 5 percent share or more of another licensee's shares, securities and ownership rights. If the purchase is less than 5 percent, it would still need approval if were to create a dominant position for a licensee.[450]

The implementing regulations of the Electricity Law are detailed in terms of what is permitted or prohibited in relation to the agreements between licensees and stipulate the requirements for mergers or acquisitions. Moreover, the implementing regulations o also define abuse of dominant position. However, these actions were not included and the Law grants power to the Authority to determine those prohibited actions.[451] Moreover, the Saudi Electricity Law provides penalties for violations in Article 15, which mentions that a violator may receive a fine of no more than 10 million SR or have their licence suspended or cancelled.[452]

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[448] Ibid Art 2.
[449] Ibid Art 10.
[450] Ibid Art 10.
[451] The Implementation Regulations of Saudi Electricity Law 2007, Art 24-26.
[452] Saudi Electricity Law 2005, Art 15.

Although reference is made to competition law in the Electricity Law, there is lack of clarity about which of these two laws has priority in terms of them being applied in the electricity sector. In addition, the Electricity Law contains conditions that should be considered in the case of mergers or acquisitions and that need to be approved by the Authority. The ambiguity about which of these two laws has priority in application can lead to confusion between the participants, which can undermine the operation of justice. An example of such injustice could be where a violator is reviewed and punished under the two different laws by two different bodies and could be punished twice.

4.7 Structure of the Saudi Civil Aviation Sector

Civil aviation is an important regulated sector in Saudi Arabia and has witnessed a history of restructuring. Moreover, the aviation sector has witnessed a significant amount of development over the years in the areas of passenger air transport and other associated sector services. Currently only three operators exist in the Saudi aviation sector, which are Saudi Airlines, a state-owned company, Nas Fly and Sama Fly, both of which are licensed for internal flights only. The sector is regulated by the General Authority of Civil Aviation (GACA)[453] and the sector is governed by the Saudi Civil Aviation Law.[454]

GACA's remit includes air transport regulations, airport operations and air navigation and the organisation is responsible for 27 domestic, regional and international airports, which it owns and operates.[455] GACA was introduced under the Ministry of Defence and Aviation[456] and, more recently, under the Ministry of Transport. With regards to regulation in the sector, although there is the Civil

[453] Article 5 of the Saudi Civil Aviation Law established the General Authority of Civil Aviation (GACA).
[454] Saudi Civil aviation law 2005, Saudi Cabinet Decision No 185 of 2005
[455] Saudi General Authority of Civil Aviation (GACA) https://gaca.gov.sa/web/en-gb/page/airports > (Accessed 20 July 2019).
[456] Alriyadh newspaper, (9 January 2012, available at http://www.alriyadh.com/699474> (Accessed 20 July 2019).

Aviation Law, it contains no provisions for regulating competition in the aviation sector.

GACA established the Saudi Civil Aviation Holding Company, which owns the strategic units that are subject to be privatised in 2016 as per the Directive of GACA, this is to be achieved in order to increase operational efficiency and financial independence from the public sector. There are three units that were proposed to be privatised, which include the King Khalid International Airport to be privatised as the 'Airports Company of Riyadh' in the first quarter of 2016, the air navigation services, privatised as the 'Air Navigation Services Company' in the second quarter of 2016 and finally, the sector of Information Technology, privatised as the 'Saudi Company for information systems of aviation' at the end of 2016.[457]

The Chairman of the GACA's Board of Directors is also the Chairman of the Board of Directors of Saudi Arabian Airlines, the largest company in the aviation sector that also happens to be state owned.[458] In addition to this apparent lack of neutrality, the dominant participant in this sector, Saudi Airlines, is exempted from competition regulation leading the likely possibility that it could abuse its dominant position.

4.8 The capacity and competence of the regulatory agencies

One of the aims of discussing the regulatory agencies in this chapter is to evaluate their capacity and competence to carry out their functions. This aim will help to explore their ability, if the exclusive model applies. The research shows that these agencies are still suffering from lack of human and financial resources. For example, the ECRA confirmed that the labour market in the Kingdom of Saudi Arabia lacks the presence of experienced specialists. Also, the ECRA seeks to attract a qualified employee, who has the flexibility to enable it from entering a new field and acquiring

[457] Ibid

[458] Saudi Press Agency, http://spa.gov.sa/1328303> (Accessed 20 July 2019), In 2016, the Minister of Transport has been appointed as the Chairman of the board of the GACA by the Royal Decree No. 133/A (May 2016).

experience in it.[459] Furthermore, the GACA seeks to attract qualified experts or provide training courses and scholarships programmes for current staff.[460]

Therefore, the regulatory agencies in the Saudi market cannot be able to enforce the sectoral regulations effectively and regulate competition alone, especially with lack of human and financial resources and the absence of clear relationship with the Competition Council.

4.9 The Implementation Procedures of Saudi sectoral regulations by of the regulatory agencies

There is no difference between the enforcement of the sectoral regulations by the regulatory agencies and the enforcement of competition law by the Council of Competition in terms of the implementation procedures. All these procedures rely on two methods, either the complaints or initiatives. This section provides a brief discussion with regard to competition regulation by enforcing the sectoral regulations in the regulatory agencies. The Civil Aviation Law is excluded from this section, because it does not include any competition rules. Even though GACA is the regulatory agency of the civil aviation sector, it is not authorised to enforce the provisions of the Competition Law in its sector. However, one of the goals of the GACA is promoting and protecting competition in the Civil Aviation sector by prohibiting agreements or arrangements among national air carriage companies or between national companies and foreign air carriage companies that affect the competition in the sector. There is no clarity of implementation procedures in this regards.[461] Furthermore, the Civil Aviation sector is subject to the Competition Law, but Saudi Airlines, which is state-owned and possesses a dominant position, is exempted from the enforcement of the provisions of the Competition Law.[462] There is an ambiguity about the enforcement of Competition Law in the Civil Aviation sector and primarily which authority has primacy in enforcing competition law. For

[459] The annual report of ECRA (2010), https://www.ecra.gov.sa. (Accessed 22 July 2019).
[460]The annual report of ECRA (2016) https://www.ecra.gov.sa. (Accessed 22 July 2019).
[461] Article 27 of the Saudi Civil Aviation Law 2005
[462] Article 3 of Saudi Competition Law 2004

example, the Council of Competition received complaint from Egypt Air against the merger of companies but this was considered by the CC.[463] However, there are two questions that need to be addressed here: what is the role of GACA in this case and why the CC had dealt with this complaint? The answer to these questions is the following: either the complainant already complained to the GACA but did not receive any response or the complainant was not aware of the role of the GACA.

With regard to the Communications and Information Technology Commission (CITC), which is responsible for enforcing the Telecommunication Law, it applies the competition rules included in this Law following the receipt of complaints[464] or following its own investigations and inspections.[465] However, the implementation procedures followed by the CITC are different from the procedures under the Competition Law when dealing with violators. While the violators of the Competition Law are presented before the legal committee once they are convicted for a violation,[466] the CITC has an additional step before starting the prosecution and litigation procedures. This step allows the CITC to remedy any practice that is considered to constitute abuse of the dominant position of any operator before starting the prosecution and litigation procedures before the legal committee through certain measures, such as stop or prevent any activities that related to the abusive behaviour, including calling a meeting between the violator and other operators that might be damaged by the violator's activities, attempt and reach a solution that may prevent or remove these practices or infringing activities.[467]There are many cases that have been received by the CC related to Telecommunications sector.[468] This can raise some questions about the role of the CITC in these cases, such as why the CC received these complaint. It seems that I think the reason why these complainants ignored the CITC, which is the regulatory agency, and opted for the CC is the CITC did not take any legal actions in relation to to their complaints or these complainants

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[463] The annual report of the Council of Competition 2013 < https://gac.gov.sa/YearlyReports_en.aspx> (Accessed 23 July 2019).
[464] Article 29 of the Implementation Regulations of Saudi Telecommunications Law 2001.
[465] Ibid., Article 7
[466] Article 15 of Saudi Competition Law 2004.
[467] Article 34 of the Implementing Regulations of the Saudi Telecommunications Law 2001.
[468] The annual report of the Council of Competition 2013 (n. 429).

were not satisfied by the implementation procedures of the CITC. Moreover, one of known lawsuits against STC Telecoms was considered twice by the CC and the CITC in the same violation and STC has been punished twice. This case confirmed that there is no relationship between the CC and the CITC.[469]

In terms of the implementation procedures of the Electricity Law, the ECRA acts either following the receipt of complaints or following its own initiatives as the supervising and monitoring body of the Electricity market.[470] However, there is an additional step before starting the prosecution and litigation procedures. This step requires an attempt of settling any disputes between licensees and the Authority through arbitration, as Article 13 of the Electricity Law states that "Any dispute or disagreement arising between any Licensee and the Authority may be settled by arbitration in accordance with the provisions of the Arbitration Law".[471] Although reference is made to competition law in the Electricity Law, there is lack of clarity as to which of these two laws has priority in terms of them being applied in the electricity sector. In addition, the Electricity Law contains conditions that should be considered in mergers or acquisitions and need to be approved by the Authority.[472]

4.10 The Prosecution and Litigation Procedures Stages

There are two steps in the prosecution and litigation procedures. Firstly, the prosecution and secondly the decision. This step implementing by the legal committees. Each authority has a specific committee established under the Competition Law and the sectoral regulations. The first committee is the committee for settlement of violations of competition law.[473] The second committee is the committee for considering violations of the Telecommunications law.[474] The third committee is dispute resolution committee of the violations of the Electricity Law.[475] The fourth committee is the committee for considering violations of the Civil

[469] E-Newsletter of the Council of Competition, Issue No.10 (Feb 2016).
[470] Article 2 of the Saudi Electricity Law 2005.
[471] Ibid Article 13.
[472] Article 10 of the Saudi Electricity Law 2005.
[473] Article 15 of Saudi competition Law 2004.
[474] Article 38 of the Saudi Telecommunications Law 2001.
[475] Article 13 of the Saudi Electricity Law 2005.

Aviation Law.[476] These committees have the authority to make decisions regarding the violations of these Laws, including violations of competition rules, except the committee for considering violations of the Civil Aviation Law as explained above.

Moving now to the litigation procedures, after a decision is made by the legal committees, all victims of violations have the right to appeal before the Board of Grievances (Administrative Court) except the victims of the decisions made by the committee for considering violation of the Telecommunications Law, as these victims have the right to appeal before the Minister of Communication and Information Technology. If the Minister (and Chairman of Board of Directors) approved the decision, then the violator has the right to appeal against the decision of the legal committee before the administrative court (the Board of Grievances), which means that the duration of the violation and the litigation procedures will be longer.[477]

After the appeal of the cases is considered by the administrative court and a decision is made, the victim has the right to appeal before the administrative Court of Appeal and this judgment is binding, unless it is challenged on the basis of the procedural defect, thus the competent court for reviewing it is the Supreme Administrative Court.[478]

[476] Article 174 of the Saudi Civil Aviation Law 2005.
[477] Article 39 of the Saudi Telecommunications law 2001.
[478] The Board of Grievances 2007, Arts 8, 9, 10 and 12.

4.11 Conclusion

Just as democratic systems have flaws so does the process of regulating competition in regulated sectors. This is also the case in Saudi Arabia. This chapter has demonstrated that in the Saudi context one of the problems of regulating competition is that the regulatory bodies lack the required independence. It has been shown that there is an overlap between the functions of the Council of Competition and the Commission and one of the consequences is that organisations can be punished twice by two different institutions. Another problem highlighted in this chapter is that there is a lack of cooperation between these two bodies. Despite the fact that Article 7 of the Communication and Information Technology Commission Ordinance provides that the Commission may cooperate and coordinate with other government Ministries and agencies [479], there is rarely any cooperation which can negatively affect the award of justice.

Although the main goal of competition is to create an environment where consumers have a choice and can enjoy increased value and best practices, competition still needs to be regulated in order to ensure fairness and equity. However, it has been shown, especially in the context of Saudi Arabia, that there is tension between the regulatory bodies. To be specific, the CITC, the telecommunications sector regulator, overlaps in terms of functions with the Minister, and this overlap has also been found in the case of the ECRA as the regulatory body for the electricity sector.

The analysis in this chapter showed problems with the institutional and legal framework of sector regulations. While laws have been adopted, the problem is with the institutions themselves because there is a deficiency as regards the streamlining and delineation of the regulators' functions. The analysis of the telecommunications, electricity and civil aviation sectors in Saudi Arabia revealed that the associated regulatory bodies, namely the CITC, ECRA and the GACA,. It is important to note that it is difficult to fully verify whether independence and impartiality have been achieved in Saudi Arabia, because the privatisation process is still underway in the country. Currently, there is a constant confusion between the Ministry, the Council of

[479] Article 7 of Communication and Information Technology Commission Ordinance 2001.

Competition and other government agencies and there is a fine line between the Competition Law and sector-specific regulation. One of the questions posed by this Thesis is whether other models of regulatory interdependence can be transferred to Saudi Arabia. The following chapter will address this question and focus on the relationship between competition law and sector-specific regulation.

Chapter 5

The relationship between the Council of Competition & regulatory agencies

5.1 Introduction

As stated in chapter one, the relationship between the competition authority and regulatory agencies is essential for the successful enforcement of competition law. Indeed, the interface between the Council of Competition and regulatory agencies in Saudi Arabia is the main issue of this research. It has been indicated in the preceding chapters that there is no reference to the relationship between these authorities either from a legal or an institutional perspective in the Competition Law 2004. However, after the restructuring and renaming of the CC to the General Authority for Competition (GAC) and the adoption of the new Competition Law 2019,[480] there is a mention to the relationship between these authorities in Article 3 (3) of the Competition Law 2019, where it is provided that GAC have the primary jurisdiction and have inherent jurisdiction over any governmental bodies.[481] However, there is an ambiguity about the mechanisms of applying this approach in the relationship between GAC and regulatory agencies.

To effectively discuss this issue, the chapter will highlight the nature of the relationship between the Competition Law and the sectoral regulations, on the one hand, and the relationship between the competition authority and the regulatory

[480] The Council of Ministers resolution No. (55) dated 10/10/2017 was issued in regard to approve the change of the name of "Council of Competition" to become "General Authority for Competition," and to approve the Authority statute. Also, the Royal decree No. (M/75) dated 06/03/2019 was issued to approve the new competition law and resolution the Board of Directors of the General Authority for Competition No. (337) dated 24/09/2019 which was issued to approve the Implementing Regulations of the Competition Law.

[481] Article 3 (3) of the Competition Law 2019 and Article 5 of Implementing Regulations of the Competition Law 2019.

agencies, on the other hand. Also, the chapter will show the common obstacles that these institutions face in the enforcement of their laws, such as conflict of laws, overlapping or the jurisdictional conflict among these authorities. Moreover, the chapter will review proposed solutions to provide recommendations for reforms to solve the current problems in the Saudi system.

The chapter is divided into two sections. Firstly, the discussion will commence with analysing the relationship between the CC and the RAs through an analysis of the provisions of competition law against the competition rules in the sectoral regulations to identify the challenges and obstacles that influence their relationship. It will also analyse the competition policy against other governmental policies, especially privatisation and foreign investment, to discover their impact on the relationship between these institutions and the relationship between the Council of Competition and the regulatory bodies. Secondly, it will provide recommendations to address the abovementioned challenges and obstacles between the CC and delineate the relationship between these institutions.

5.2 Overview of the relationship between competition authority and regulatory agencies

5.2.1 Fundamental concept of the Competition Law and the sectoral regulations

As stated before in chapter one, competition law consists of the legal rules that regulate the behaviour of competitors in the market by prohibiting certain practices, such as anti-competitive agreements, abuse of the dominant position of a company or merger operations. The aim of these rules and procedures is clearly to prevent or at least minimise the effect that such practices can have on the competition between companies in a market through the creation of a dominant position. In addition, competition law consists of legal rules that are designed to regulate competition within the market and prevent monopolies by creating a competitive environment

and promoting consumer welfare through the provision of good quality products in competitive prices.[482]

Regulation is one of the fundamental roles that a state has to perform in its attempt to promote the welfare of its citizens, corporations and the society in general. Regulation can also be regarded as the means that the government uses to restrict private activities.[483] Moreover, competition law is protecting the operation of the market and the behaviour of all market participants by preventing anti-competitive practices and inadmissible behaviour through 'ex post punishments'.[484] At the same time, the market requires the introduction of sectoral regulations, which are designed to keep the right balance in all segments of the market and control the prices that the participants impose to each other.[485] Sectoral regulation involves the structure of the sector, users' interests and the promotion of competition.[486] Sectoral regulation is a vital instrument for creating a competitive environment in the market, while competition law is all about promoting and protecting competition in the market. Thus, competition law and sectoral regulation need to complement each other in order to achieve their purpose and create a level-playing field for companies and businesses within the market.[487]

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[482] Bernard Hoekman and Peter Holmes, 'Competition Policy, 'Developing Countries and the WTO', (1999) The World Economy, Vol. 22, No. 6, 875-893.

[483] Maurice E. Stucke, 'Is Competition Always Good?' (2013) Journal of Antitrust Enforcement, Volume 1, Issue 1, 162–197. See also G Christensen, 'Public Interest Regulation Reconsidered: From Capture to Credible Commitment' (2010) Paper presented at "Regulation at the Age of Crisis", ECPR Regulatory Governance Standing Group, 3rd Biennial Conference, University College Dublin <http://www.regulation.upf.edu/dublin-10-papers/1J1.pdf> Accessed 24 July 2019.

[484] Paul A Grout, 'Competition Law in Telecommunications and its Implications for Common Carriage of Water', (2001), CMPO Working Paper, 02/056, CMPO, University of Bristol <http://www.bristol.ac.uk/media-library/sites/cmpo/migrated/documents/wp56.pdf > Accessed 24 July 2019.

[485] Jon Stern, 'Sectoral Regulation and Competition Policy: The U.K.'S Concurrency Arrangements—An Economic Perspective' (2015) Journal of Competition Law & Economics, Volume 11, Issue 4, 881–916. See also Pornchai Wisuttisak, 'Liberalization of the Thai Energy Sector: A Consideration of Competition Law and Sectoral Regulation', (2012) Journal of World Energy Law and Business, Vol. 5, No. 1, 60-77.

[486] Alexandre de Streel, 'The Relationship between Competition Law and Sector Specific Regulation: The Case of Electronic Communications' (2008), Reflets et perspectives de la vie économique 2008/1 (Tome XLVII), 55-72.

[487] Pornchai Wisuttisak, 'Competition Law and Sectoral Regulation in the Electricity Sector in Thailand: Current Problems, International Experience and Proposals for Reform', (PhD Thesis, UNSW Australia, 2013).

5.2.2 Interaction between the competition law and sectoral regulations

All countries seek to create a free market in order to attract investors, while at the same time they seek to protect the investors through a clear legal and institutional regulatory framework. After the globalisation of the economy, the liberalisation and privatisation movement, the countries sought to privatise utility industries from public monopoly. However, the monopoly can be transferred from public to private stakeholders. To avoid this from happening, the state established regulatory agencies to supervise regulated sectors and open the market for competition for national and international investors. Therefore, the countries adopted competition and investment laws. However, the investment law, some competition policy and economic regulations might be barriers per se to access the markets due to their provisions and requirements. To achieve the advantages of opening the markets for national and international investors and promoting the competition, countries should provide facilities to access their markets through deregulation, removal of any regulatory barriers and reform of the relevant policies.

The concept of regulatory competition denotes "a movement from the core conception of competition law towards a model that more closely resembles the paradigm of regulation".[488] On the one hand, this movement may reflect the progressive development of competition law that can more effectively address certain types of market failures.[489] On the other hand, there must be some focus beyond the domestic competition policy that would extend to the evaluation of the current trend toward the worldwide harmonisation of policies, so that the authorities have a more panoramic view of the international market, apart from their own domestic one. In this chapter, it is argued that the relationship between competition authorities and regulatory bodies cannot be totally separated, as there is a deep interdependence between the two bodies.

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[488] Niamh Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (Cambridge University Press 2015) 137.
[489] Michal S Gal, *Competition Policy for Small Market Economies*, (Harvard University Press, 2003), 15-18.

Nevertheless, the distinction between them must be understood. Firstly, competition law also refers to *ex post* regulation and is characterised by interventions by competition authorities, where abusive behaviour by one or more market participants takes place in the market.[490] Therefore, competition law is said to look backward (*ex post*). On the other hand, sector-specific regulation is *ex ante*, because it lays the foundation or groundwork for basic competition in the market, where forces and factors fail to ensure fair competition.[491] Sector-specific regulation is forward-looking (*ex ante*), because it prescribes regulatory solutions regardless of particular circumstances.[492] Secondly, sector-specific regulation is mostly found in infrastructure and utility sectors, which is due to the importance of the services they provide. Such regulation is also found where governmentally controlled monopolies exist.[493] On the contrary, competition rules are general and normally do not always provide specific answers, but at the same time they are more flexible.[494]

As a consequence, while sector-specific regulation does not only contain more precise rules, which offer certainty for regulatory bodies and concerned undertakings, they do provide faster and more effective solutions.[495] Although neoclassical economic theory posits that free markets are the engines of progress and function as efficient allocators of resources,[496] it is argued that the concept of 'free' markets is, to an extent, a fallacy.[497] This is because, as posited by Cass Sunstein, the

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[490] Rolf Weber, 'From Competition Law to Sector-Specific Regulation in Internet Markets? A Critical Assessment of a Possible Structural Change' in Joseph Drexl & Fabiana Di Porto (eds) *Competition Law as Regulation* (Edward Elgar Publishing 2015) 239-267, 245.

[491] Rolf Weber, Regulatory Models for the Online World (Schulthess 2002), 25.

[492] 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 Eugène Buttigieg (ed) *Rights and Remedies in a Liberalised and Competitive Internal Market* (Gutenberg Press 2012) 137, 139.

[493]Devendra G. Kodwani, 'Economic Regulation of Utility Industries' (2000) Economic and Political Weekly, Vol. 35, No. 30, 2657-2661, 2660.

[494] Weber (n. 486) 246.

[495] Giorgio Monti, 'Managing the Intersection of Utilities Regulation and EC Competition Law' (2008) LSE Law, Society and Economy Working Papers 8/2008, <http://www.lse.ac.uk/law/working-paper-series/2007-08/WPS2008-08-Monti.pdf > Accessed 24 July 2019.

[496] Dunne (n. 484), 6.

[497] Tony Lawson, 'What is this 'School' called Neoclassical Economics? (2013) 37(5) Cambridge Journal of Economics 947-983; Edward O'Boyle, *Looking Beyond the Individualism and Homo Economicus of Neoclassical Economics A Collection of Original Essays Dedicated to the Memory of*

'myth of laissez-faire' remains a myth because free markets depend on law for their existence and, therefore, there always have to be a system of rules regulating who owns what, who can do what and to whom and setting penalties for trespass in private property.[498] Consequently, although this notion of free market may appeal to the notions of autonomy and freedom from state oppression, all markets depend, to a degree, on law for their existence and operation.[499] 'It is essentially impossible to think of any market that does not, in some way, rely upon legal rules that regulate' it.[500] Therefore, same as in the case of other institutions, markets should be considered as an individual legal construction, and should thus be evaluated as such as to whether they promote human interests rather than as a simple way of promoting voluntary interactions.[501]

Of course, the abovementioned point inevitably brings certain questions to mind; more specifically, is it possible to have markets that are wholly unencumbered by regulation? Does the involvement of state or government in the operations of market by way of regulation result in obstacles in the market? Whilst answers to these questions may be better achieved in practice than through a theoretical analysis such as the present one, this chapter will delve into an analysis of how the law and regulatory bodies intervene in the markets to secure a better outcome for consumers.[502]

Apparently, state supervision of the market relies on the use of two tools, namely competition law and economic regulation, with more specific consideration on whether and to what extent the use is effective, because otherwise the impact of the

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Peter L. Danner Our Friend and Colleague (Marquette University Press 2011); Mark Bevir, *Encyclopedia of Political Theory* (University of California, 2010).

[498] Cass Sunstein, *Free Markets and Social Justice* (Oxford University Press 1999) 5.

[499] See Daniel Bennett, 'Myth Busting: The Laissez-Faire Origins of American Higher Education' (2014) 18(4) The Independent Review 503-525; Capitalist Myth, 'The Fallacy of Laissez-Faire Capitalism 8 January 2013, http://www.geopolitics.us/fallacy-of-laissez-faire-capitalism/> (Accessed 26 July 2019).

[500] Dunne (n. 484), 2.

[501] Sunstein (n. 494), 5. See also Richard A Posner Economic Analysis of Law (7th edition, Aspen Publishers, 2007)

[502] See Office of the Fair Trading (OFT). The mission statement of the OFT was 'to make markets work well for the interests of the consumers

two legal tools.[503] The argument is that both tools are relevant and may be managed together for a better service delivery. Therefore, the tools should be seen as complementary rather than contradictory. It must be noted that 'competition law seeks to strengthen the workings of the market mechanism by prohibiting certain forms of anticompetitive behaviours by firms'[504]. While regulation involves a state-directed, positive and coercive alteration of or derogation from the operation of the free market in order to address market failure.[505] Admittedly, both bodies are distinct mechanisms for market supervision, but, due to the overlap of their functions, it is better to conceive them as complementary rather than antagonistic.[506]

Since the 1970s, developed countries embarked on neoliberal programme and this made economic regulation to take a new turn in its journey of expansion and transformation both at the national and international levels.[507] Accordingly, John Braithwaite and Peter Drahos agree that every state exhibits special experiences and circumstances, however the fact that most fundamentals of regulation are global is of key importance and should be considered accordingly.[508] Furthermore, Susan Strange argues that mid-sized countries outside Europe and the United states are 'rule takers' and that also globalisation has caused states' territorial boundaries to no longer coincide with the limits of political authority over society and economy.[509]

As noted above, it is clear that there are few differences between the function of sector-specific regulators and competition authorities. While the former looks back to punish anticompetitive behaviour in the marketplace, the latter sets the ground rules

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[503] Dunne (n. 484), 3.
[504] Ibid
[505] Robert D. Anderson, William E. Kovacic, Anna Caroline Müller and Nadezhda Sporysheva, 'Competition Policy, Trade and the Global Economy: Existing WTO Elements, Commitments in Regional Trade Agreements, Current Challenges and Issues for Reflection (2018) World Trade Organization - Economic Research and Statistics Division, Staff Working Paper ERSD-2018-12, <https://www.wto.org/english/res_e/reser_e/ersd201812_e.pdf> Accessed 27 July 2019.
[506] Ibid. See also Hugh M. Hollman and William E. Kovacic, 'The International Competition Network: Its Past, Current and Future Role' (2011) 20 Minnesota Journal of International Law 274-323, 301.
[507] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press 1992) 7. In contrast, see David Levi-Faur and Jacint Jordana, *The Rise of Regulation Capitalism: The Global Diffusion of a New Order* (Thousand Oaks Calif 2005) 12.
[508] John Braithwaite and Peter Drahos, *Global business Regulation* (Cambridge University Press 2000) 604.
[509] Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press 1998).

and conducive environment for competition. In addition, sector-specific regulation could be adopted in market segments where competition pressure is weak or where the systematic abuse of market power is likely to occur due to the non-existence of competition.[510]

The topic on the interaction between regulations and competition law has been a subject of an ongoing debate amongst scholars.[511] This is because the liberalisation of former monopoly industries has created markets where partial regulation coexists with competitive segments.[512] Both competition law and regulation have the primary function of addressing the various weaknesses within the market system.[513] Therefore, it is necessary to reflect on the function of the market mechanism prior to any assessment of the mechanics of these legal instruments.[514] Therefore, the presence and persistence of market failures, or the lack of effective market, creates the need for state corrective measures through competition law or regulatory instruments.[515]

Economic regulation is a relatively narrow concept, limited to the regulation of conventional forms of public utilities. Economic regulation has four distinguishing components, which include (i); price-fixing (ii); universal service obligations, (iii)

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[510] Weber (n. 486), 245.

[511] See among others, François-Charles Laprévote, Sven Frisch, and Burcu Can, Competition Policy within the Context of Free Trade Agreements (E15 initiative on Strengthening the Global Trade and Investment System for Sustainable Development, September 2015), <http://e15initiative.org/wpcontent/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf> Accessed 27 July 2019; Robert D. Anderson, Anna Caroline Müller and Antony Taubman, 'Competition Policy and the WTO TRIPS Agreement: An Essential Platform for Policy Application, and Questions Unresolved' in Robert D. Anderson, Nuno Pires De Carvalho and Antony Taubman (eds.), *Competition Policy and Intellectual Property in the Global Economy* (Cambridge University Press, 2018); Frank H. Easterbrook, 'Vertical Arrangements and the Rule of Reason: Antitrust Law Enforcement in the Vertical Restraints Area' (1984) 53 Antitrust Law Journal 135

[512] Dunne (n. 484), 4.

[513] Ibid., 6; Renato Nazzini, *The Foundations of European Union Competition Law: The Objective and Principles of Article 102* (Oxford University Press 2012) 11. According to him, competition rules rely on concepts, such as prevention, restriction or distortion of competition or abuse of a dominant position and that these concepts may themselves have different meanings depending on factors such as the political environment, prevailing market conditions, or economic and political theories).

[514] Dune (n. 484), 6

[515] Eleanor M. Fox and Amedeo Arena, 'The International Institutions of Competition Law: The Systems Norms', in Eleanor M. Fox and Michael J. Trebilcock (eds), The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project (Oxford University Press, 2012); N. Ashford, C. Ayers and R. Stone, 'Using Regulation to Change the Market For Innovation' (1985) Harv. Envtl. L. Rev. 419.

control of entry, prescription of quality and conditions of service.[516] Unlike competition law that offers a residual mechanism of market supervision applicable in most sectors, economic regulation is sector-specific in nature and it prescribes particular market conduct, rather than merely proscribing broad categories of anticompetitive conduct.[517] Nevertheless, the market difficulty that economic regulation offers solutions to is the same problem that is addressed by competition law, namely, excessive market power.

Economic regulation thus provides a substitute for the market discipline by emulating the competitive outcome.[518] Accordingly, Kahn described the importance of economic regulation as 'the direct replacement of competition with governmental orders as the principal institutional device for ensuring good performance'.[519] Economic regulation as a separate category of state supervision aimed at controlling market power has been frequently discussed by economic policy-makers.[520] 'Within regulatory economics, moreover, competition law has been identified as a third facet alongside economic and social regulation. Accordingly, it is possible to discern a notion of economic regulation that is distinct from, yet has overlapping spheres of application with, competition law, creating a potential for cumulative application of these mechanisms'.[521]

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[516] Dunne (n. 455), 35.

[517] Ibid. See also Nick Godfrey, 'Why is Competition Important for Growth and Development?' (A Contribution to the OECD Global Forum on Investment, 27-28 March 2008, <http://www.oecd.org/investment/globalforum/40315399.pdf> Accessed 28 July 2019.

[518] David EM Sappington and Dennis L Weisman, 'Price Cap Regulation: What Have We Learned from 25 years of Experience in the Telecommunications Industry? (2010) J Regul Econ 38(3), 227–257, 229; Timothy Tardiff, 'Efficiency Metrics for Competition Policy in Network Industries' (2010) 6(4) Journal of Competition Law and Economics 957, 958.

[519] Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, (MIT Press, 1988), 20-21. See on this issue, Daniel F. Spulber, *Regulation and Markets*, (MIT Press, 1998), 23-24 and Charles F Philips, *The Economics of Regulation: Theory and Practice in the Transportation and Public Utilities Industries*, (Lexington, 1969).

[520] See, for example, W. Kip Viscusi, John M. Vernon and Joseph E. Harrington, Jr., *Economics of Regulation and Antitrust*, (4th edition, MIT Press, 2005).

[521] Dunne (n. 484), 36.

5.2.3 The relationship between the competition authority and regulatory agencies

Competition law and economic regulation are both components of a country's market regulatory tools that facilitate the function of market regulation.[522] With the expansion of markets internationally, especially with state-owned enterprise, regulated monopoly sectors, privatisation and liberalisation, it has become imperative to discuss the operations and interaction between competition authorities and regulatory bodies. There is an ongoing debate about the relationship between these two institutions, the semblance of competition law towards economic regulation and its change towards a regulatory nature.[523] Still, the terms 'competition law' and 'economic regulation' are just used to denote the various wavering ideas and the phenomenon nature of the relationship between the Council and the regulatory bodies.[524] The contentious issue of whether the functions of these bodies can be delineated and separated from each other is the focus of this chapter.

According to the OECD, introducing competition in regulated market that previously monopolised by state owned enterprises is not easy tasks especially with required structural matters, stranded cost and service issues, it needs to high level of experience.[525] Thus, the transition period from government ownership to regulation, which relies on market forces, needs to four tasks should be taken into careful consideration. Firstly, the achievement of competition protection through controlling anti-competitive conduct as well as mergers and acquisitions; secondly, the provision

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[522] Niamh Dunne, 'Price Regulation in the Social Market Economy' (2017) LSE Law, Society and Economy Working Papers 3/2017, <http://eprints.lse.ac.uk/73418/1/WPS2017-03_Dunne.pdf> Accessed 24 July 2019.

[523] Keith Hylton, 'Deterrence and Antitrust Punishment: Firms Versus Agents' (2015) 100 *IOWA Law Review* 2069-2082; Phillip Areeda and Herbert Hokenkamp, *Antitrust Law An Analysis of Antitrust Principles and their Application* (3rd edn Aspen Publishing 2008) 770; Valentine Korah, 'The Interface between Intellectual Property and Antitrust: The European Experience' (2002) 69(3) *Antitrust Law Journal* 801-839, 832.

[524] Mariateresa Maggiolino, 'The Regulatory Breakthrough of Competition Law: Definitions and Worries' in Josef Drexl and Fabiana Di Porto (eds) *Competition Law as Regulation* (Edward Elgar Publishing 2015) 3-26.

[525] OECD, 'Relationship between Regulators and Competition Authorities', (1999), AFFE/CLP(99), 8, <http://www.oecd.org/regreform/sectors/1920556.pdf> Accessed 28 July 2019.

of access regulation[526], which would be designed to ensure non-discriminatory access to all necessary inputs, especially network infrastructures; thirdly, the introduction of economic regulation[527] through the adoption of cost-based measures to control monopoly pricing; and fourthly, technical regulation[528], which would allow the setting and monitoring of standards so as to guarantee compatibility and address privacy, safety, and environmental protection concerns.[529] Technical regulation, in particular, always appeals to all regulatory agencies, which have experience in monitoring and application of sector-specific regulations. Hence, we cannot have a 'one-size-fits-all' solution, because we cannot apply the same solution in all countries, it will not bring the same results. It basically depends on the regulatory framework of each country and its historical development, while it can also be argued that we may have to adopt different strategies even among different sectors of the same country.[530]

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[526] Access regulation covers issues of ensuring non-discriminatory access to necessary input, such as network infrastructure. Access regulation may require the processing of an enormous amount of cost data in order to determine access terms and monitoring of compliance with these terms by the relevant operators and this makes it arguable that sector regulators should handle this kind of regulation. On the other hand, many competition authorities have developed strong expertise in access issues in the context of "abuse of dominance" and so they can be said to have a key advantage in performing this type of regulation. See, for example: the European Commission's investigation and findings reached in 2004 against Microsoft (finding abuse of dominance on the part of the firm due its refusal to disclose interface information); and the South African Competition Commission's investigation and findings against Telkom in 2009 (for abusing its "near-monopoly" position by charging excessive prices for the basic infrastructure needed by its downstream rivals). Some competition authorities have published guidance on the application of provisions on abuse of dominance in relation to access issues: see the Canadian Competition Bureau Information Bulletin on the Abuse of Dominance Provisions as applied to the Telecommunications Industry (2008), in particular part 4.2.2.

[527] Economic regulation extends to pricing issues and those concerning standard marketing practices, such as advertising. Economic regulation, like technical regulation, is an on-going process. Sector regulators are considered to be suited to carry out economic regulation. However, unlike technical regulation, competition authorities can also be said to be capable of handling this type of regulation.

[528] Technical regulation involves the determination of standards – such as those relating to processes and products – and may extend to issues of safety, environment and privacy. The nature of technical regulation, in particular the fact that it requires consistent and on-going monitoring, has resulted in the belief that such regulation is best handled by sector regulators who have the necessary resources in terms of sector-specific knowledge and time.

[529] Ibid. See also Einer Elhauge and Damien Geradin, *Global Competition Law and Economics*, (2nd ed., Hart Publishing, 2011).

[530] See Robert H. Bork, *The Antitrust Paradox* (2nd edition, Free Press, 1993).

After deregulation and privatisation attempts, countries establish regulatory agencies with particular responsibilities, such as supervision, monitoring and regulating competition in their sectors. Before establishing any competition authorities, assigning responsibilities to the regulatory agencies, it is essential to set and promote clear competition principles in the regulated sectors. However, jurisdictional conflicts between the competition authorities and the regulatory agencies occur once there are ambiguities in the law and lack of clarity as to which law has precedence to deal competition issues in the regulated markets.[531]

In most states, the relationship matter between the competition authorities and the regulatory agencies is ongoing challenge. Although, this matter has been discussed widely, there is no single appropriate solution. There are different approaches among different jurisdictions, even within one single jurisdiction, there are different approaches. For example, in one jurisdiction the competition authorities have powers over the regulated markets in only some aspects or the competition authorities and the regulatory agencies can exercise concurrent jurisdiction. Moreover, there is another jurisdiction that adopted a framework for formal agreement of cooperation between the competition authorities and the regulatory agencies.[532]

Even though competition authorities and regulatory agencies are presumed to have the ability to execute their functions through their expertise, the differences of the experience and the institutional cultural among these institutions are not easy to eradicate or to tackle, because they may negatively affect their performance and effectiveness.

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[531] UNCTAD, 'Best practices for defining respective competences and settling of cases, which involve joint action by competition authorities and regulatory bodies', (2006), TD/B/COM.2 /CLP/44/Rev.2.
[532] William Blumenthal, Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China' (23-24 May 2005) <https://www.ftc.gov/sites/default/files/documents/public_statements/presentation-international-symposium-draft-anti-monopoly-law-peoples-republic-china/20050523sclaofinal.pdf > Accessed 29 July 2019.

There are five important aspects regarding the experience and institutional culture should be considered. Firstly, managing market power is different in the case of competition authorities and regulatory agencies, as competition authorities mostly seek to reduce it, whereas the regulatory agencies are often responsible to mitigate the impact of market power on public interest. Secondly, competition authorities pick structural remedies, while the regulatory agencies are monitoring and imposing some conditions for certain types of conduct. Thirdly, competition authorities apply ex-post enforcement except in the important area of merger review, whereas, the regulatory agencies apply ex ante enforcement. Fourthly, the competition authorities are basically based on receiving information through complaints and then conduct research for additional information, if needed, whereas the regulatory agencies intervene and require information continuously from competitor companies. Finally, the regulatory agencies have more range of goals than the competition authorities which may grant them the ability for to trade off conflicting goals more easily.[533]

To resolve the jurisdictional conflicts between the competition authorities and the regulatory agencies so that these institutions can coexist, UNCTAD proposed five possible approaches that can be taken by countries to build a basis for coordination between these institutions and make their policies more coherent.[534] These approaches are:

> I. To combine technical and economic regulation in a sector regulator and leave competition enforcement exclusively in the hands of the competition authority;
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> II. To combine technical and economic regulation in a sector regulator and give some or all competition law enforcement functions;
>
> III. To combine technical and economic regulation in a sector regulator and competition law enforcement functions will be performed in coordination with the competition authority;

[533] OECD (n 521), 9.
[534] Ibid

IV. To organise technical regulation as a stand-alone function for the sector regulator and include economic regulation in the competition authority's functions; and

V. Rely solely on competition law enforced by the competition authority. [535]

In other words, these approaches simply mean:

a) Giving primacy to the competition authority for economic regulation in the regulated sectors.
b) The regulatory agencies deal with competition matters in the regulated sectors.
c) Giving primacy to the competition authority to enforce Competition law in the sectoral regulations.
d) Exercising concurrent jurisdiction between the competition authority and the regulatory agencies.
e) Dividing the labour between the competition authority and the regulatory agencies.[536]

Furthermore, Dabbah believes that there are substantial differences between competition law and sectoral regulations; however, there are common objectives shared between them. Thus, this can potentially complicate matters from a practical perspective. Therefore, many countries have developed different models to determine the relationship between competition authority and regulatory agencies.[537]Also, Dabbah indicated that the most notable and workable options are:

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[535] Ibid., 5.
[536] Rishika Mishra, 'Harmonising Regulatory Conflicts, CUTS Centre for Competition, Investment & Economic Regulation', (2013) < http://www.cuts-ccier.org/pdf/Harmonising_Regulatory_Conflicts.pdf> Accessed 29 July 2019.
[537] Maher Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) 70(1) The Cambridge Law Journal 116.

> ‘OPTION A: The exclusive allocation of competition enforcement in specific sectors to sector regulators in addition to technical, economic and access regulation;
> OPTION B: The coordination of competition enforcement between the sector regulators (who also enforce technical, economic and access regulation) and the competition authority;
> OPTION C: The allocation of economic regulation and access regulation – in addition to competition enforcement – to competition authorities with technical regulation (perhaps with significant aspects of economic regulation) being handled by sector regulators;
> OPTION D: The allocation of competition enforcement and access, economic and technical regulation to competition authorities;
> OPTION E: The exclusive allocation of competition enforcement in the sectors to competition authorities with technical, economic and access regulations being given to sector regulators;
> OPTION F: The allocation of competition enforcement in the sectors in a concurrent manner to competition authorities and sector regulators with the latter also performing technical, economic and access regulation.’[538]

Some countries have adopted different options in different sectors because the list is not comprehensive and there are several alternatives, as we can see from the example of the USA and Canada.[539]

As shown above, the competition authorities play a major role in the regulated sectors. This is why there are different options available. However, these options can be listed under two main models. Firstly, the exclusivity model, which means the competition authority handles competition enforcement in the regulated sectors in an exclusive manner. Secondly, the concurrency model, which means the competition

[538] Ibid.
[539] Ibid 117.

authority enforce the competition law in the sectors concurrently with the regulatory agencies. These models will be considered in the following sections.

- **The exclusivity model**

The exclusivity approach operates where competition authorities are allowed to enforce competition laws to the exclusion of sector regulators. There are apparent advantages and disadvantages with this approach. Some of the advantages include the independence of competition authorities that can reduce the risk of capture by the industry, the ability of the competition authority to take an economy-wide perspective is strengthened, there is consistency in competition enforcement across all sectors of the economy, the enforcement by competition authorities minimises the prospect of unnecessary distortion of competition which can arise from heavy intervention by sector regulators.[540] Other merits include the likely savings in administrative time and costs, the minimising of duplication in enforcement efforts and the promotion of competition through rigorous actions by specialist bodies of competition law.[541]

In addition, competition authorities can use a 'rule of reason' approach, which is not always considered to be possible in sectoral regulation.[542] Despite the advantages mentioned above, the exclusivity approach also has a number of disadvantages. These disadvantages include the lack of technical expertise in the relevant sectors on the part of competition authorities, lengthy procedures, which are typical in competition enforcement, the risk of a competition authority becoming entangled in overly detailed and complex regulatory issues, which do not have a sufficient link to competition.[543] Other disadvantages include the fact that competition law is

[540] Dabbah (n. 533), 118.
[541] Ibid
[542] The Rule of reason is a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited. See OECD, 'Glossary of Statistical Terms', https://stats.oecd.org/glossary/detail.asp?ID=3305 (Accessed 29 July 2019).
[543] Dabbah (n. 533), 119.

concerned with protecting competition and in the sectors the action needed in many cases is to facilitate competition because it is usually absent, not to mention the fact that regulating the sectors is considered to revolve around the protection of the public interest and achieving other important social objectives.[544] There is also the lack of a specialised mechanism for resolving disputes between market players, which can easily arise within the sectors.[545] In addition, the regulatory agencies tend to keep a good relationship with the regulated firms, which fact may impact the role of the agencies and their investigation against these firms. Also, the regulatory agencies are subject to the power of the lobbying by stakeholders, which might be taken into consideration. Moreover, the regulatory agencies prefer resolving the cases using their regulatory rules more than general competition law.[546]

The fairly obvious conclusion that should be drawn in light of the existence of advantages and disadvantages to the exclusivity model is that the best scenario is not a perfect one.[547]

From the above discussion, it is obvious that granting competition authorities exclusive powers to enforce competition rules in a regulated sector may not work well in practice in view of the many disadvantages mentioned earlier. The same argument holds true for sector regulators, namely that allocating exclusive powers to sector regulators is discounted.[548] This is for the simple reason that in the same way there are disadvantages with competition authorities being given exclusivity of power, there are also serious shortcomings inherent in exclusivity of power to sector regulators. According to Dabbah, one such shortcoming is revealed by the simple

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[544] Ibid

[545] In contrast, see the Australian experience where the ACCC is empowered by the Trade Practices Act 1974 to engage in arbitration and to make directions in 'access' disputes as well as take all necessary steps for the purposes of ensuring speedy hearing and determination of such disputes.

[546] Angelene Duke, 'Concurrency: Is it the dawn of a new day?', Kluwer Competition Law Blog, 13 January 2014, http://competitionlawblog.kluwercompetitionlaw.com/2014/01/13/concurrency-is-it-the-dawn-of-a-new-day/ accessed March 2020

[547] Dabbah (n. 533), 119. (noting that the exclusivity is the best scenario in comparison to the concurrency approach).

[548] Ibid

fact that sector regulators are not competition authorities.[549] There is also the uncertainty of whether regulators will cooperate among themselves in a structured and meaningful manner, especially when cross-sectoral issues arise and when competition law is applied by regulators in different sectors.[550] A third shortcoming arises because sector regulators may not be able to conduct competition work due to constraints of resources.[551]

- **The concurrency model**

The concurrency model is about competition authorities as well as sectoral regulators (in those sectors for which they are responsible) having competition powers. The best example of this model is the UK. The UK has a system of concurrent enforcement of competition law, where both the general competition authority and the regulatory agencies are responsible to enforce the Competition Act. This Act is enforced by the CMA[552] and exercised concurrently with the relevant regulatory agencies, such as the FCA (Financial Conduct Authority), the PSR (Payment Systems Regulator), the Ofcom (Office of Communications), the Ofgem (Gas and Electricity Markets Authority), the Ofwat (Water Services Regulation Authority), the ORR (Office of Rail and Road), the CAA (Civil Aviation Authority), the Northern Ireland Authority for Utility Regulation (NIAUR) and the NHS Improvement (NHSI).[553]

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[549] Ibid
[550] Ibid
[551] In the UK, for example, the Civil Aviation Authority (CAA) does not enjoy concurrent powers with the Office of Fair Trading (OFT) in relation to regulating airports: it has concurrent powers in relation to air-traffic services. Whilst there is a huge scope for arguing that the concurrent powers of the CAA should be extended to airports, the CAA itself has acknowledged that it may not have enough staff to cope with competition work. See Report of the House of Lords Select Committee, 'UK Economic Regulators' (2007), <http://www.publications.parliament.uk/pa/ld200607/ldselect/ldrgltrs/189/189i.pdf> Accessed 29 July 2019. Bringing competition law and the regulation of airports under the remit of a single authority, the CAA, can be highly desirable to enable it to take advantage of the unique features of the airports market.
[552] In April 2014, the competition powers of the Office of Fair Trading (OFT) and the Competition Commission (CC) joined into one authority - the Competition and Markets Authority (CMA).
[553] Helen Weeds, Concurrency between OFT and regulators, Utilities Policy 12 (2004) 65–69. Also, see CMA's Annual report on concurrency 2019, available at

"The Competition Act 1998 (Concurrency) Regulations 2004 (the Concurrency Regulations) set out rules on how the concurrency arrangements are to work in practice in relation to the application of the Chapter I and II prohibitions and Arts 101 and 102 TFEU. Where the [CMA] or the relevant sector regulator is proposing to exercise its competition powers, it is required to inform the other competent authority, with a view to agreeing who should exercise such powers".[554]

The concurrency regulations allow transferring cases between authorities and make rules for exchanging staff between the competent authorities to assist in cases that have been identified by another authority. However, it is not allowed that one case is considered by more than one competent authority to avoid duplication of efforts and conflicting enforcement.[555]

Concurrency relates to the impact of the appropriate parameters of the concurrent application of competition law within the regulated markets.[556] Dunne argues that the prohibition of concurrency may inhibit public enforcement in regulated markets undertaken presumptively in the public interest to remedy market failures.[557] It appears that concurrency is supported by literature this is because, as argued by Dunne, the mere presence of regulation within a market should not exclude the application of competition law to anticompetitive conduct arising within that sector.[558] In the same vein, it is acknowledged that 'certain competition problems that occur in regulated markets are wholly attributable to the regulatory framework rather than private behaviour, so that antitrust liability should be entirely precluded'.[559]

Consequently, in order to give more substantive guidance for situations falling between these broad rules of liability, Dunne highlighted three sources of potential

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811431/ACR_PV2406.pdf ,accessed in 20 April 2020.

[554] John McInnes, Concurrent Exercise of Competition Powers by the Sectoral Regulators: Is It time for a more radical change of approach? competition law (2012), 39.

[555] Ibid. The concurrency arrangements were introduced in their current form by the Enterprise and Regulatory Reform Act 2013 effective from 1 April 2014.

[556] Dunne, (n.455), 251.

[557] Ibid 244.

[558] Ibid, 262.

[559] Ibid.

concern in cases of concurrent application.[560] These are the following: first, the economic objection, which is that competition enforcement in regulated markets can actually be inefficient, thereby scoring something of an antitrust 'own goal'.[561] The second is the rule-of-law objection, which relates to the risk that competition enforcement in the regulated markets might override individual rights, particularly in circumstances where regulation itself is inefficient.[562] Thirdly, Dunne evaluated the institutional or enforcement objections that underline practical considerations such as the availability of appropriate remedies and the identity of the antitrust plaintiff.[563] "None of these concerns reject concurrent application definitively, yet together they help to explain the resistance towards competition enforcement that can exist in regulated markets".[564]

Undoubtedly, competition rules can make a valuable contribution to the functioning of competition in regulated markets when directed against anti-competitive private conduct. Articulating this point more generally, Weatherill asserted that competition can be employed as a 'problem-solver and as a means to "tame" the corruptive excesses of nationally-biased political processes'.[565] In contemporary times, competition laws are closely aligned to the economic concept of efficiency.[566] Therefore, competition enforcement in regulated markets is generally premised on the desirability of correcting inefficiencies that result from or that persist despite the presence of a regulatory framework.[567] "Like regulation, however, competition enforcement is vulnerable to error, the costs of which can be as significant as regulatory errors".[568] Nevertheless, overlaps do arise in practice between ostensible

[560] Ibid
[561] Ibid.
[562] Ibid, 236-241
[563] Ibid, 243-251 (discussing private enforcement and remedies where in private enforcement one of the major challenges was whether or when to prohibit concurrency in private and not in public antitrust actions. As rightly argued, this will be problematic because certain countries, such as the U.S for example, would need legislative intervention or judicial clarification on how this can work in practical terms)
[564] Ibid, 262
[565] Steve Wetherill, *Better Regulation* (Hart Publishing 2009) 26.
[566] Dunne (n. 484), 232
[567] Ibid
[568] Ibid

'substantive' and 'institutional' issues.[569] The thesis agrees with the concurrency approach that would put sector regulators in the forefront of regulating competition in regulated sectors, with competition authorities complementing and supplying the gaps, where necessary, may be better.

5.3 The Saudi Perspective

With regard to the Saudi Competition Law 2004, Telecommunications Law 2001, Electricity Law 2005 and Civil Aviation Law 2005, the first point that needs to be made is that there is ambiguity and conflict between these laws. Firstly, the Saudi legislature, before abolishing any law, usually adopts a new piece of legislation that replaces the old law. A specific reference is normally included in the closing provisions of the new law, which explains the rationale for the adoption of the new set of rules and the reasons that made the maintenance of the old legislation unnecessary. In this way, there is clarity as to the government's aims and objectives as well as transparency as to the means employed to achieve specific goals.

In the case of the Saudi Competition Law, there was no reference to abolishing any law and replacing it with the new Law. There was also no reference as to what would happen even in the case of a conflict between the Competition Law and other laws. For instance, although reference is made to the Competition Law by the Electricity Law, there is lack of clarity as to which of these two laws has priority in terms of them being applied in the electricity sector. In addition, the Electricity Law contains conditions that should be considered in the context of mergers and acquisitions and need to be approved by the Authority. The ambiguity about which of these two laws has priority in case of conflict can lead to confusion amongst the relevant participants. Such confusion can create problems and tensions in relation to the interpretation and the application of the relevant legal provisions in the future, especially in the short-term, before the courts and the authorities have time to familiarise themselves with the new rules and procedures.[570] As it becomes apparent,

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[569] Ibid, 263

[570] See United Nations Conference on Trade and Development, UNCTAD Guidebook on Competition Systems, (United Nations, 2007), 123ff, <https://unctad.org/en/Docs/ditcclp20072_en.pdf> Accessed

these instances could effectively undermine the principles of clarity and legal certainty.[571] An obvious example is when a violator is found guilty under the two different laws by two different bodies and there could be the danger that is punished twice.[572] What is really worrying is that this scenario was not foreseen or contemplated by the legislature, despite the fact that it is a situation that can easily arise in practice.

Secondly, the provisions of the Competition Law are quite general when dealing with the issue of violations as compared to the competition rules in the sectoral regulations. For example, the Telecommunications Law includes much more elaboration on the nature of the violations, the definitions and the elements required for the finding of a violation. For instance, Article 5 of the Competition Law includes four clauses for dealing with practices restricting competition and abuse of dominant position in the market[573], while the Implementing Regulations of the Telecommunications Law include nine clauses that deal with practices which are considered as restricting competition and abusive.[574]

Thirdly, the competition rules of the Electricity Law are not specific and detailed as to practices that restrict competition and constitute abuse of a dominant position by a company if compared with the provisions of the Competition Law.[575] Fourthly, as stated earlier in chapter three, the implementation procedures of the Saudi Competition Law by the Competition Council require the transfer of all cases that have been considered and approved by the board of directors of the CC to the Committee for Settlement of Violations of Competition Law for starting the prosecution and litigation procedures.[576] On the other hand, according to Article 34

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28 July 2019 ; See also David Lewis (ed), *Building New Competition Law Regimes: Selected Essays*, (Edward Elgar, 2013)

[571] See P. Weiser, 'Paradigm Changes in Telecommunications Regulation' (2000) U.C.L. Rev. 819. In his perspective, even when an overlap exists, this does not mean that competition authorities and sector regulators necessarily approach the exercise of market definition in identical or similar fashion. Equally, it could be argued that lack of overlaps does not necessarily mean that there is a problem that needs to be addressed.

[572] Article 10 of the Saudi Electricity Law 2005.

[573] Article 5 of Saudi competition Law 2004.

[574] Article 31 of the Implementing Regulations of the Saudi Telecommunications Law 2001.

[575] Article 10 of the Saudi Electricity Law 2005.

[576] Article 12 of Saudi competition Law 2004.

of the Implementing Regulations of the Telecommunications Law, the Communications and the Information Technology Commission (CITC) may remedy any practice that is considered as abuse of dominant position of any operator before starting the prosecution and litigation procedures through some specific steps, such as making decisions to stop or avoid any activities that related to abuse of dominant position or calling for a meeting among the violator and other operators that might be affected by these activities.[577] This illustrates one of the key differences between the application of the Competition Law and the Telecommunications Law in the regulated market (telecommunications market), where the violators have the chance to amend or reflect on their violations, something that is not allowed by the Competition Law.

Moreover, according to Article 13 of the Electricity Law, 'any dispute or disagreement arising between any Licensee and the Authority may be settled by arbitration in accordance with the provisions of the Arbitration Law'[578] It is obvious that the sectoral regulations (Telecommunications and Electricity Law) are softer than the Competition Law towards the violators, while the regulatory agencies have more choices of remedies than the Council of Competition. Fifthly, Article 19 of the Competition Law provides that 'each violation of the provisions of this Law shall be subject to "a fine not exceeding (10%) of the total annual sales value subject of the violation. When it is impossible to estimate the annual sales, the fine shall not exceed ten million riyals. The Committee may, at its discretion, impose a fine not exceeding three times the gains made by the violator as a result of the violation".[579] According to Article 38 of the Telecommunications Law, any violation is subject to a fine not exceeding five million Saudi Riyals.[580] In addition, according to Article 15 of the Electricity Law, the violator will be subject to one or more of the following penalties, which include a fine not exceeding ten million riyals, the cessation of the activity in question or suspension or cancellation of the violator's license.[581]

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[577] Article 34 of the implementing regulations of the Saudi Telecommunications Law 2001.
[578] Article 13 of the Saudi Electricity Law 2005.
[579] Article 19 of Saudi Competition Law 2019.
[580] Article 38 of the Saudi Telecommunications Law 2001.
[581] Article 15 of the Saudi Electricity Law 2005.

Finally, the violators under the Competition Law has the right to appeal against the decision of the Committee before the Board of Grievances.[582] However, the violator under the Telecommunications Law can appeal against the Commission's decision before the Minister. If the Minister of Communication and Information Technology (the Chairman of Board of Directors) approved the decision, then the violator has the right to appeal before the Board of Grievances, which means that the litigation procedures will be longer.[583] However, the violator under the Electricity law has the right to appeal against decision of the Committee before the Board of Grievances.[584]

Moving now to the Civil Aviation Law, there is no reference to the competition rules except in Article 27 of the Civil Aviation Law, which includes two clauses. These clauses regard the agreements between aviation companies. According to Article 27, the agreements, arrangements and joint investment in any commercial air carriage operations between national and foreign air carriage companies are prohibited, unless they receive the final approval from the General Authority of Civil Aviation (GACA). The GACA may approve or reject all these agreements and arrangements, but the rejection must be justified and limited to cases of violation of competition rules, safety rules or general policies.[585]

As it has been discussed above, there is no reference made to the Competition Law in the sectoral regulations except the Electricity Law, which only includes the phrase 'Taking into account the stipulations of the Competition Law, the following shall be realised'.[586] This can cause lack of clarity as to which of these two laws has priority in terms of them being applied in the electricity sector.

These observations confirm that there is ambiguity, which might lead to conflicts, overlaps and confusion. The present thesis, apart from identifying these pitfalls and loopholes, has taken an extra step towards mitigating their impact through the recommendations included in the last chapter. These recommendations aim at contributing to the debate as to how the existing legal framework can be improved

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[582] Article 15 of Saudi Competition Law 2004.
[583] Article 39 of the Saudi Telecommunications Law 2001.
[584] Article 13 of the Saudi Electricity Law 2005.
[585] Article 27 of the Saudi Civil Aviation Law 2005.
[586] Article 10 of the Saudi Electricity Law 2005.

and strengthened in a way that it achieves its objectives. It is not the aim of this Thesis to criticise the government's initiatives and decisions; to the contrary, the recommendations put forward in the present Thesis are intended to offer food for thought for the authorities and assistance in their continuous attempts to make the Saudi market a transparent and level-playing field for all market participants, domestic and foreign ones.

5.3.1 Competition policy and other governmental policies

'competition law may be used to service specific governmental policies such as social, employment, industrial, environmental, and/ or regional policy (for example, by prohibiting mergers which will cause job losses, or allowing restrictive agreements which will preserve declining industries for longer)'.[587] Thus, 'it will doubtless lead to increasing calls for competition policy to take account of it as a major consideration'.[588]

It has been explained before, the competition policy refers to all governmental measures that affects the regulation of competition on the market.[589] The establishment of regulatory agencies was a requirement for adopting the privatisation programme, where the regulatory agencies are responsible for the supervision and regulation of their respective sectors. Furthermore, privatisation encourages competition and trade liberalisation through opening up markets and attracting investment.[590]The privatisation plays important role in the competition if the government has a good planning for its privatisation programme by providing conditions conducive for the entry of new competitors. Otherwise, the private participation in the economy will be prevented and the competition will be stifled. Moreover, the liberalisation of the market reflects the level of competition in the economy of states, as the liberalisation policy is focusing on entry the market and

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[587] Alison Jones, Brenda Sufrin and Niamh Dunne, *EU competition law: Text, cases, and Materials* (seventh edition, Oxford University Press 2019) 34.
[588] ibid.
[589] Sengupta and Dube (n.2).
[590] Maghawri Shalabi, *Protect competition and prevent monopoly between theory and practice: an analysis of the most important Arab and international experiences*, (Dar Arab renaissance, 2005), 99.

establishment of business. If the liberalisation policy includes stringent licensing conditions and monitoring, the level of competition will be low.[591]

With regard to the Saudi system, in 2002, a strategy for privatisation in Saudi Arabia was approved. It was designed to achieve eight goals, each of which contained a number of policy objectives intended to increase the efficiency and competitiveness of the Saudi economy both regionally and internationally. Towards these goals the strategy aimed to make it attractive for the private sector to participate through investment which would lead to increased citizen participation in productivity and an increase in national and foreign capital investment.[592] There are three types of regulated markets in Saudi Arabia, which are considered in the present study. The first is the telecommunications sector, which has sectoral regulation and includes competition provisions and a sector regulator. In this sector, there are competitors attracted by the opening of the Saudi Arabia's market both to domestic and foreign companies. The second sector to have sectoral regulation is the electricity sector, which has competition rules and a regulatory body. Although the electricity sector is an open market, there are no competitors. The third is the sector is the Civil Aviation sector, and, although there is regulatory body and sectoral regulation, competition law is excluded from this regulation. Although the Civil Aviation sector is open for competition, but there are stringent licensing conditions, which clearly have an impact on the competition level in market, and the largest company in this sector is exempt from competition regulation, because it is state-owned.

It seems that the privatisation in the Civil Aviation market does not go much forward as long as the largest company, which is a national one, is not privatised yet. Also, this company got much support from the government, such as reduction in the price of fuel, franchising to sell the governmental tickets for all ministries, getting huge spaces of the geographical division of the market. Also, the liberalization policy in

[591] Sengupta and Dube (n.2).
[592] Saudi cabinet's decision No. 219 (11 November 2002). The Privatisation Strategy was based on the Supreme Economic Council Decision No. 1/23 (4 June 2002).

the Civil Aviation market includes stringent licensing conditions and monitoring which led to reduce the level of competition.

The differences between the current application of the privatisation and liberalisation policies and the strategy for privatisation in Saudi Arabia may serve as evidence that the intention of the Saudi government is not serious towards these reforms in its economy because it was forced to apply those changes for joining the World Trade Organisation (WTO). The ambiguity and conflicts among the Competition Law and the sectoral regulations on the one hand and the conflict of the institutional jurisdictions between the Council of Competition and the regulatory agencies on the other hand may also be understood as a consequence of the lack of governmental motivation.

5.3.2 The Council of Competition and the regulatory agencies

In the preceding chapters, it was argued that, in the context of the Saudi market, these bodies are strictly different. In chapter three, an analysis of the Council of Competition was made and it was noted that the Council of Competition is the body responsible for the regulation and enforcement of competition law across the Saudi market, whether regulated or unregulated. In chapter four, the functions of regulatory bodies were analysed. The sector-specific analysis of the telecommunications, electricity and aviation sectors in chapter four demonstrated that certain regulatory bodies have been created to regulate competition in these sectors.[593] Competition authorities and other public authorities, such as regulatory bodies, are responsible for implementing the competition policy. For example, adopting and enforcing Competition Law, which is a part of competition policy, are some of the tasks entrusted to competition authorities.[594] Nevertheless, there seems to be some overlap

[593] The Communications and Information Technology Commission (CITC), the Electricity and Co-generation Regulatory Authority (ECRA) and the General Authority of Civil Aviation (GACA) were some of the sector-specific regulators in Saudi Arabia discussed in the previous chapter.
[594] Maher Dabbah, EC and UK Competition Law: Commentary, Cases and Materials (Cambridge University Press, 2004) 8.

in the functions of both competition authorities and regulatory bodies. Economic regulation and competition law could be regarded as two sides of the same coin.[595]

Overall, there is no formal relationship between the Council of Competition and regulatory agencies and this is the main reason why there are jurisdictional conflicts between these institutions, uncertainty and potential overlaps.

5.3.3 Simulation of the UNCTAD approaches in the Saudi system

In order to address the jurisdictional conflicts between the Council of Competition and the regulatory agencies in Saudi Arabia and build a basis for coordination in this regard, this section will discuss some approaches that have been proposed by UNCTAD and the possibility to apply them in the Saudi system. For instance, a proposal to combine technical and economic regulation in a sector regulator and leave competition enforcement exclusively in the hands of the competition authority Currently, it is not easy for the Council of Competition to enforce the competition rules exclusively due to capacity problems that the Council of Competition faces, as it suffers from insufficient human and financial resources. In addition the regulatory agencies have more information about their sectors than the Council. Therefore to reach this approach it needs more work of regulatory reforms regarding the legal and institutional frameworks.

The second proposal involves combining technical and economic regulation in a sector regulator together with some or all competition law enforcement functions.

This approach exists in some sectors, namely Telecommunications and Electricity in Saudi Arabia. However, there is no clear guidance for these roles, such as when and how can be applied which has led to the jurisdictional conflicts between the Council of Competition and the regulatory agencies and duplications in some cases. Even though all markets and sectors are subject to the Competition Law as enforced by the Council of Competition, some sectors have their own competition rules that are

[595] Maggiolino (n. 520).

enforced by the regulatory agencies at the same time. This Thesis aims to fill in this gap with its recommendations and suggestions.

The third proposal involves combining technical and economic regulation in a sector regulator and the competition law enforcement functions will be performed in coordination with the competition authority. This option can be easily applied temporarily with some minor changes, such as the signing of a memorandum of understanding between the Council of Competition and regulatory bodies, until the completion of the regulatory reforms. However, the regulatory agencies do not have the power to enforce the Competition Law because these agencies have their own competition rules that are limited to their sectors only. The fourth proposal involves organising technical regulation as a stand-alone function for the sector regulator and include economic regulation in the competition authority's functions. This is not a suitable for the Saudi system because the regulatory agencies have more information about their sectors than the Council of Competition and also the Council of Competition suffers from lack of qualified staff in the legal and economic field and cannot cover all markets and sectors.

According to the final proposal, Saudi Arabia can rely solely on competition law enforced by the competition authority. As stated before, all markets and sectors are subject to the Competition Law as enforced by the Council of Competition. However, it is difficult for this proposal to be implemented now because some sectors have their own competition rules and there is no reference in the Competition Law about such possibility. Additionally, this approach would lead to the exclusion of the regulatory bodies from their regulated sectors.

5.3.4 Addressing the interaction between the Council of Competition & regulatory agencies

5.3.4.1 Reforming Competition Law and sectoral regulations

The competition authorities and the regulatory agencies were established by the Competition Law and the sectoral regulations. These laws include provisions about the role, competence and operation of these institutions. To delineate the relationship

between those authorities in complementary way, reforming the legal framework and the cooperation process should be taken carefully through dividing the labour between the competition authority and the regulatory agencies or building a legal framework for cooperation between those authorities or leaving it informal.[596]

In Saudi Arabia, Competition Law and the sectoral regulations should be reformed following a number of specific steps. Firstly, even though Article 3 mentions that all companies in the Saudi markets are subject to the provisions of the Competition Law, there is no reference to the regulated markets, which have competition rules in their sectoral regulations and it has not been clarified which authority has primacy over the other in case of conflicts.[597] Secondly, unifying competition rules and resolve any conflicts between Competition Law and sectoral regulations. Thirdly, unifying the provisions of the Competition Law and the sectoral regulations, especially in relation to the violations and the respective penalties. Finally, unifying the prosecution and litigation procedures and their levels.

5.3.4.2 Delineating the relationship between the Council of Competition & regulatory agencies.

As discussed before, there are some possible approaches for delineating the relationship between the competition authorities and the regulatory agencies. However, there are two models that can be used in implementing these approaches. These models are: the exclusive model and the concurrency model. This section provides an overview of these models and explores the possibility of applying them in Saudi Arabia.

- **The exclusive model**

With regard to the Saudi system, the exclusive model refers to regulating competition in Saudi regulated sectors through the sole application of general competition law by

[596] Gamze Aşçıoğlu, 'Role of Competition Authorities and Sectoral Regulations: Regional Experiences', (2006) UNCTAD's Seventh Session of the Intergovernmental Group of Experts on Competition Law and Policy <https://unctad.org/en/Docs/c2clpd57_en.pdf> Accessed 29 July 2019.
[597] Article 3 of Saudi Competition Law 2004.

the Council of Competition. It might be good in terms of prevention of the conflict of laws and overlapping jurisdictions. However, radical reforms are needed as well. Firstly, unification of the laws and regulations that linkup to regulate competition to be the general competition law. Secondly, granting a sole power to the Competition Council in terms of regulating the competition of regulated sectors.

In terms of the practical steps needed when applying this model, there are some reforms that should be taken. The first step is to determine that the enforcement of the Competition Law is the exclusive responsibility of the Council of Competition. The second step is the abolition of the provisions dealing with competition that are included in the sectoral regulations, which would promote the idea that lead the regulation of competition is restricted to the provisions of the Competition Law 2004. Finally, to utilise some of the provisions on competition that were included in some sectoral regulations by transferring some of these detailed rules to the Competition Law, because these rules are designed for the needs of the sectors and can be useful in practice.

Having discussed the institutional design of the Council of Competition and the regulatory agencies in the preceding chapters as well as their role and competences, there are many advantages of applying this model. First, the conflicts of law and the overlap of jurisdiction will be avoided, because there will be clarity in law regarding the institution that has the power to enforce the applicable rules. Secondly, considering the fact that the Council of Competition and regulatory bodies are not completely independent, all their budget, or at least a larger part of it, will be provided by the government. Thus, the government will cut off some of its operating expenses by reducing the cost of operating these bodies. Finally, by adopting this model, there will be a considerable saving of resources, such as time and effort, spent by those bodies. This model has a number of disadvantages as well. It is important to note that at present it is not an ideal model when implemented and it can face a lot of difficulties in practice because the Council of Competition and the regulatory bodies are relatively new in terms of operation. Hence, they seem to lack enough human and financial resources, such as experts and employees, who are acquainted in competition law and sectoral regulation. Also, the handling of the competition cases

and the enforcement of competition law by the Council of Competition may lead to longer time to reach a decision because the CC is understaffed and has a small capacity compared to the country's market size when regulated sectors are included.

Moreover, there are some matters that may increase the delay of handling the competition cases by the CC, these matters are not problems per se, but should be solved promptly to curb the continuation of their negative effects on regulating competition in the Saudi market and the function of the Council of Competition. Firstly, the lack of social awareness by the individuals or businesses about competition law and its scope, the CC and its jurisdiction, has led to the CC receiving many that not related to CC and competition law. In addition, this lack of social awareness among businesses and individuals has caused many breaches of competition law. This in turn leads to an increase in the number of cases that are submitted to the CC and this in turn means that all these cases might take longer time to be considered.

Secondly, the existence of shortcomings and weakness of the penalty in competition law may allow companies to breach the law because these companies believe the CC does not have the capacity to enforce the law effectively since the CC is relatively new and has not sufficient human and financial recourses. additionally, the penalty does not make a major impact on the violators, if it found by the CC. Thirdly, there are challenges in relation to starting the investigation procedures, which require that the CC receives the complaints from individual or bodies, either governmental bodies or other competitors in the market. As stated in chapter three, the CC must initiate the investigation procedures for a particular case. The challenge is obtaining proofs or enough evidence on the complainant to warrant the handling of the case by the CC. Furthermore, securing sufficient evidence to start the investigation procedures could be difficult for any organisation that wish to submit complaint to the CC. This is due to the absence of clarity regarding the relationship between the CC and other organisations, whether governmental or semi-governmental bodies, such as the Consumer Protection Association in which there is no mechanisms between CPA and CC that needs to address any case that may make damages for consumer through breaching the competition law.

Finally, with regard to the Committee for Settlement of Violations of Competition Law, all its members are not experts in competition law or have at least experience in the field of competition law while they are not full-time members as well. Therefore, it will be difficult for them to deal with this field of law that concerns complex issues, such as sectoral regulations, anti-competitive behaviour, abusive conduct etc.

- **The concurrency model**

Having considered the exclusivity and concurrency approaches and having defined as much as possible the purposes and parameters of each one of these approaches, this section now focuses more directly to the core issue to be considered, namely the relationship between competition authorities and sector regulators. "Both competition law and regulation involve, to a greater or lesser extent, a derogation from the presumed default position of unencumbered free markets".[598] 'When viewed at an abstract level, therefore, these instruments may appear broadly similar or even equivalent, insofar as both comprise state-imposed legal mechanisms for market supervision or control, necessitated by the presence of market defects'.[599]

Admittedly, as demonstrated in the preceding analysis, the distinct conceptualisations of these instruments as discrete and separate mechanisms for market supervision are clearly identified. In particular, the means and scope of application of these mechanisms, in addition to the market attainable outcomes, start to distinguish one from the other. Therefore, the purpose of this section is to give a more balanced account of the relationship between competition authorities and sector regulators. This is because in reality there is always an overlap or duplication of their functions, leading to the lack of independence of sector regulators, in addition to the fact that in practice they are neither identical nor wholly distinct.[600] This is so because the spheres of application of competition law and regulation are neither mutually exclusive nor entirely co-extensive.[601] While certain forms of market failure can be

[598] Dunne (n. 484), 41.
[599] Ibid
[600] Ibid.
[601] Ibid

addressed efficiently only by competition law mechanisms, others can be resolved only through regulation. At the same time, some market failures are susceptible to both competition law and regulatory intervention, although the outcome may vary depending on the selected mechanism.[602]

With regard to the Saudi system, the concurrency model aims to delineate the relationship between the Council of Competition and regulatory agencies by adopting a concurrency relationship among these institutions to avoid the conflict between the Competition Law and sectoral regulations as well as the institutional jurisdictions between the Council of Competition and regulatory agencies. A set of radical reforms need to be taken into the consideration. Firstly, unification of the rules of the Competition Law and sectoral regulations can be achieved by abolishing some of the provisions of competition that are included in sectoral regulations, such as the competition rules in Telecommunications law and Electricity law, and adding to the Competition Law elements from these rules that can improve its quality and overall efficiency. Such additions will eventually cover some gaps that exist in the framework used to regulate competition in the regulated sectors and will therefore add more depth in the respective rules. In this way, unification will be achieved, as there will be only on Competition Law that would include all competition-related provisions. Once this is achieved, the second reform involves the need to determine the tasks of the Council of Competition and the respective sectors' regulatory bodies. This reform can be implemented in two steps:

First Step (Short Term)

Signing of a memorandum of understanding between the Council of Competition and regulatory bodies should be to determine the period of this step, which can either be one year or four years. This is because the reforms and the transition to the next step should take place gradually. It is essential to allow sufficient time for the circumstances to mature before moving to the next step, because unless the proper

[602] Ibid

regulatory tools are used and a constant review of the legal and institutional framework in place, the reforms will not be successful in the Saudi market.

This memorandum of understanding should include information about the function of these institutions clearly establishing communication channels between them so as to avoid the bureaucracy and the time-consuming methods of communication that have been used so far. For example, instead of sending official letters using the post service, it is recommended that more modern and efficient means of communication are used, such as an electronic portal, emails or through liaison officers, for the exchange information and other inquiries. Additionally, the memorandum should include mechanisms for exchanging employees, especially experts. This step will allow the staff of the CC to spend time working at the regulated sectors and get indispensable experience by receiving training and reviewing the actual practices. At the same time, the employees of the regulatory bodies can learn more about the functions of the CC as well as practical experience in dealing with competition law issues.

Building on the above step, the memorandum of understanding should include a clause relating to the exchange of the members of legal committees and their training period. The rationale is that they will be able to observe the implementation procedures of legal committees within their respective bodies, explore the way that these institutions perform their tasks and also familiarise themselves with the obstacles and challenges that those bodies are facing during the performance of their duties. The independence of those bodies, both financial and institutional, should be specifically stated in this agreement and safeguarded as much as possible.

With regard to the memorandum of understanding, it should include provisions about the division of tasks between all institutions. Each sector regulator should be responsible for regulating competition in its own exclusively. Specifically, in the case of receiving a complaint or initiative related to any regulated sector by the CC, the regulatory body should be informed to avoid an overlap with the CC. In the case that the regulatory body receives a complaint, the complaint should be considered by that sector regulator and then the CC should be informed about this complaint to avoid an overlap and the duplication of work. After making a decision regarding that

case, a copy of the case's file should be sent to the CC to keep it in their archives to create a database so that there is an official record and the case is not decided twice. If the violation is repeated, then the CC has should have the power to punish the violator more strictly, as repeated violations need to lead to increased penalties.

The Second Step (Long-Term)

This step is the final stage of regulatory reforms that is needed to improve the system of regulating the competition in the regulated sectors. This step includes the unification of the laws and regulations that regulate competition under the umbrella of a new, modern and comprehensive competition law. This unification process presupposes the adoption of the concurrency model to delineate the relationship between the CC and regulatory bodies in terms of regulating competition in the regulated sectors and dividing the tasks. The concurrency model will also lead to the exchange of information between the CC and the regulatory bodies, so that all parties involved are informed about what the others are dealing with and the rationale is to avoid replication of tasks and unproductive use of resources.

In terms of advantages and disadvantages of this model, one of the advantages is that it is possible to help in the avoidance of conflicts in between these institutions. Another advantage involves the exchange of information and experts between these institutions. On the other hand, a disadvantage of this model is that there can be a sort of misunderstanding about the nature of work among these bodies. Also, there is lack of accreditation between these bodies, which may pay the institutions to leave their tasks because other bodies have same power and the cases can be covered by other bodies.

5.3.4.3 The Recommended model for Saudi Arabia

Following an analysis and evaluation of both the exclusive and the concurrency models for delineating the relationship between the Council of Competition and the regulatory agencies in the Saudi system, also with consideration of the characteristics of successful competition authorities in the preceding chapters, the Thesis recommends the adoption of the concurrency model. As it will be explained below, there are good reasons that dictate the adoption of this model as the

most suitable and fit for purpose for Saudi Arabia. Firstly, all the authorities now are working separately without developing any kind of close relationship, which would require the establishment of rules and regulations. At a first glance, this arrangement is not significantly different from the one proposed by the exclusive model, which means that separation in the operation of all the competent authorities is a common denominator for both models that could be adopted. This arrangement offers flexibility and allows each authority to develop its own strategy, having enough breathing space to implement this strategy and bring stability and legal certainty within its area of control.[603]

Secondly, the concurrency model does not promote exclusive operation of the authorities, just to allow them a degree of flexibility in dealing with their specific issues arising in their sphere of responsibility. This does not mean though that they will not help each other or communicate with the other authorities. The contrary, because from a practical point of view it is not efficient for these authorities to work in isolation from each other and also it is extremely hard for them to enjoy administrative and financial independence. Dabbah believes that 'effective competition law enforcement requires the availability of sufficient resources, whether human (including expertise) or financial'.[604] Considering that the resources available are scarce, as it was mentioned earlier, it is the wisest choice to allocate these resources are smartly as possible in order to achieve efficiency and effectiveness.[605] This is the essence of complementarily after all.

Thirdly, adopting the exclusive model will come together with radical changes in the legal and institutional framework, which might be take long time to be implemented. Time is of essence at this stage and it is important that the Saudi

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[603] E. Biester, 'Understanding Antitrust Laws, Competition, the Economy, and Their Impact on Our Everyday Lives' (2011) 72(2) Social Education 68, 77. See also M Casoria, 'Competition Law in the GCC Countries: The Tale of a Blurry Enforcement' (2017) 16(3) Chinese Business Review 141.
[604] M Dabbah, 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime' (2010) 33(3) World Competition 457–475, 461.
[605] DR Desai and S Waller, 'Brands, Competition, and the Law' (2010) 5(1) Brigham Young University Law Review 1425, 1433.

government adopts pragmatic solution which can be implemented quickly and efficiently without jeopardising the stability and the overall operation of the Saudi market.[606] If in the future it becomes apparent that a change of model is required or a more extensive reform, then the exclusive model could be put forward and adopted. However, this change should come gradually and following careful planning and a thorough cost-benefits analysis.

Finally, the issue of the relationship between the Council of Competition and the regulatory agencies requires an urgent resolution, because the Saudi market expands day by day and the violations of the Competition Law and the sectoral regulations are constantly increasing as well.[607] Therefore, it is of utmost importance for the government to take action and deal with this burning issue. It is a burning issue because non-resolution would undermine the plans of the government for market expansion and the attraction of foreign investment in the country. The attractiveness of the Saudi market presupposes the operation of a legal and regulatory framework that guarantees certainty and clarity[608], otherwise it will be hard for foreign companies and investors to take the decision to invest in a market that is promising but not stable.

In order to recommend the right model for the Saudi system, we need to consider the current legal framework as well as the existing policies and the institutional framework. Inevitably certain reforms will be required and it may take long time to be implemented. However, the current issue of the relationship between the Council of Competition and the regulatory agencies requires urgent resolution. Therefore, the concurrency model for delineating the relationship between these institutions is needed as an urgent solution. Moreover, the exclusive model is similar to the current

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[606] F. Cunningham, 'Market Economies and Market Societies' (2005) 36(2) Journal of Social Philosophy 129. In particular, see M Dabbah, 'Islam, Islamic Countries and Competition Law: From Past Glory to Modern Day Challenges' (2012) 2 CPI Antitrust Chronicle 1

[607] Al Shaiqi and A. Al-Kmali, 'Hadiths of the Monopoly' (2000) 24(2) Journal of Law 367, 369. See also R. Abdulrahman, 'Guarantees in Early Islamic Financial System' (2015) 29(3) ALQ 274

[608] U Aydin U and T Büthe T, '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).

practices, which means adopting this model is pointless, as no major changes will be brought. Thus, the present Thesis recommends the concurrency model by taking two steps to reform because the length of the legislative procedures of reforming laws mentioned in chapter two. These steps are based on the cooperation and coordination between the institutions through the signing of a memorandum of understanding between the Council of Competition and regulatory bodies. Then, a transition to permanent cooperation and coordination can take place by reforming the Competition Law and the sectoral regulations specifically by including some articles that address the issue of the relationship between these institutions and their roles. When this happens, the government could also address the issue of limited human and financial resources. As Dabbah believes, 'effective competition law enforcement requires the availability of sufficient resources, whether human (including expertise) or financial'.[609]

[609] Maher Dabbah, 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime' (2010) 33(3) World Competition 457–475, 461

5.4 Conclusion

It has been clearly seen that the current relationship between the Council of Competition and the regulatory agencies that operate in the Saudi Market need to be delineated. This has been the emphasis of this chapter and the analysis above clearly aims to underline this need and to recommend a suitable platform for this delineation to take place. The different models explored offer alternatives and the discussion was intended to test the applicability of these models and the extent to which they can bring the required result. When we say required result, we are not talking about patches and general statements about respect of authority and wishful thinking.

The argument put forward by this chapter and the thesis in general is that the need for a reform of the Saudi Competition Law is clear and goes beyond any shadow of doubt. The new status quo is imperative to guarantee that there are no conflicts amongst the provisions of the Competition Law and the sectoral regulations. At the same time, it is equally important that the new post-reform model guarantees that there are no of jurisdiction as well between all these authorities. As discussed in the previous chapters, the main problem is not only the conflict of laws and the ambiguity of the provisions found in both the Competition Law and the sectoral regulations. The main issue that needs to be tackled goes deeper to the design of the competition system of the Saudi market, its Council of Competition and the regulatory agencies. It is in fact related to the capacity and the efficiency of those authorities. It goes beyond the aim of the present thesis to discuss the reasons behind this problematic design and to investigate who is responsible for the establishment of a system that is not fit for purpose. Since it has been recognised that the Council of Competition and the regulatory agencies suffer from lack of administrative and financial independence, any proposed reform should be carefully designed to offer independence to these authorities, provide them with a clear mandate and a set agenda.[610] Once the mandate and the agenda are agreed and set, the next step would be to equip them with the necessary resources to be able to deliver their goals and

[610] T A Alshubaiki, 'Developing the Legal Environment for Business in the Kingdom of Saudi Arabia: Comments & Suggestions' (2013) 27(4) ALQ 371, 376.

achieve their purpose. If something of the abovementioned steps is omitted, the system will end up being defective and ineffective once again. Recognising that a mistake was made or that a decision made was not the most appropriate one is always the best way to amend them. The era of globalisation, of foreign investment and market interconnectedness presupposes a robust, flexible and clear model of regulation.[611] Each country is free to set up their own system that fits their political aims and goals, having respect to the developments in other countries because the markets change so rapidly that nobody has the luxury to become complacent anymore.

To sum up, the present thesis suggests that the best way forward for Saudi Arabia is through excluding the exclusive model and adopting the concurrency model. In this way, the relationship between the Council of Competition and the regulatory agencies that operate in the Saudi market will be shaped in a way that best guarantees stability, harmony and mutual respect of authority.[612] The adoption of this model requires a set of reforms in the area of Saudi Competition Law as well as the sectoral regulations currently in place. As a result of these reforms, the implementation of the concurrency model will be supported and the groundwork will have been done in order for this model to put in practice without delays and teething problems. In addition, the creation of certain new mechanisms is necessary, so that there is cooperation and coordination between these authorities and the first step is the signing of a memorandum of understanding.[613] This memorandum is of central importance in the reform process. Apart from the fact that it will specifically mention

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[611] See P Peters and P Bearman, The Ashgate Research Companion to Islamic Law (Ashgate, 2014), 108-115. See also J Van Sinderen and R Kemp, 'The Economic Effect of Competition Law Enforcement: The Case of the Netherlands' (2008) 156(4) De Economist 365

[612] GM Anderson and Tollison RD, 'Morality and Monopoly: The Constitutional Political Economy of Religious Rules' (1992) 12(2) Cato Journal 373, 380. See also Joaquín 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) <http://europa.eu/rapid/press-release_SPEECH-10-121_en.htm> accessed 15 December 2019

[613] AY Baamir, 'Issues of Transparency and Disclosure in the Saudi Stock Market' (2008) 22 ALQ 63, 71.

the independence of the Council of Competition and the respective regulatory agencies and set the parameters of their new relationship, it will contain rules and guidance during the reform period. In other words, it will establish the way that the exchange of information and staff between these authorities will be taking place until the reform is complete and the new system is fully implemented.

Therefore, the adoption of the concurrency model for the Saudi system will lead to the creation of cooperation and coordination between the Council of Competition and the regulatory agencies. This in turn will allow them to avoid the conflicts of jurisdiction and unify the efforts made while exploiting all available human and financial resources that those authorities have. Moreover, the adoption of the concurrency model is easier in practice than the exclusive model through signing a memorandum of understanding between the Council of Competition and regulatory bodies. This memorandum can provide new mechanisms for the cooperation and coordination between these authorities and additional provisions regarding the exchange of information and staff until the reform of the Competition Law and the sectoral regulations, which will permanently solve the issues related to the relationship between the Council of Competition and the regulatory agencies and their roles.

Chapter Six: Conclusion

6.1 Final concluding remarks

The purpose of this thesis is to explore the influence of introducing competition law on the enforcement of the sectoral regulations in Saudi regulated sectors. Also, this Thesis aims to highlight the interface between the Council of Competition and regulatory agencies in Saudi Arabia. All these aims have been put to deconstruct the current issue of competition regulation in regulated sectors and reflect on the challenges and obstacles faced by those institutions in carrying out their functions. The Thesis has identified two main problems regarding competition regulation in regulated sectors. Firstly, the conflict between competition law and sectoral regulations. Secondly, there is no relationship between the Council of Competition and the regulatory agencies which leads to jurisdictional conflict, where there are many cases that have appeared recently due to the absence of delineating the interface between the Council of Competition and regulatory agencies.

Furthermore, the preceding chapters included an evaluation of the institutional design of the Council of Competition and the regulatory agencies through four elements that are considered as the characteristics of successful competition authorities. These elements are the independence of the institution, the leadership of the institution, structure and processes, relationships with regulatory agencies. Also, the preceding chapters provided an assessment of the Competition Law and the sectoral regulations in Saudi Arabia, because the institutional structure of those authorities is based on these law and regulations. All of these were essential elements of this research, so that the present Thesis can reach its aim which was to investigate the factors that contributed to the jurisdictional conflict between the Council of Competition and the regulatory agencies by highlighting the institutional design of the Council of Competition and regulatory agencies and exploring their influence over competition regulation in Saudi regulated sectors, particularly the telecommunications, electricity and civil aviation sectors.

The researcher sought to discuss the general background of the legal and judicial system of Saudi Arabia in chapter two, before moving to consider the role and competence of the Council of Competition in chapter three. Then, the research turned to the role and competence of the regulatory agencies in chapter four. Finally, chapter five discussed the interface between the Council of Competition and regulatory agencies. The aim of this chapter was to summarise the research, provide recommendations and suggest areas for further research.

A. The structure of Saudi legal and judicial systems

In chapter two, the Thesis discussed the general background of the legal and judicial system in Saudi Arabia. It is undeniable that studying the historical background of laws is essential in understanding how laws were drafted and how the institutions are designed in Saudi Arabia. Also, another important element is to explore how the mechanisms of the government address the conflict between laws or the overlap between the institutions in this jurisdiction. The thesis has found that independent authorities are not independent administratively or financially because the chairmen are members of the cabinet, who are already appointed as ministers in the government. Their independence is not crucial *per se*, but it can have an impact in the role of these institutions and law enforcement. Indeed, this basic issue must be solved before considering any other issues, as this is an obstacle for any future reform.

B. The role and competence of the Council of Competition

Chapter three discussed the role and competence of the Council of Competition in regulating competition in the Saudi market, which includes regulated sectors. The chapter explained the institutional design of the CC, its jurisdiction, its decision-making process and the appeal procedure against its decisions before administrative courts. The findings show that there is insufficient independence for the CC either financially or administratively. The lack of independence has had a negative effect on the function of the CC and its efforts on regulated sectors which have been supervised by regulatory agencies that have the authority to regulate competition

therein. The lack of independence and dispersion of efforts appeared in the annual report of the CC and some cases that have been arisen recently. Also, the findings show that there is no relationship between the CC and the RAs and there are plans to reform this area. Nevertheless, the CC sought to reform competition law by making changes in some provisions and submit these suggested changes to the legislature authorities. This Thesis supports these changes and believes that more independence for the CC and the RAs is needed, as lack of independence is one of the greatest obstacles that these institutions face in their attempts to achieve sufficient enforcement with delineated institutional jurisdiction for each institution. Furthermore, the findings indicate that the CC needs additional resources by employing more qualified staff or providing training to current staff. At this point it is confirmed that the CC is not able to perform its role in the whole market effectively, which means that the relationship between the CC and the RAs must be delineated, while the institutional jurisdiction is determined or at least a cooperation and coordination mechanism is created among the institutions. This Thesis provides recommendations to deal with the transition period from the current situation to the suggested stage of reform, such as signing a memorandum of understanding between the CC and the RAs. The chapter discussed the lack effectiveness of the administrative court, where the court considered a case twice, which shows that there are no records in the court to avoid the duplication of cases being considered. Thus, all findings show the need for reform of the CC on the one hand and the relationship between the CC and other institutions on the other hand.

C. ***The role and competence of the regulatory agencies***

Chapter four discussed the role and competence of the regulatory agencies, especially the CITC, ECRA and GACA as case studies. Also, the chapter explained the institutional design of these authorities and the Telecommunications, Electricity and Civil Aviation law as enforced by these authorities. The sectoral regulations include competition rules, except the Civil Aviation law. The findings show that the regulatory agencies suffer from lack of independence whether administratively or financially. The lack of relationship between these agencies and the CC has led to conflict of jurisdiction in enforcing these laws and a duplication of cases between the CC and the RAs. Moreover, the chapter discussed the process of making decisions in

the RAs and how to make an appeal against these decisions before the administrative court, which is similar to the appeal against the CC's decisions before the same court. As mentioned before, the administrative court suffers from lack of an existing database of cases, which would help in addressing the problem of conflicting jurisdictions among the institutions, conflict of laws and the non-existent of relationship between those institutions. Furthermore, the findings confirmed the lack of qualified staff in the competition field, even though all regulatory agencies have the authority to supervise their sectors and have information about the sector. However, competition regulation is considered as a small task, which means the abandonment of part of the responsibility of regulating competition by the CC and focusing their efforts in the supervision of administration and other technical tasks.

It can be clearly seen that the roles of the regulatory agencies are not sufficient in terms of regulating competition in their sectors. Thus, the enforcement of competition law exclusively by the regulatory agencies is not workable due to the capacity of these agencies and their fundamental functions. Therefore, the concurrency model should be taken into consideration once the government initiates the necessary reforms.

D. ***The interface between the Council of Competition and regulatory agencies***

Chapter five discussed the relationship between the competition authority and the regulatory agencies as well as the fundamental concept of competition law and the sectoral regulations and the interaction between the Competition Law and sectoral regulations. Also, chapter five provided five possible approaches, which have been proposed by the UNCTAD and can be used as a basis for coordination between institutions, including the exclusivity model and the concurrency model. Moreover, the interface between the Council of Competition and the regulatory agencies by explaining the current relationship between them. This explanation includes Competition law and sectoral regulations, especially Telecommunications law and Electricity law, only because there are no competition rules in the Civil Aviation law. Also, the chapter analysed Competition policy and other governmental policies, such as privatisation and foreign investment and its impact on the competition policy. Furthermore, the chapter discussed the relationship between the Council of Competition and the regulatory agencies as well as the challenges and the obstacles

that prevent the creation of a clear relationship and determined jurisdiction for each institution. After an attempt to have a simulation of the UNCTAD approaches, which included the exclusivity model and the concurrency model, in the Saudi system, taking into consideration the evaluation of the institutional design of the Council of Competition and the regulatory agencies, the chapter provided guidance on addressing the interface between the Council of Competition and the regulatory agencies through recommendations to reform Competition law and sectoral regulations and delineate the relationship between the CC & the RAs by adopting a concurrency model of relationship.

6.2 Recommendations

The research focused on the conflict of the institutional jurisdiction between the Council of Competition and the regulatory agencies in Saudi Arabia. In addition, it aimed to address the conflict between the Competition law and the sectoral regulations namely Telecommunications law, Electricity law and the Civil Aviation law as result of introduction of the enforcement of the Competition Law on in regulated markets in Saudi Arabia. The researcher sought to explore the causes and obstacles that prevent delineating the relationship between the Council of Competition and the regulatory agencies to avoid the conflict of the institutional jurisdiction in one hand and the conflict between the Competition Law and the Competition rules in the sectoral regulations in another hand. Moreover, the researcher attempted to find solutions for these issues by studying and discussing two models to delineate the relationship between these institutions, which are the exclusive model and the concurrency model, to select a workable model for the Saudi system.

To achieve that the researcher had to take into his consideration the institutional framework of those institutions and the legal framework of these laws, where the legal framework plays a crucial role for the operation of these institutions and the relationship between laws. While the institutional framework plays an important role of implementing the laws and the relationship between the authorities. Therefore, the researcher suggested some recommendations to reform in order to solve the research issues. The researcher suggested adopting the concurrency model for some reasons.

Firstly, the findings of the discussion of the abovementioned institutional and legal framework indicated that Saudi Competition Law does not cover and actually does not focus on the relationship between the Council of Competition and the regulatory agencies and does not clarify which law has the priority over the others. Secondly, the adoption of the exclusive model will not resolve the current issue, because the Council of Competition will not have all the necessary and required information about the sectors and there is no formal relationship between the institutions as evidenced by the annual report of the Council of Competition.[614] Thirdly, the Competition Law does not deal in detail with violations as the Telecommunications law and the Electricity law do. Finally, the discussion on the exclusive model showed that there are several problems and issues that call for reform in relation to the institutional design of the Council of Competition, such as financial and administrative independence and the lack of qualified human resources. As a result, these difficulties render the application of this model highly unlikely. Additionally, the findings showed that the leadership of these institutions have also problems, when the members of the board of directors are representatives of Ministries and/or businessmen, as this may easily lead to conflicts of interest. Therefore, the research suggests that adopting the concurrency model is a better option for the Saudi system only if it is followed by certain important reforms. More specifically, to successfully apply the concurrency model, there must be two periods of reform that should take place with emphasis on the legal framework, the institutional framework as well as the implementation procedures.

[614] The annual report of the Council of Competition, 2014, page 75, available at www.coc.gov.sa Accessed 24 December 2019 .

First period: Reforming the legal framework by signing a memorandum of understanding between the Council of Competition and the regulatory agencies

Signing a memorandum of understanding between the Council of Competition and regulatory bodies should be the starting point of the first period, which can either last one year or four years. This is because the reforms and the transition to the next step should take place gradually. It is essential to allow sufficient time for the circumstances to mature before moving to the next step, because unless the proper regulatory tools are used and a constant review of the legal and institutional framework takes place, the reforms will not be successful in the Saudi market.

This memorandum will allow the exchange of all relevant information and qualified staff between the institutions so that conflicts are avoid and there is efficiency in the use of budget and resources among these institutions. A specific article needs to be added in the Saudi Competition Law that would refer to this cooperation and coordination. Also, the memorandum of understanding should include provisions about the division of tasks between all institutions and the allocation of responsibilities, including the authority of the institutions that enforce the competition law or the sectoral regulations if included competition rules, especially in the event that the Civil Aviation Law does not include any rules focused on competition issues and it is not clear which institution is responsible to regulate competition in this sector.

This memorandum of understanding should include information about the function of these institutions clearly establishing communication channels between them, so as to avoid the bureaucracy and the time-consuming methods of communication that have been used so far. For example, instead of sending official letters using the post service, it is recommended that more modern and efficient means of communication are used for the exchange information and other inquiries, such as an electronic portal, emails or through liaison officers. Additionally, the memorandum should include mechanisms for exchanging employees, especially experts. This step will allow the staff of the CC to spend time working at the regulated sectors and get indispensable experience by receiving training and reviewing the actual practices. At the same time, the employees of the regulatory bodies can learn more about the functions of the CC as well as obtain practical experience in dealing with competition law issues.

Reforming the institutional framework

Building on the above step, the memorandum of understanding should include a clause relating to the exchange of the members of legal committees and their training period. The rationale is that they will be able to observe the implementation procedures of legal committees within their respective bodies, explore the way that these institutions perform their tasks and also familiarise themselves with the obstacles and challenges that those bodies are facing during the performance of their duties. The independence of those bodies, both financial and institutional, should be specifically stated in this agreement and safeguarded as much as possible because the independence from the government will contribute to the acceleration of work at the board of directors of the CC and avoid the bureaucracy, where the chairman is the Minister of Commerce and Industry and four representatives of the board of directors are from three ministries and one authority: the Ministry of Commerce and Industry, the Ministry of Economy & Planning, the Ministry of Finance and the General Investment Authority, which may delay the meetings and the overall consideration of cases, while it may lead to incidents where the same cases are also being considered by the regulatory agencies specifically if these cases are related to the regulated markets. In addition, it would be a positive development if extra budget is provided to appoint more qualified employees and improve the work environment at the Council of Competition and the regulatory agencies.

Finally, the memorandum of understanding should provide for the appointment of regulatory agencies' representatives as members of the board of directors of the Council of Competition instead of the appointment of representatives of Ministries and businessmen, because in this way a clear and workable relationship will be established between the CC and the regulatory agencies.

Reforming the implementation procedures

After the signature of the memorandum of understanding, the process will be as following:

Firstly, once a violation of Competition is detected in any sector by the regulatory agencies, the Council of Competition should be informed and then a regulator should be responsible to enforce the competition rules of the sectoral regulation or the Council of Competition will apply the relevant provisions of the Competition Law, if sectoral regulation does not have competition rules.

Secondly, the memorandum of understanding should provide that each sector's regulator should be responsible for regulating competition exclusively within the sector. However, the CC should be informed about all complaints so that overlaps and duplication of work are avoided. The regulator should supervise the implementing of the law and the enforcement of any decision made if the Council of Competition does not. After making a decision regarding a case, a copy of the case's file should be sent to the CC to keep it in their archives and create a database so that there is an official record and the case is not decided twice. If the violation is repeated, then the CC should have the power to punish the violator more strictly, as repeated violations need to lead to increased penalties.

Thirdly, the legislator should put forward a reform of the Competition Law with particular focus on the detailed violations of Competition Law that are already included in the sectoral regulations in order to promote harmonisation in the area of competition law and pave the way for the steps to be taken in the next period.

Finally, the institutional framework of the Council of Competition and the regulatory agencies should be supported by more independence, financial and administrative and more qualified human resource.

Second period: The unification of the Competition Law provisions and the abolition of competition rules in the sectoral regulations

After reforming the Competition Law, an additional article should be added regarding the unification of the competition rules under the umbrella of the Competition Law only. During this period, the competition rules in the sectoral regulations should be abolished, especially in the Telecommunications law and the Electricity law, to avoid the duplication and conflicts between the Competition Law

and the competition rules in the sectoral regulations. Also, another article needs to be added so that the provisions of the Competition Law are applicable over all sectors without exceptions, even in the case that state-owned enterprises are found to be in violation by the Council of Competition or any regulatory agencies. One practical solution is that in such cases, the Council of Competition needs to be informed about the violation. If the violations occur in the regulated sectors and are detected by the Council of Competition, the Competition Law is enforceable by the Council of Competition on the basis of cooperation and exchange information with the regulatory agencies or by the regulatory agencies after informing the Council of Competition. By implementing the provisions of the unification of competition law by the regulatory agencies, there is no ambiguity regarding the applicable law or in the event of a conflict of institutional jurisdiction between the different authorities. The process of unification of competition law rules is important, as it promotes equality and justice, where the penalties in the sectoral regulations are lower than the penalties in the Competition Law. Also, reducing the prosecution and litigation stages, where the victims of the decisions that made by the committee for considering violations of the Telecommunications law have the right to appeal before the Minister of Communication and Information Technology. If the Minister (and Chairman of Board of Directors) approves the decision, then the violator has the right to appeal against the decision of the legal committee before the administrative court (the Board of Grievances). Moreover, the CITC has an additional step before the initiation of the prosecution and litigation procedures. This step allows the CITC to remedy any practice that is considered to constitute abuse of the dominant position of any operator before starting the prosecution and litigation procedures before the legal committee through certain measures, such as stop or prevent any activities related to the abusive behaviour, including calling a meeting between the violator and other operators that might be damaged by the violator’s activities, attempt and reach a solution that may prevent or remove these practices or infringing activities.

The ECRA would act either following the receipt of complaints or following its own initiatives as the supervising and monitoring body of the Electricity market.[615] However, there is an additional step before starting the prosecution and litigation procedures. This step requires an attempt of settling any disputes between licensees and the Authority through arbitration, as Article 13 of the Electricity Law clearly states that "Any dispute or disagreement arising between any Licensee and the Authority may be settled by arbitration in accordance with the provisions of the Arbitration Law".

These recommendations correspond to the research questions of the present research and draws the road map of the transition from the temporary stage to the permanent stage in a smooth way. They also address the conflict between the Competition Law and the sectoral regulations as well as the conflict between the jurisdiction of the Council of Competition and the regulatory agencies.

This step is the final stage of regulatory reforms that are needed to improve the system of regulating competition in the regulated sectors. This step includes the unification of the laws and regulations that regulate competition under the umbrella of a new, modern and comprehensive Competition Law. This unification process presupposes the adoption of the concurrency model to delineate the relationship between the CC and regulatory bodies in terms of regulating competition in the regulated sectors and dividing the tasks. The concurrency model will also lead to the exchange of information between the CC and the regulatory bodies, so that all parties involved are informed about what the others are dealing with and the rationale is to avoid replication of tasks and unproductive use of resources.

[615] Article 2 of the Saudi Electricity Law 2005.

6.3 Further research

It might be useful to conduct further research by selecting one of the sectors mentioned in this Thesis and extending the research on other aspects, such as anti-competitive agreements, mergers or abuse of dominant position. It might also be useful to conduct future research regarding these other sectors, as there are many sectors that will be regulated soon according to the 2030 vision in Saudi Arabia, such as the postal sector or the public transport sector.

Furthermore, further research could be conducted in the area of competition law and another area of law that is directly linked to competition law, such as Consumer Law and Procurement and Contracting Law. For example, in Saudi Arabia there are many cases that have been found by the Council of Competition that are linked with the violation of the Competition Law and the Procurement and Contracting Law at the same time.

It might also be useful if future researchers use different methodology, such as empirical research and conduct interviews with the officials in the Council of Competition and the regulatory agencies, lawyers and academic staff, experts and the corporate executives. Moreover, it can be useful to have further comparative studies between the Saudi jurisdiction and other jurisdictions, for instance, such as Gulf countries or any similar jurisdictions in the world. These studies can also employ different methodologies.

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