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A Critique of Saudi M&A Laws

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The Pennsylvania State University

Penn State Law

A Critique of Saudi M&A Laws

A Dissertation in Law

by

Mulhim Hamad Almulhim

Submitted

for the Degree of

Doctor of Juridical Science

Abstract

This dissertation aims to elucidate Saudi Arabia's mergers and acquisitions (M&A) laws. The dissertation studies and analyzes current Saudi M&A laws with reference to comparative models from different countries and provides recommendations to improve the transparency and efficiency of Saudi Arabia's M&A laws. Such improvements may help companies attempting to conduct M&A activity in Saudi Arabia address certain barriers and difficulties, which may in turn help to stimulate the Saudi Arabian economy.

Saudi Arabia is considered one of the world's foremost emerging markets. Since Saudi Arabia joined the World Trade Organization, its stock market has been growing quickly, including rapid growth in M&A transactions. The author of this paper argues that Saudi has a significant need for M&A activity and notes that despite the sharp growth in M&A activity in Saudi in recent years, most of Saudi's M&A laws are not modern or sophisticated enough to handle the large, complex M&A transactions that are beginning to occur in the Kingdom. Certain M&A transactions attempted in Saudi, such as the Sahara-Sipchem deal, have been unsuccessful due to the absence of a legal framework capable of reinforcing and protecting M&A transactions and boosting M&A activities. This paper offers a critique and analysis of Saudi Arabia's M&A laws.

The author argues that most of Saudi's current M&A laws discourage corporations from engaging in M&A activity and/or cause M&A transactions to fail due to their (the laws') deficits. This dissertation identifies loopholes in the Saudi legislation that governs M&A transactions. It covers antitrust law, corporate law, securities law and tax law and provides recommendations supported by models from different jurisdictions as to how M&A laws in Saudi can be made more efficient and brought in line with modern economic principles.

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Chapter 1: Introduction

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§1.1. Introduction to the Chapters

Chapter 1 provides an overall introduction to this dissertation. It contains an abstract summarizing the main arguments of the dissertation; an acknowledgment; and a literature review that highlights the fact that currently, no academic research has been done on mergers and acquisitions (M&A) activity in Saudi Arabia. Chapter 1 also addresses certain obstacles that the author faced during the course of writing this paper. The methodology and scope of this dissertation are then addressed, followed by a discussion of the significance of the dissertation.

Chapter 2 lays the foundation for the five chapters that follow it by providing a comprehensive introduction of the Saudi legal system. This introduction focuses mainly on the authoritative bodies that are related to, and/or may impact, M&A activity in Saudi Arabia. Each section provided in this chapter describes an entity or process that affects M&A transactions in some way. Chapter 2 begins with Section 2.2, which provides a brief introduction of the history, geographic characteristics and present-day population of Saudi Arabia. Partly in response to the rapid increase in international trade over the past two decades, Saudi Arabia has recently enacted a series of M&A laws, among other important laws and directives; Section 2.3 discusses this development. Section 2.4 outlines the constitution of Saudi Arabia, and Section 2.5 outlines its legal system, which is based on Islamic law. Section 2.6 explains the Saudi government in general, and the Saudi royal house in particular, while Section 2.7 addresses the three branches of Saudi's government. Authoritative bodies in Saudi that are germane to M&A transactions are addressed in Section 2.8. Section 2.9 discusses in some detail the permissions required for foreign investors to participate in Saudi's stock market. This section serves as important background for this paper, because Saudi has opened its stock market to foreign investors, and

the stock market is inextricably related to most M&A transactions. Finally, Section 2.10 provides a comprehensive diagram of Saudi Arabia's entire governmental system.

Chapter 3 introduces the activities of Saudi Arabia's business organizations and highlights the volume of mergers and acquisitions (M&A) transactions in Saudi that require advanced regulation. The chapter addresses the role that M&A plays in the Saudi economy and evaluates the importance of this activity to the overall economy. Section 3.2 of this chapter illustrates Saudi Arabia's business organizations, and Section 3.3 presents the value of Saudi's exports. Section 3.4 discusses how Saudi Arabia's debt has been decreasing every year since 1999. Section 3.5 introduces Saudi's business activities. Section 3.6 details the increase in the number of listed companies critical to M&A activity in Saudi, and Section 3.7 addresses the strength and liquidity of the Saudi stock market. Section 3.8 addresses the role of family businesses in Saudi Arabia; Section 3.9 addresses the role, number and economic size of closely held corporations in Saudi that impact M&A activities in the Kingdom. The volume and impact of foreign investment and cash flowing into and out of Saudi Arabia are addressed in Section 3.10. Section 3.11 describes the business councils in Saudi Arabia that facilitate business among foreign and Saudi investors, while Section 3.12 discusses business sectors that are growing within Saudi Arabia. Section 3.13 lists the number of M&A transactions that have occurred in Saudi in recent years. Finally, Section 3.14 provides several tables that list a wide variety of M&A related activity that occurred in Saudi Arabia during the period from 2013 to early 2016.

Chapter 4 begins with Section 4.2, which contains four Subsections: (a) a brief overview of microeconomics; (b) a discussion of the general principles of antitrust laws and merger control regulations; (c) an introduction to the Saudi Competition Law and (d) and a high level clarification of how the Saudi Competition Law covers M&A activity in Saudi Arabia. The rules

that govern the pre-merger notification process are addressed in Section 4.3, including rules pertaining to the right and process of appealing the Competition Council's decisions. Section 4.4 explains the principles of the Competition Law and analyzes the rules governing M&A economic concentration requests. Several decisions rendered by the Competition Council regarding M&A are discussed in Section 4.5. Sections 4.6 and 4.7 detail interviews conducted by the author with members of the Competition Council. Section 4.8 provides a critique of the Saudi Competition Law regarding M&A. Section 4.9 considers the South African Competition Law, which the author addresses for comparison and in order to provide suggestions that Saudi legislators may use to improve the rules of the Saudi Competition Law. Section 4.10 offers a comprehensive list of recommendations that may be used to improve, amend and enhance the provisions of the Saudi Competition Law that govern M&A transactions.

Chapter 5 begins by outlining the fundamentals of the New Saudi Companies Law of 2015 in Section 5.2. Section 5.3 addresses the basic rules of corporate governance in Saudi, such as starting a corporation, calling for a shareholder meeting, electing directors and handling conflicts of interest. Section 5.3 also covers activities that are related and essential to M&A transactions, such as the issuance of shares by a publicly held company, private offering exceptions and insider trading. Following these introductory sections are three subsequent sections that consist of the following: Section 5.4 addresses the stock acquisition of a closely held corporation by discussing a crucial court case, (the Safola case), as well as an acquisition deal that was canceled due to what the author considers a legislative vacuum where M&A laws are concerned; this discussion references the US approach to M&A. Section 5.5 addresses the assets acquisition of closely held corporations; this section concludes that Saudi Arabia should amend its M&A legislation in order to handle such acquisition activity in the same manner as the

US does. Section 5.6 addresses the merger of closely held corporations and discusses certain articles that Saudi M&A legislation currently does not address; the author argues that these articles are necessary for Saudi to facilitate mergers in the manner that the American system follows, and further argues that adopting such articles would help to reform the Saudi Companies Law 2015 in economically efficient manner.

Chapter 6 is an assessment and critique of the Saudi Arabia M&A Regulation. The Chapter identifies provisions that may help improve the economic and legal efficiency of M&A activity in Saudi; the European Commission's (EC) Directive on takeover bids is referenced throughout the Chapter as a comparison and guide. This Chapter concludes with recommendations that may improve the efficiency of the Saudi M&A Regulation and facilitate the efficient use of the takeover mechanism.

Chapter 6 begins by introducing the Saudi Capital Market Authority and its role, which is to regulate tender offers under the Saudi M&A Regulation and also under the European Commission's Directive on Takeover Bids. The author explains why the EC Directive was chosen as a model in Section 6.2 and addresses the applicability of the Saudi M&A Regulation in Section 6.3. Every subsequent section of this Chapter includes some level of comparison between the Saudi M&A Regulation and the EC Directive; if the EC Directive does not cover a specific section, then a brief reference to the UK Takeover Code and its relevant rules is made. Rules governing the announcement of a takeover bid are addressed in Section 6.4, the prohibition of dealing rule is discussed in Section 6.5, and the mandatory offer rule is treated in Section 6.6. Section 6.6 also discusses the question of which ownership threshold—30% or 50%—is more efficient as the trigger of the mandatory offer, and Section 6.7 discusses the types of, and considerations for, mandatory offers. Section 6.8 lays out the disclosures of information required

for the mandatory offer. Section 6.9 explains the obligation of the board of directors of the offeree company to provide an opinion regarding the offer, and Section 6.10 discusses the independence of the board of directors of the offeree company. Section 6.11 addresses the provisions necessary to establish the ability of the offeror to complete the offer, and Section 6.12 details the offer period and the right to withdraw acceptance. Section 6.13 addresses the breakup and reverse breakup fee provisions, Section 6.14 explains the competition provision, Section 6.15 discusses the hostile takeover and restrictions on the defensive measures rules, Section 6.16 details the required disclosures of ownership that must be reported during the offer, and Section 6.17 details the required disclosures of ownership acquired before the offer. Section 6.18 addresses the EC Directive's treatment of squeeze out and sell out rules. Section 6.19 provides a summary of the author's recommendations and a diagram that provides a visual representation of the structure of a tender offer of a publicly held corporation.

Chapter 7 focuses on the Saudi tax rules that apply to M&A transactions in Saudi Arabia and addresses how Saudi income tax law in particular applies to M&A transactions. The Chapter begins by enumerating the basic Saudi income tax rules in Section 7.2. Section 7.3 deals with the application of Saudi income tax rules to M&A transactions, provides a general comparison with the US tax treatment of M&A, and emphasizes the need for Saudi income tax law to adopt specific rules that govern M&A. Section 7.4 provides a summary of the Chapter and Section 7.5 outlines recommendations.

Chapter 8 compiles the recommendations section of Chapters 4, 5, 6 and 7.

§1.2. Acknowledgements

I would like to thank my supervisor, Samuel C. Thompson, Jr., who is an Arthur Weiss Distinguished Faculty Scholar, Professor of Law and Director of the Center for the Study of Mergers & Acquisitions at Penn State Law School. I am thankful for his assistance and guidance.

§1.3. Literature Review

Regarding scholarship related to the topics of this dissertation, the author has found a small number of articles that address the legal and tax issues relevant to M&A activity in Saudi Arabia; however, to date, no unified paper such as this dissertation has been written or published that addresses all legal aspects of M&A in Saudi Arabia. The author did find one short research paper, which is addressed in Chapter 6. Therefore, this paper should be considered the first published academic research to address M&A in Saudi Arabia in a comprehensive and detailed manner, and the author hopes this work will open the door to this subject matter for other researchers and dissertation writers.

§1.4. Methodology

The author employs the historical method of research and analysis, especially when addressing the historical background of Saudi Arabia. The historical method is also used when addressing the legislative history of the old and new (1965 and 2015) Saudi Companies Laws. The author employs a descriptive method when describing the Saudi legal system and the comparative method when comparing Saudi M&A laws with other models from different countries. The author also uses the comparative method in comparing the old and new Saudi Companies Laws. Finally, the author employs case analysis techniques in Sections in which the dissertation addresses cases, decisions and transactions.

§1.5. Obstacles

The author faced and overcame various obstacles in the course of writing this dissertation. First, while several Saudi ministries and agencies expressed willingness to help the author with research, and each person with whom the author spoke was welcoming to the extent of his capacity, the author's access to materials such as cases, agreements, files and decisions was still quite limited. The author managed to overcome this obstacle somewhat by collecting information from multiple different sources. Second, on several occasions, the author found that translations of materials—such as specific laws, cases, decisions and other resources and authorities—were incompletely translated or missing entirely. The author tried to translate personally many materials that have never before been officially translated. In this work, the author has endeavored to point out instances in which the translation of a law or decision that was available was substantially incorrect or imprecise. The author made meticulous efforts to reflect (in English) the exact meaning of the Arabic in such cases. Third, the author found that there are very few people who can be considered experts on M&A activity in Saudi Arabia. When the author did find an expert, he or she usually was an expert in only one aspect of M&A. For example, the author found an expert on the corporate aspect of M&A, but this person had no knowledge of the antitrust aspects of M&A. Obstacles such as these had to be overcome by meeting with different types of judges, officials, attorneys, professors, businessmen, board members, economists and accountants.

§1.6. The Scope of the Dissertation

This dissertation addresses the legislative aspects of Saudi Arabia's M&A laws; specifically, it focuses on the Saudi antitrust, corporate, securities and tax laws. The dissertation incorporates cases and transactions that help address the issue of flawed or nonexistent

legislative provisions that should be included in Saudi law in order to promote and enhance economically efficient M&A transactions in Saudi.

§1.7. The Significance of the Dissertation

This dissertation has a practical significance for attorneys and practitioners, because it provides analysis and guidance for attorneys that aim to become M&A experts. The structure of the chapters in this work is transactionally oriented. The dissertation has academic significance because it adds substance and new data to the legal field as to how M&A transactions are governed in Saudi Arabia. Moreover, the dissertation opens doors for other scholars to develop research on each issue that it addresses.

The dissertation is also significant from a legislative perspective. It focuses mainly on legislative flaws in Saudi Arabia that need to be amended, and it suggests provisions that should be adopted and included.

The dissertation also has business significance for investors seeking to invest in Saudi Arabia. The information, case studies and Q&A with Saudi ministries that this work presents may provide foreign investors with important information that they need in order to understand how to successfully enter the Saudi market.

Finally, the dissertation has a governmental significance, in that it not only provides recommendations for improvements that should be made to Saudi M&A laws, but also provides concrete evidence (in terms of dates and volume) of the significant increase in M&A activity in Saudi Arabia, the proper handling of which demands immediate reform at the legislative level.

Chapter 2: Saudi Legal System and Authorities Related to M&A¹

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§2.1. Scope

Chapter 2 lays the foundation for the next five chapters of this paper by providing a comprehensive introduction of the Saudi legal and governmental systems. This chapter focuses mainly on the authoritative bodies that are related to, and/or may impact, mergers and acquisition (M&A) activity in Saudi Arabia. Each section provided in this chapter describes an entity or process that affects M&A transactions in one way or another.

This chapter begins with Section 2.2, which provides a brief introduction to the history, geographic characteristics and present-day population of Saudi Arabia. Partly in response to the rapid increase in international trade over the past two decades, Saudi Arabia has enacted a series of M&A laws, among other important laws and directives; Section 2.3 discusses this development. Section 2.4 outlines the constitution of Saudi Arabia, and Section 2.5 outlines its legal system, which is based on Islamic law. Section 2.6 explains the Saudi government in general, and the Saudi royal house in particular, while Section 2.7 addresses the three branches of government. Authoritative bodies in Saudi that are germane to M&A transactions are addressed in Section 2.8. Section 2.9 discusses in some detail the permissions required for foreign investors to participate in Saudi's stock market; this section serves as important background for this paper, because Saudi has opened its stock market to foreign investors, and the stock market is inextricably related to most M&A transactions. Finally, Section 2.10 provides a comprehensive diagram of Saudi Arabia's entire governmental system.

§2.2. Introduction

A. Saudi Arabia: a short history

Over 270 years have passed since the first Kingdom of Saudi Arabia was created.²

Muhammad bin Saud and Muhammad bin Abdulwahab³ met in 1740 and agreed to join together to establish a state; their efforts and the state that they formed marked a new era for the entire Arabian peninsula.⁴ The creation of Saudi Arabia has been well documented:

Saudi Arabia was never directly colonized[,] although parts of the present-day state had come under nominal or intermittent Ottoman control since the 16th century. Turkish garrisons were at times stationed in Mecca, Medina, Jeddah and other centers, but the Ottomans only exercised limited powers[,] and local rulers had a high degree of autonomy in internal affairs. The Ottomans['] final efforts at occupying eastern Arabia in 1871[,] to forestall the growing British influence at their borders in the Arabian Gulf[,] eventually failed. The basis of the Wahhabi state of Saudi Arabia was established in 1902[,] when Abd al-Aziz al-Saud and his followers gained control of Riyadh, signaling the beginning of the third period of Saudi-Wahhabi dominance in the region. Abd al-Aziz consolidated his territorial gains over the next decade, expanding out of the surroundings of Riyadh and the eastern part of the region into the areas where the Ottomans were expelled. The Kingdom of Saudi Arabia was declared on 22nd September 1933 over those lands that had come under Abd al-Aziz[']s control by conquest and by [his] forging numerous alliances.⁵

As this quotation notes, Saudi Arabia has never been colonized. It was and has always been governed by its people. Under the Ottoman Empire, the governors were first Arabs and then Islamic Caliphates, which (the Caliphate structure) was common in the 19th century.⁶ The

² WAHBI HARIRI-RIFAI, MOKHLESS HARIRI-RIFAI, *THE HERITAGE OF THE KINGDOM OF SAUDI ARABIA*, 26 (Washington DC, GDG Publication, 1990). See also *A Chronology of the House of Saud*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/saud/cron/> (last visited August 16, 2014).

³ Muhammad bin Abdulwahab is a religious leader and founder of the Wahhabism movement. See ALEXEI VASSILIEV, *THE HISTORY OF SAUDI ARABIA*, Chapter 3 (Saqi Publication, 2013). For more information about Wahhabism, see NATANA DELONG-BAS, *WAHHABI ISLAM: FROM REVIVAL AND REFORM TO GLOBAL JIHAD* (New York, Oxford University Press, 2004); HAMID ALGAR, *WAHHABISM: A CRITICAL ESSAY* (United States, Islamic Publication International, 2002); KHALID ALDAKIL, *THE WAHHABIYYAH BETWEEN SHIRK & DISINTEGRATION OF THE TRIBE* (Beirut, Lebanon, Arab Network for Researching and Publishing, 2013). [in Arabic]

⁴ HARIRI-RIFAI, 26. See also *A Chronology of House of Saud*, available at <http://www.pbs.org/wgbh/pages/frontline/shows/saud/cron/>.

⁵ University of Emory, available at <http://www.law.emory.edu/ifl/legal/saudi-arabia.htm> (last visited September 22, 2014).

⁶ See VASSILIEV, *supra* note 3, at Chapter 8.

Ottoman Empire controlled the western side of the country—including Mecca and Al Madinah—which had Al Sharif as its representative.⁷ With support from the Ottomans, the Al Rasheed family took over the central part of Saudi Arabia.⁸ King Abdul-Aziz came from Kuwait to retake the Arabian Peninsula and wrest control from Al Rasheed in the center and Al Sharif in the west.⁹ Abdul-Aziz eventually won control over the west in 1926,¹⁰ and he gave himself the title of king of Saudi Arabia in 1932.¹¹ He accepted monthly payments from Great Britain to remain a British ally in the region, agreeing to a specific set of British terms; among other terms, he agreed not to attempt to extend the kingdom beyond what he had agreed upon with the British, not to engage in any conflicts without British support and finally to allow the British to search for minerals and oil in Saudi territory.¹² Thus, the governance of Saudi Arabia shifted from the control of the Ottoman Empire to being an independent kingdom; however, the country continued to be governed by the Arab people, rather than becoming a colony.¹³ Although King Abdul-Aziz was a British ally and accepted British monetary aid, Great Britain did not dictate how he should rule the country.¹⁴ This means that, as this paper will argue, the principles and laws that were developed and applied in Saudi Arabia were, and remain, unique.

Because Saudi Arabia was never directly colonized, it has remained different from most other countries in the world.¹⁵ Not having been colonized has affected how Saudi Arabia

⁷ JAMES WYNBRANDT, *A BRIEF HISTORY OF SAUDI ARABIA*, 166, 176, 170, (New York, Checkmark Books, 2010).

⁸ *Id.*

⁹ See VASSILIEV, *supra* note 3, at Chapter 8.

¹⁰ *Id.* at 168, 169, 182.

¹¹ Simon Henderson, *After King Abdullah Succession in Saudi Arabia*, POLICY FOCUS, 6 (96, 2009).

¹² ABDULLAH ALBASSAM, *TOHFATAL MUSHTAQ IN THE HISTORY OF NJED, HIJAZ AND IRAQ 409-10* (2000). For more information, see also AL-RASHEED, *MADAWI, A HISTORY OF SAUDI ARABIA*, (New York, Cambridge University Press, 2010); ROBERT LACEY, *THE KINGDOM: ARABIA & THE HOUSE OF SA'UD*, (Hutchinson, 1981); and ROBERT LACEY, *INSIDE THE KINGDOM: KINGS, CLERICS, MODERNISTS, TERRORISTS, AND THE STRUGGLE FOR SAUDI ARABIA* (New York, Viking Adult by Penguin Group, 2009).

¹³ See VASSILIEV, *supra* note 3, at Chapter 8.

¹⁴ See CHRISTOPHER D. O'SULLIVAN, *FDR AND THE END OF EMPIRE: THE ORIGINS OF AMERICAN POWER IN THE MIDDLE EAST*, 92 (Dhu'l-Q. 9, 1433 AH, New York, Palgrave Macmillan, 2012).

¹⁵ See *Id.* at 91.

perceives different types of business transactions, such as mergers and acquisitions.¹⁶ Most African countries and many Arab countries were colonized by France or Great Britain and forced to follow the French or British economic system, including imitating how these colonizing countries handled corporate law and transactions.¹⁷ Understanding Saudi's historical background provides a sense of why Riyadh, the capital of Saudi Arabia, remained for the most part beyond the reach of the Ottoman Empire.¹⁸ Many scholars and historians of the Arabian Peninsula would agree that the Ottomans (and others) viewed the area around Riyadh as little more than a desert wasteland in which no one would ever want to invest.¹⁹ Indeed, my father has told me a story about one of our family's ancestors being offered a piece of land in Riyadh. The government was gathering people together to pressure them to sign up for land, hoping they would cultivate it successfully and attract more people to go there and settle. My ancestor jumped over a fence and escaped, wondering to himself who in his right mind would commit to owning a piece of land in a desert. Now, Saudi Arabia attracts some of the world's wealthiest personal and corporate investors, greatly increasing the potential for mergers and acquisitions activity to take place in its capital markets.

B. Saudi Arabia's geographic advantage

Saudi Arabia rests in the heart of the Middle East, which gives it a strategic advantage in the politics and economics of the region. Saudi Arabia's neighbors are Yemen and Oman to the

¹⁶ For instance, while Saudi laws and regulations apply to the governance of businesses when certain issues are addressed in the legal codes, Islamic rules apply whenever the code is silent about such issues. *See also* O'SULLIVAN at 91.

¹⁷ *See* RUTH OTUNGA, DAVID K. SEREM, AND JONAH NYAGA KINDIKI, SCHOOL LEADERSHIP IN AFRICA, 367; Daniel Klerman, Paul Mahoney, Holger Spamann, and Mark Weinstein, *Legal Origin or Colonial History*, 7, JOURNAL OF LEGAL ANALYSIS 3 (2011).

¹⁸ *See* C. Raja Mohan, *Saudi Arabia: a very different place*, The Hindu Newspaper, Friday, January 19, 2001. Available at <http://www.thehindu.com/2001/01/19/stories/0319000d.htm> (last visited August 25, 2014); CHARLES TOWNSHEND, DESERT HELL, 370 (Harvard University Press, Jul 31, 2011); BERNARD HAYKEL, THOMAS HEGGHAMMER & STÉPHANE LACROIX, SAUDI ARABIA IN TRANSITION: INSIGHTS ON SOCIAL, POLITICAL, ECONOMIC AND RELIGIOUS CHANGE, 242 (Cambridge University Press, Jan 19, 2015).

¹⁹ *See Id.*

south; Qatar, the UAE and Kuwait to the East; and Iraq and Jordan to the north. Saudi Arabia's territory reaches west to the Red Sea, which connects it with the African continent; it shares this sea with Egypt, Sudan, Eritrea and Ethiopia. Saudi also borders the Persian Gulf, which it shares with Iran. Saudi Arabia is connected to most of the richer countries in the region, rendering it economically powerful. Finally, Saudi is deeply connected to the world's financial markets because of its oil production, and it is an essential religious center because it contains two of Islam's most important mosques—Mecca and Medina.

C. Saudi Arabia's population

According to the most recent Population Figures Report, the Saudi population in 2015 totaled 31.5 million: 21.1 million Saudi citizens and 10.4 million foreigners.²⁰ The nominal gross domestic product (GDP) in 2012 calculated in billions of SAR was 2,666.4 (approximately USD 709 billion), and the nominal GDP per capita was SAR 91,328²¹ (approximately USD 24,261).²² According to the IMF, the Saudi nominal GDP for 2015 was an estimated USD 805.225 billion.²³ These figures demonstrate that Saudi Arabia currently has the 19th largest GDP in the world.²⁴ By way of reference and comparison, the United States has the world's largest GDP, reaching an estimated USD 18,286.685 trillion for 2015.²⁵

²⁰ See *Estimated Population Figures' Report*, produced by the General Authority for Statistics, available at <http://www.stats.gov.sa/sites/default/files/PopulationEstimate2010-2025-0.pdf> (last visited February 25, 2016)

²¹ Exchange Rate (SR/US\$) at that time was 3.750.

²² *Id.*

²³ International Monetary Fund, available at [²⁴ *Id.*](http://www.imf.org/external/pubs/ft/weo/2014/02/weodata/weorept.aspx?sy=2012&ey=2015&scsm=1&ssd=1&sort=country&ds=.&br=1&pr1.x=43&pr1.y=11&c=456&s=NGDPD%2CNGDPDPC%2CPPPGDP%2CPPPPC&grp=0&a=.(last visited February 16, 2016).</p></div><div data-bbox=)

²⁵ *Id.*

§2.3. International Saudi Trade

Saudi Arabia joined the World Trade Organization on December 11, 2005.²⁶ Saudi Arabia was a young country, still forming its financial systems, when it joined WTO,²⁷ and it quickly began to enact reforms and new laws and regulations, particularly in the area of mergers and acquisitions. For the purposes of this paper, the main impact of Saudi's membership in the WTO has been Saudi's issuance of new laws and reforming of current laws²⁸ to bring them into compliance with WTO standards. Saudi established new agencies and amended some existing laws during King Abdullah's reign,^{29, 30} which helped it grow its market and take the leading financial role in the region. The following excerpt from Saudi Arabia's General Investment Authority summarizes the size of Saudi's international trade:

Saudi Arabia is the largest free market in the Middle East, having 25% of the total Arab gross domestic product (GDP), the largest oil reserves worldwide (25%) and lowest energy prices for investment projects. Thus, Saudi Arabia is an Ideal [sic] destination for projects that depend on energy consumption. In addition, Saudi Arabia has a number of promising mining natural resources and a good location [that] makes it and [sic] easy access for the European, Asian and African markets. Moreover, [the] Saudi market has high purchasing power and continuous expansion. The Kingdom is one of the fastest-

²⁶ World Trade Organization (WTO), available at http://www.wto.org/english/thewto_e/countries_e/saudi_arabia_e.htm (last visited February 20, 2016).

²⁷ *Id.*

²⁸ M.A. Ramady and Mourad Mansour, *The impact of Saudi Arabia's WTO accession on selected economic sectors and domestic economic reforms*, WORLD REVIEW OF ENTREPRENEURSHIP, MANAGEMENT AND SUSTAINABLE DEVELOPMENT Vol. 2, No. 3 (2006), 193, available at https://www.researchgate.net/publication/5173465_The_impact_of_Saudi_Arabia's_WTO_accession_on_selected_economic_sectors_and_domestic_economic_reforms (last visited February 23, 2015).; also see Khan H. Zahid, *The Impact of WTO on Saudi Arabia*, Arabnew Newspaper, 19 September 2005, available at <http://www.arabnews.com/node/273257> (last visited February 29, 2016).

²⁹ US-Saudi Arabian Business Council, available at <http://www.us-sabc.org/i4a/pages/Index.cfm?pageID=3690#.VEq1Bf14pV0>. (last visited December 21, 2014).

³⁰ King Abdullah bin Abdul-Aziz was the sixth Saudi monarch and died on the 23d of January, 2015. CNN reported his death in a news piece entitled "Saudi Arabia's reformer King Abdullah dies," available at <http://edition.cnn.com/2015/01/22/middleeast/saudi-arabia-king-abdullah-dies/> (last visited January 25, 2015). His successor was his brother, King Salman the Crown Prince; he had another brother, Mugrin, and the Deputy Crown Prince is his nephew, Muhammad bin Nayef, who is the Minister of Interior. King Salman was chosen by the succession Law, invented by King Abdullah. See generally <http://edition.cnn.com/2015/01/23/middleeast/saudi-arabia-king-abdullah-death/> (last visited January 25, 2015).

growing countries worldwide, with per capita income forecast to rise from \$25,000 in 2012 to \$33,500 by 2020.³¹

According to the World Bank group’s report for 2016 (Measuring Regulatory Quality and Efficiency), Saudi Arabia was ranked—in terms of the ease of doing business—as 82 out of 189 countries in the world.³² In terms of this same metric, for reference and comparison, note that Singapore is ranked 1, the United Kingdom 6, the United States 7, Turkey 55, and Brazil 116.³³ This suggests that Saudi Arabia should further reform its laws, so they are more efficient and transparent.³⁴

The table below (Table 2.1) illustrates a comparison of Saudi Arabia vs. certain other countries in terms of nominal GDP and GDP per capita for 2014, according to the World Bank.

Table 2.1

Comparison of five countries’ GDP, 2014

	Country	GDP (USD billion)	GDP per capita (USD)
1	United States	17,419,000,000,000	54,629.5
2	United Kingdom	2,988,893,283,565	46,332.0
3	Brazil	2,346,076,315,119	11,384.4
4	Turkey	798,429,233,036	10,515.0
5	Saudi Arabia	746,248,533,333	24,161.0 ³⁵

³¹ See Saudi Arabian General Investment Authority, available at <http://www.sagia.gov.sa/en/Investment-climate/Some-Things-You-Need-To-Know-/Investment-Incentives/> (last visited December 25, 2015)

³² A World Bank Group Flagship Report, *Doing Business 2016 Measuring Regulatory Quality and Efficiency Report*, 5 (13th ed). Available at <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB16-Full-Report.pdf>. (last visited February 25, 2016)

³³ *Id.*

³⁴ The Report highlight some of the need of regulatory reforms and transparency which reads as follows: Saudi Arabia transferring a commercial property from one company to another takes less than a week and costs nothing in fees, but new data collected by Doing Business this year on the quality of land administration systems show that the Saudi system lacks transparency and the mechanisms for resolving land disputes are complex. Information either is not accessible to everyone or can be obtained only in person. And resolving a land dispute over tenure rights between two local businesses in Riyadh takes more than three years. See *Doing Business 2016 Measuring Regulatory Quality and Efficiency Report*, 3.

³⁵ See the World Bank’s website, available at <http://data.worldbank.org/indicator/NY.GDP.MKTP.CD> (last visited February 25, 2016)

The table below (Table 2.2) illustrates a comparison of Saudi Arabia vs. certain other countries in terms of nominal GDP and GDP per capita for 2015, according to the International Monetary Fund.

Table 2.2

Comparison of five countries' GDP, 2015

	Country	GDP (USD billion)	GDP per capita (USD)
1	United States	17,968,195,000,000	55,904
2	United Kingdom	2,864,893,903,000	44,118
3	Brazil	1,799,612,000,000	8,802
4	Turkey	722,219,000,000	9,290
5	Saudi Arabia	632,037,000,000	20,139 ³⁶

§2.4. The Saudi Constitution

The current constitution of Saudi Arabia was issued on March 1, 1992;³⁷ the Kingdom of Saudi Arabia did not have a constitution before that date. Saudi's 1992 constitution³⁸ outlines the Kingdom's general rules, system and branches. It contains 83 articles. The first article states:

The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qur'an,³⁹ and the Sunnah (Traditions) of

³⁶ See the International Monetary Fund's website, available at <http://www.imf.org/external/pubs/ft/weo/2015/02/weodata/index.aspx> and <http://statisticstimes.com/economy/countries-by-projected-gdp.php> (last visited February 27, 2016)

³⁷ According to the Bureau of Experts in the Council of Ministers, Royal Order No. A/90 on 1412 H (corresponding with 1992), available at <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=4&VersionID=240> (last visited June 25, 2015)

³⁸ Known in Saudi/Arabic as "*Nezam Alhokom*," which means in English "Basic Law of Governance." This name is what causes some Saudis or foreigners to believe that there is no constitution in Saudi Arabia, because the name of Saudi's constitution is different from what most countries use.

³⁹ Qur'an can be defined as "The Islamic sacred book, believed to be the word of God as dictated to Muhammad by the archangel Gabriel and written down in Arabic. The Qur'an consists of 114 units of varying lengths, known as *suras*; the first *sura* is said as part of the ritual prayer. These touch upon all aspects of human existence, including matters of doctrine, social organization, and legislation." See Oxford Dictionaries, available at http://www.oxforddictionaries.com/us/definition/american_english/Koran (last visited December 12, 2015) Many Muslims believe that translations of the Qur'an can only give an abstract sense of the meaning or the concept of the Qur'an and its verses, and that the Qur'an's translation into any language is unimaginable, as not other language can

the Prophet (PBUH).⁴⁰ Arabic is the language of the Kingdom. The City of Riyadh is the capital.”⁴¹

The author agrees with some scholars⁴² who state that while the Qur’an is a resource for the constitution, it cannot be the constitution itself, because the Qur’an is not a code.⁴³ Stating that the Qur’an is the constitution limits the message of the Qur’an.⁴⁴ The Qur’an contains many stories that teach morals that extend well beyond the constitution’s purpose.⁴⁵ A constitution exists to provide guidance about how a government and its branches should be structured, as well as to define the basic principles that underpin the rights and obligations that exist between a government and its people.⁴⁶

reflect the exact miraculous language of the Qur’an. See ANNEMARIE SCHIMMEL, ISLAM: AN INTRODUCTION, 29-30 (State University of New York Press, 1992). Although the Prophet Muhammad was illiterate, he was sent to the people most fluent in Arabic at that time, and he recited the most fluent and powerful Arabic word when he recited verses. The Qur’an challenged those fluent Arabic speakers and poets to create words similar to those found in the Qur’an; however, they could not, as the Qur’an says, “And if ye are in doubt as to what We have revealed from time to time to Our servant, then produce a Sūra like thereunto; and call your witnesses or helpers (If there are any) besides God, if your (doubts) are true.” (al-Baqarah Sura-23) “Or do they say, ‘He forged it’? say: “Bring then a Sūra like unto it, and call (to your aid) anyone you can besides God, if it be ye speak the truth!” (Yūnus Sura-38). “Say: ‘If the whole of mankind and Jinns were to gather together to produce the like of this Qur’ān, they could not produce the like thereof, even if they backed up each other with help and support.’ (al-Isrā’ Sura-88). See Abdullah Yusuf Ali, *The Meanings of The Holy Qur’an*, Kindle Edition (2014). It is important to cite Pickthall’s description regarding the translation of the Qur’an that, “The book is here rendered almost literally and every effort has been made to choose befitting language. But the result is not the Glorious Qur’an, that inimitable symphony, the very sounds of which move men to tears and ecstasy. It is only an attempt to present the meaning of the Qur’an-and peradventure something of the charm in English. It can never take the place of the Qur’an in Arabic, nor is it meant to do so.” See MARMADUKE WILLIAM PICKTHALL, THE MEANING OF THE GLORIOUS KORAN: AN EXPLANATORY TRANSLATION, vii (New York, The Muslim World League, 1997). Pickthall was the first man from the West, particularly from England, whose native language was English and who translated the meaning of the Qur’an from Arabic to English. See SHABBIR AKHTAR, THE QURAN AND THE SECULAR MIND: A PHILOSOPHY OF ISLAM, 376 (New York, Routledge, 2008).

⁴⁰ It can be defined as: “The second source is the Sunnah, reports about the sayings, actions, or tacit approvals of the Prophet.” See The Oxford Dictionary of Islam, available at <http://www.oxfordislamicstudies.com/article/opr/t125/e2444> (last visited December 12, 2015)

⁴¹ The Saudi Constitution, art. 1.

⁴² Such as Dr. Khalid Al-dakhil. See Saudi in focus, *Allegiance Council: Dr.Khaled al-Dakhil – 1*, (Mar 27, 2008), <https://www.youtube.com/watch?v=O21YDYRNjw0> (last visited March 12, 2016)

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

§2.5. The Saudi Legal System

The Kingdom of Saudi Arabia is an Islamic country with a legal system that follows Sharia law (Islamic law), and it is generally informed by the *Hanbali* School.⁴⁷ Islamic Schools are schools of jurisprudence that teach the interpretation of the two main sources of Islam: the *Qur'an* and the *Sunnah*. There are four main schools of thought in Islamic *Sunni* (the study of the *Sunnah*) jurisprudence: the *Hanbali* School, the *Shaf'I* School, the *Hanafi* School and the *Maliki* School. Islamic *Sunni* schools represent 85-90% of all Muslims in the world, while Islamic *Shia* schools represent approximately 10%.⁴⁸ According to The Global Religious Landscape, the world's Muslim population numbers 1.6 billion, which represents 23% of the world's population: 87-90% of Muslims are from the Sunnah branch, and 10-13% are from the Shia branch.⁴⁹ Islam is considered the second largest religion in the world after Christianity.⁵⁰ Christians number 2.2 billion, representing 32% of the world's population.⁵¹

According to Article 7 of the Saudi constitution:

Government in the Kingdom of Saudi Arabia derives its authority from the Book of God⁵² and the Sunna[h] of the Prophet⁵³ (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.⁵⁴

In 1927, King Abdul-Aziz announced that Saudi's courts must follow the principles of the *Hanbali* school, unless a judge had a compelling reason to follow a certain (other) school or

⁴⁷ It has been claimed that Saudi courts follow the Hanbali School, as stated here <http://www.oxfordislamicstudies.com/article/opr/t125/e799>; <http://www.international-divorce.com/Basics-of-Saudi-Family-Law-System.htm>.

⁴⁸ See ABU UMAR FARUQ AHMAD, THEORY AND PRACTICE OF MODERN ISLAMIC FINANCE: THE CASE ANALYSIS FROM AUSTRALIA, 73-83 (Florida, Brown Walker Press, 2010).

⁴⁹ See The Global Religious Landscape, *A Report on the Size and Distribution of the World's Major Religious Groups as of 2010*, produced by the Pew Research Center's Forum on Religion & Public Life, (December, 2012), at 17 and 21, available at <http://www.pewforum.org/files/2014/01/global-religion-full.pdf> (last visited December 15, 2015)

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² The Book of God means the *Qur'an*.

⁵³ It is also called the *Sunnah* or *Hadeeth*.

⁵⁴ Constitution of Saudi Arabia, art. 7.

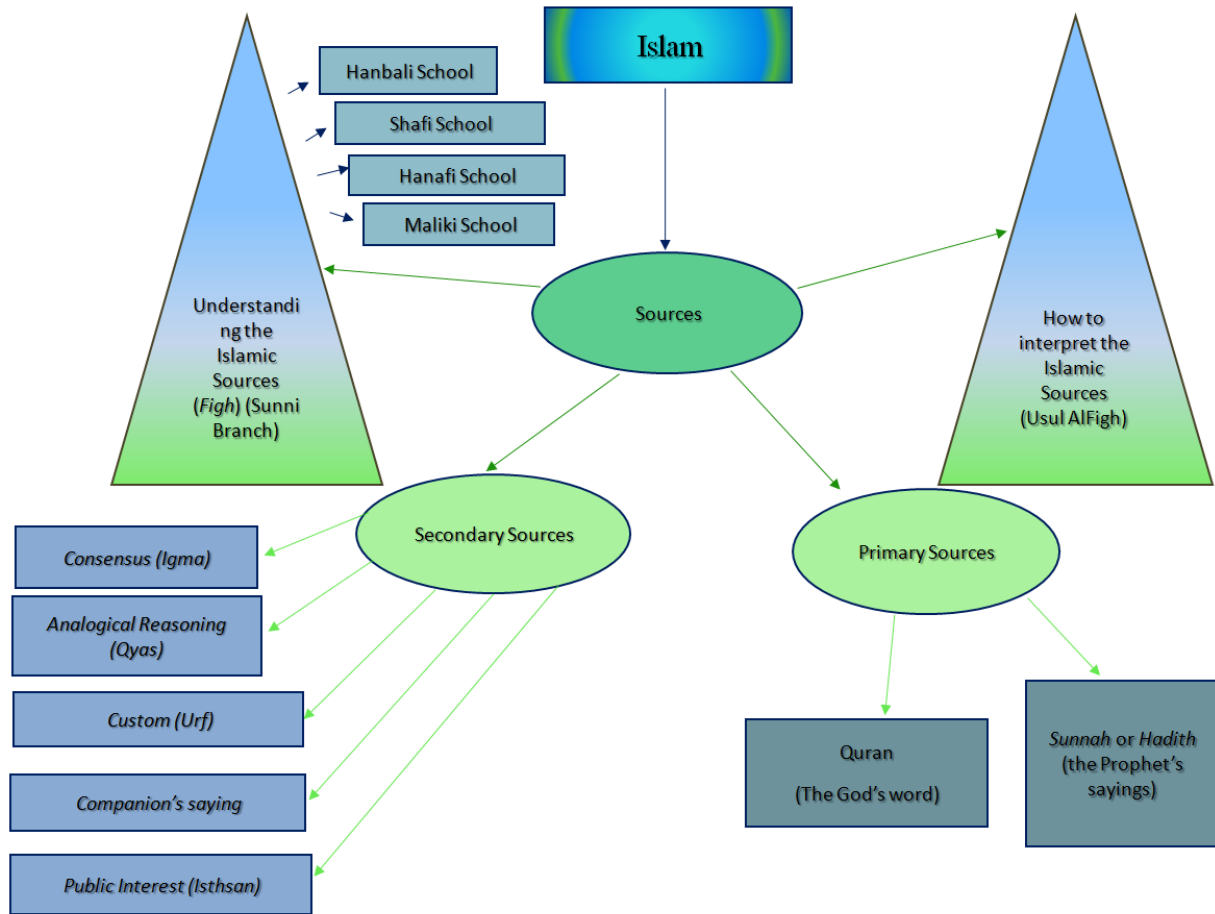
reasoning in deciding a particular dispute; in such a case, the judge would be required to state the reasoning and evidence that caused him to rule according to anything other than *Hanbali*.⁵⁵

Figure 2.1, which is displayed immediately below, illustrates the study and interpretation of Islam, which can be divided into four main categories: primary sources, secondary sources, *usul alfiqh* (the interpretation of Islamic sources, which may be understood as the equivalent of the laws of reason) and *fiqh* (the jurisprudence that results from the application of the interpretation [*usul alfiqh*] of the primary sources). As noted, Figure 2.1 illuminates how these four categories fit together.

⁵⁵ Supreme Judicial Council, available at <http://www.scj.gov.sa/index.cfm?do=cms.conArticle&contentid=1144&categoryid=385> (last visited December 22, 2015)

Figure 2.1

The study and interpretation of Islam



§2.6. The Saudi Monarchy

Saudi Arabia is a kingdom ruled by the House of Saud; specifically, it is ruled by the sons of King Abdul-Aziz, and their sons, as decreed in Article 5 of the Saudi constitution:

- a. Monarchy is the system of rule in the Kingdom of Saudi Arabia[.]
- b. Rulers of the country shall be from amongst the sons of the founder King Abdulaziz bin Abdulrahman Al-Faisal Al-Saud, and their descendants.
- c. The most upright among them shall receive allegiance according to Almighty God's Book and His Messenger's Sunnah (Traditions).

d. The Crown Prince shall devote himself exclusively to his duties as Crown Prince and shall perform any other duties delegated to him by the King.

f. Upon the death of the King, the Crown Prince shall assume the Royal powers until a pledge of allegiance ([*bay'a*]) is given.⁵⁶

Each King names a crown prince, who will take over the throne after the King dies.⁵⁷ This manner of succession had been a simple equation and a simple matter until most of King Abdul-aziz's sons passed away, creating a challenging question as to who would be the first suitable prince from the second generation to take over the throne. This question remained unresolved until Saudi Arabia enacted the 2006 Succession Commission Law, which formed a body called The Allegiance Council (or Allegiance Commission) that would govern who would succeed the King.⁵⁸ This law was an amendment of Article 5, C of the Constitution of Saudi Arabia.⁵⁹ The Succession Commission Law explained how a King would be chosen, and what role the Succession Commission would play. The most important aspects of this law include:

Article 6:

Upon the King's death the Commission shall call for the pledge of allegiance to the Crown Prince as King of the country in accordance with this Law and the Basic Law of Governance.

Article 7:

(a) After receiving the pledge of allegiance and after consultation with members of the Commission, the King shall choose one or two or three he deems fit to be crown prince. Such choice shall be brought before the Commission[,] which shall exert effort to agree on one nominee to be named Crown Prince. In case the Commission does not nominate any of them, then it shall nominate whom it deems fit to be crown prince.

(b) The King may at any time ask the Commission to nominate whom one [sic] it deems fit to be crown prince. In case the King disapproves [of] the Commission's nominee in

⁵⁶ Constitution of Saudi Arabia, art. 5.

⁵⁷ This old and unwritten mechanism had been utilized by previous kings, beginning with Abdul-Aziz, until the succession Law was issued.

⁵⁸ Succession Commission Law, Royal Order No. A/135 1427 H from 2006. available at <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=8&VersionID=13>. (last visited December 3, 2015)

⁵⁹ Al-dakhil, *supra* note 42.

accordance with any of paragraphs (a) and (b) of this Article, then the Commission shall vote on its nominee and another chosen by the King, and the one with the majority of votes shall be named crown prince.

Article 8:

A nominee for crown prince must satisfy the provisions of paragraph (b) of Article 5 of the Basic Law of Governance.

Article 9:

The crown prince shall be chosen in accordance with the provision of Article 7 within a period not exceeding thirty days from the date of the pledge of allegiance to the King.⁶⁰

The Succession Commission Law emphasizes that the process must accord with Article 5 of the Saudi Constitution, which states that the king must be the son of King Abdul-Aziz, or the son of one of his sons. That means that the cousin of King Abdul-Aziz, or more precisely any prince who is not a son or grandson of King Abdul-Aziz, cannot become king of Saudi Arabia.

§2.7. The Three Branches of Government

According to Article 44 of the Constitution of Saudi Arabia, three parts make up the Authorities of State: the Executive, Legislative (Regulatory) and Judicial branches. Article 44 also states that “[t]hese Authorities will cooperate in the performance of their functions, according to this Law or other laws. The King is the ultimate arbiter for these Authorities.”⁶¹

This language may sound similar to the method of checks and balances that exists in the United States; however, the last sentence shows that it is not, because the three authorities ultimately answer to the King.

⁶⁰ Succession Commission Law, available at <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=8&VersionID=13> (last visited December 5, 2015).

⁶¹ Constitution of Saudi Arabia, art. 44.

A. Executive

1. In General

The Council of Ministers functions as an executive and regulatory or legislative body at the same time.⁶² It is the only executive body, but it shares the function of legislation with the *Al Shura* Council.⁶³ Its executive purpose is stated in the Council of Ministers Law. The Council of Ministers is a regulatory authority, and the King is its Prime Minister.”⁶⁴ The Saudi constitution states the following regarding the functionality of the Council of Ministers:

Article 20:

While deferring to Majlis Ash-Shura Law, laws, treaties, international agreements and ‘concessions’ shall be issued and amended by Royal Decrees after deliberations by the Council of Ministers.

Article 21:

The Council shall study draft laws and regulations on the agenda and vote on them chapter by chapter and then as a whole in accordance with the By-laws of the Council.

Article 22:

Every minister may propose a draft law or regulation related to [the] work of his ministry. Every member of the Council of Ministers may propose what he deems worthy of discussion in the Council of Ministers’ meetings after the approval of the Prime Minister.

Article 23:

All laws shall be published in the Official gazette and shall be put into force from the date of its publication unless it is stipulated otherwise.

Article 24:

The Council, being the ultimate executive authority, shall have full jurisdiction over all executive and management affairs. The following shall be included in its executive jurisdiction:

- Monitoring the implementation of regulations, By-laws and resolutions.

⁶² The Council of Ministers Law, Royal Order No. A/13 in 1414 H from 1993. art. 1; (24).

⁶³ *Id.*

⁶⁴ The Council of Ministers Law, art. 1, available at <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=6&VersionID=11> (last visited December 12, 2015)

- Creating and arranging public institutions.
- Following up on the implementation of the general plan for development.
- Forming committees for the oversight of the ministries' and other governmental agencies' conduct of business. Those committees may also investigate any given case. The committees shall submit the findings of their investigations within a set time to the Council, and the Council shall consider these findings. It shall have the right to form committees of inquiry accordingly to make a final conclusion taking into consideration the regulations and stipulations of the By-laws.⁶⁵

Articles 24 and 1 clearly state that the Ministers Council functions as both an executive and legislative body.

2. The ministries

There are 22 ministries in Saudi Arabia, and they all fall under the Ministers Council, which is held by the King every week. Many of these Ministries have agencies that work with them on specific tasks. Some of the agencies that are relevant to mergers and acquisitions activity in the Kingdom. The list of ministries in Saudi Arabia is as follows:

- 1- Ministry of Agriculture
- 2- Ministry of Civil Service
- 3- Ministry of Commerce and Industry
- 4- Ministry of Communications and Information Technology
- 5- Ministry of Culture and Information
- 6- Ministry of Education
- 7- Ministry of Finance
- 8- Ministry of Foreign Affairs
- 9- Ministry of Hajj
- 10- Ministry of Health

⁶⁵ *Id.*

- 11- Ministry of Higher Education⁶⁶
- 12- Ministry of Interior
- 13- Ministry of Water and Electricity
- 14- Ministry of Islamic Affairs, Endowments, Call and Guidance
- 15- Ministry of Justice
- 16- Ministry of Labor and Social Affairs
- 17- Ministry of Municipal and Rural Affairs
- 18- Ministry of the National Guard
- 19- Ministry of Petroleum and Mineral Resources
- 20- Ministry of Planning and National Economy
- 21- Ministry of Transport
- 22- Ministry of Housing

The relevant ministry for M&A transactions is the Ministry of Commerce and Industry.

B. Legislative

The *Shura* Council (*Majlis Al Shura*), which in English means Consultative Assembly of Saudi Arabia, examines and studies drafts of laws; this Council also writes comments about draft laws before sending the drafts to the Ministers Council.⁶⁷ The *Shura* Council also has the power to interpret laws.⁶⁸ In most cases, the Ministers Council promulgates laws only after they have been reviewed by the *Shura* Council.⁶⁹ The following articles states the *Shura* Council's functions:

Article 15:

⁶⁶ The Ministry of Higher Education was merged with Ministry of Education on January 29, 2015.

⁶⁷ The *Shura* Council Law, art. 15-18. Available at <http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=5&VersionID=10>.

⁶⁸ *Id.* at art. 15 (last visited December 12, 2015)

⁶⁹ *Id.* at art. 17.

Majlis Ash-Shura shall express its opinion on general policies of the State referred by the Prime Minister. Specifically, the Council shall have the right to do the following:

- Discuss the general plan for economic and social development[.]
- Study laws and regulations, international treaties and agreements and concessions, and make whatever suggestion it deems appropriate.
- Interpret laws.
- Discuss annual reports forwarded by ministries and other governmental institutions, and make whatever suggestions it deems appropriate.

Article 16:

No meeting held by Majlis Ash-Shura shall be considered official without a quorum of at least two-thirds of its members, including the Chairman or his deputy. Resolutions shall not be considered official without majority approval.

Article 17:

Majlis Ash-Shura's resolutions shall be forwarded to the Prime Minister for consideration by the Council of Ministers. If the views of both councils are concordant, the resolutions shall come into force following the King's approval. If the views are contradictory, the King may decide what he deems appropriate.

Article 18:

Laws, international treaties and agreements, and concessions shall be issued and amended by Royal Decrees after being studied by Majlis Ash-Shura.⁷⁰

C. Judicial

This subsection aims to provide the reader with a solid understanding of the venues in which M&A disputes have been heard and will be heard in Saudi Arabia.

Even though Saudi Arabia's system is based on Islamic law, which generally follows the *Figh*,^{71, 72, 73} it also uses a dual court system in which there are courts for private matters and

⁷⁰ *Id.* at art. 15-18.

⁷¹ FRANK E. VOGEL, ISLAMIC LAW AND LEGAL SYSTEM: STUDIES OF SAUDI ARABIA, 307 (New York, Brill Academic Pub, 2000).

⁷² *Figh* means Islamic Jurisprudence.

⁷³ The rules, legal reasoning, and Islamic principles that current judges apply in cases before the courts are the result of the first generations of Islamic jurists who established these rules through their interpretation and understanding of the divine recourses (*Qur'an* and *Sunnah*); this foundation has developed since then into Islamic jurisprudence.

administrative courts for cases in which at least one party is governmental. There are three types of judicial bodies: ordinary courts, administrative courts, and semi courts. This Section will address each type of court in turn.

As mentioned earlier, Saudi courts are understood to follow the *Hanbali* School,⁷⁴ which means that the *Hanbali* School's principles are binding upon the courts' judges. However, Vogel describes a case in which a judge was reviewing an action brought by an employee against a limited liability company; the action requested remittance of the plaintiff's salary while the company was under bankruptcy proceedings in another court.⁷⁵ The judge ruled in favor of the plaintiff based on the *Hadith* provision that states: "Pay the worker before his sweat dries."⁷⁶ Another situation Vogel mentions is a case in which a defendant was accused of possessing drugs in his vehicle; the defendant claimed that he had no knowledge of the existence of these drugs.⁷⁷ The judge in this case did not ask his research assistant to check what the *Hanbali* School may have said about such a situation; instead, the judge asked his research assistant to search for a *Hadith* from the *Sunnah* on the issue.⁷⁸ Consider in connection with this case a statement made during an interview by *Shaykh* Saleh bin Muhammad al-Luhaydan, who was once president of the Supreme Judicial Council and a member of the Board of Seniors (*Ulama*):

The judges of the kingdom are [*Hanbalis*], even though [they] do not commit themselves in every one their cases to the school of the Imam Ahmed ([*Ibn Hanbal*]). This is because the root of [the] principle is that of acknowledgement of leadership ([*ittiba*]), not [*taqlid*] with no seeking of the proof. One practicing [*it[t]iba*] of a particular school does not abandon (it) if he differs with it on the ground[s] of a proof[,] which in his view applies,

See MASHOOD A. BADERIN, EFFECTIVE LEGAL REPRESENTATION IN 'SHARI'AH' COURTS AS A MEANS OF ADDRESSING HUMAN RIGHTS CONCERNS IN THE ISLAMIC CRIMINAL JUSTICE SYSTEM OF MUSLIM STATES, 135-36 (Yearbook of Islamic and Middle Eastern Law 2004-2005).

⁷⁴ To read more about different types of Islamic schools, different parties, and the development of Islamic thinking, see MUSTAFA AKYOL, ISLAM WITHOUT EXTREMES: A MUSLIM CASE FOR LIBERTY, (W. W. Norton & Company, 2011).

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

since all the imams opined that the essential principle is (to adopt) that for which the proof exists.⁷⁹

In order to better understand Islamic legal thinking and the reasoning to which judges must adhere, the author cites a statement made by Ibn al-Qayyim, which is also cited in Vogel's work:

The judge needs three things, without which he cannot validly give judgment: knowledge of the ([*usul al- fiqh*]) proof (s) ([*dalils*]), occasions ([*asbab*]), and the evidences ([*bayyinat*]). The proofs show him the general sharia ruling, the occasions show him the means to judgment ([*tariq-al-hukm*]) in the dispute. When he errs in one of these three, he errs in the judgment, and all errors of judges turn upon error in one or more of them. An example of this is when two dispute[s] [come] before him about the return of purchased goods for a defect. His judgment depends on knowledge of [the] sharia proof ([*dalil*]) that give[s] the purchaser the power of return. This is an [*ijma*] of the Community based upon (a [*hadith*])... (Then the judgment depends) on knowledge of [the] occasion showing the applicability of the ruling of [the] legislator in this specific sale. This is that (the complained –of) characteristic is or is not a defect enabling return. Knowledge of this does not depend on the sharia, but on the senses, habit and custom, expertise, and such like. (Finally, the judgment depends) on evidence, which is the means of ruling between the litigants. This is whatever makes clear to him the truthfulness of one of them to a certainty or a probability...)⁸⁰

1. The ordinary courts

The new Law of the Judiciary⁸¹ was enacted in 2007 and contained many reforms. The first Article states that “judges are independent and, in the administration of justice, they shall be subject to no authority other than the provisions of Sharia and laws in force. No one may interfere with the judiciary.”⁸² A Supreme Judicial Council, in charge of the ordinary courts and its judges, has the following responsibilities toward the ordinary courts, as defined by Article 6:

- (a) Attend to judges' personnel affairs such as appointment, promotion, disciplining, assignment, secondment, training, transfer, granting of leaves, termination of service and the like, in accordance with established rules and procedures, in such a way as to guarantee the independence of the judiciary.
- (b) Issue regulations relating to judges' personnel affairs upon the approval of the King.

⁷⁹ VOGEL, *supra* note 71, at 118.

⁸⁰ *Id.* at 119.

⁸¹ Royal Decree No. M/78 19 in 1428H – 1, October 2007.

⁸² Law of the Judiciary, art. 1.

- (c) Issue judicial inspection regulations.
- (d) Establish courts in accordance with the nomenclatures provided for in Article 9 of this Law, merge or cancel them, determine their venue and subject jurisdiction without prejudice to Article 25 of this Law and constitute panels therein.
- (e) Supervise courts and judges and their work within the limits stated in this Law.
- (f) [N]ame chief judges of courts of appeals and their deputies from among the appeals judges and chief judges of courts of first instance and their assistants.
- (g) Issue rules regulating jurisdiction and powers of chief judges of courts and their assistants.
- (h) Issue rules specifying the method of selecting judges as well as procedures and restrictions pertaining to their study leaves.
- (i) Regulate the work of Trainee Judges.
- (j) Determine equivalent judicial work required to fill judicial ranks.
- (k) Make recommendations relating to the Council's established jurisdiction.
- (l) Prepare a comprehensive report at the end of each year including achievements, obstacles and relevant recommendations, and bring the same before the King.⁸³

a. The hierarchy of the ordinary courts

The hierarchy of the ordinary courts is stated in Article 9:

“Courts shall consist of the following:

- (1) The Supreme Court.
- (2) Courts of appeals.
- (3) First instance courts, which are:
 - (a) General courts.
 - (b) Penal courts.
 - (c) Family courts.
 - (d) Commercial courts.
 - (e) Labor courts.”⁸⁴

⁸³ *Id.* at art. 6.

i. The Supreme Court

The Supreme Court has the power to exercise all of the following functions, as listed in

Article 11:

In addition to the powers provided for in the Law of Procedure before Sharia Courts and the Law of Criminal Procedure, the Supreme Court shall oversee the proper application of the provisions of Sharia and the laws issued by the King[,] which are not inconsistent with Sharia in cases within the jurisdiction of the general courts in relation to the following:

(1) Review of judgments and decisions issued or supported by courts of appeals relating to sentences of death, amputation, stoning, or [*qisas*] (lex talionis retribution) in cases of criminal homicide or lesser injuries.

(2) Review of judgments and decisions issued or supported by courts of appeals relating to cases not mentioned in the previous paragraph[,] or relating to ex parte cases or the like without dealing with the facts of the cases whenever the objection to the decision is based upon the following:

(a) Violating the provisions of Sharia or laws issued by the King[,] which are not inconsistent with Sharia.

(b) Rendering of a judgment by a court improperly constituted as provided for in the provisions of this and other laws.

(c) Rendering of a judgment by an incompetent court or panel.

(d) An error in characterizing the incident or improperly describing it.⁸⁵

ii. The courts of appeal

According to Article 16 of the Judiciary Law, there shall be the following specialized

courts:

“The courts of appeals panels are:

(1) Jural panels.⁸⁶

(2) Penal panels.

(3) Family panels.

⁸⁴ *Id.* at art. 9.

⁸⁵ *Id.* at art. 11.

⁸⁶ “Jural panels” means the general court.

(4) Commercial panels.

(5) Labor panels.”⁸⁷

The courts of appeal can hear any case that can be appealed in the first court, as stated in Article 17.⁸⁸

iii. The first courts

There are three types of first courts: general courts for notaries public and traffic, panel courts for crimes, and specialized courts for commercial and labor issues, as stated in the following Articles:

Article 19:

General courts in provinces shall consist of specialized panels that include panels for execution and for ex parte and similar cases[,] which are outside the jurisdiction of other courts and notaries public, and decide on traffic accident cases and violations provided for in the Traffic Law and its Implementing Regulations. Each panel therein shall consist of a single judge or three judges as determined by the Supreme Judicial Council.

Article 20:

A penal court shall be composed of specialized panels as follows:

- (a) Panels for qisas⁸⁹ (lex talionis retribution) and had („Qur[']anic prescribed punishment[]) cases.
- (b) Panels for ta'zir⁹⁰ („discretionary punishment“) cases.
- (c) Panels for juvenile cases.

Each panel shall be composed of three judges[,] except for cases determined by the Supreme Judicial Council[,] which shall be reviewed by one judge.

Article 21:

⁸⁷ Law of the Judiciary, art. 16.

⁸⁸ *Id.* at art. 17.

⁸⁹ *Qisas* in Arabic means retaliation, or the concept of an “eye for an eye,” which carries a specific punishment in the Qur'an.

⁹⁰ *Ta'zir* in Arabic means discretionary punishment in cases in which the Qur'an and Sunnah do not specify a punishment for a crime.

A family court shall be composed of one or more panels, and each panel shall consist of one or more judges as determined by the Supreme Judicial Council and may include specialized panels as needed.

Article 22:

A commercial court and a labor court shall be composed of specialized panels, and each panel shall consist of one or more judges as determined by the Supreme Judicial Council.

Article 23:

A general court in a county or district shall be composed of one or more panels. Each panel shall consist of one or more judges as determined by the Supreme Judicial Council. Specialized penal, commercial, labor and family panels may be established, whenever necessary, in the general courts of counties and districts where no specialized courts are established. Said panels shall have the powers of specialized courts. The Supreme Judicial Council shall determine the cases to be reviewed by the general courts of one judge.⁹¹

Figure 2.2 , which is displayed immediately below, illustrates the hierarchy of the Saudi ordinary courts.

Figure 2.2

The hierarchy of the Saudi ordinary courts⁹²



⁹¹ Law of the Judiciary, art. 19-22.

⁹² ABDULLAH F. ANSARY, A BRIEF OVERVIEW OF THE SAUDI ARABIAN LEGAL SYSTEM (2008), available at http://www.nyulawglobal.org/globalex/saudi_arabia.htm (last visited March 26, 2016)

2. The administrative courts

Administrative courts are controlled by the Board of Grievances, an independent administrative judicial body reporting directly to the King, as stated in Article 1 of the Law of the Board of Grievances.⁹³

a. The hierarchy of the administrative courts

As stated in Article 8, the hierarchy of these courts is similar to that of the ordinary courts. Article 8 specifies that:

“Courts of the Board of [Grievances] shall consist of the following:

- (1) The High Administrative Court.
- (2) The Administrative Courts of Appeal.
- (3) The Administrative Courts.”⁹⁴

b. The administrative courts’ subject matter

The Law of the Board of Grievances states the matters assigned to administrative courts as follows:

Administrative courts shall have jurisdiction to decide the following:

- (a) Cases relating to rights provided for in civil service, military service and retirement laws for employees of the Government and entities with independent corporate personality or their heirs and their other beneficiaries.
- (b) Cases for revoke [sic] of final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation thereof[,] abuse of power, including disciplinary decisions and decisions issued by quasi-judicial committees and disciplinary boards[,] as well as decisions issued by public benefit associations- and the like – relating to their activities. The administrative authority’s refusal or denial to make a decision required to be made by it in accordance with the laws and regulations shall be deemed an administrative decision.

⁹³ Law of the Board of Grievances, art. 1.

⁹⁴ *Id.* at art. 2.

- (c) Tort cases initiated by the persons concerned against the administrative authority's decisions or actions.
- (d) Cases related to contracts to which the administrative authority is party.
- (e) Disciplinary cases filed by the competent authority.
- (f) Other administrative disputes.
- (g) Requests for execution of foreign judgments and arbitral awards.⁹⁵

Figure 2.3, which is displayed immediately below, illustrates the hierarchy of the Saudi administrative courts.

Figure 2.3

The hierarchy of the Saudi administrative courts⁹⁶



⁹⁵ *Id.* at art. 13.

⁹⁶ ANSARY, *supra* note 92.

3. The commercial courts and commercial panels, originally overseen by the Board of Grievances, have been established as the commercial courts within the ordinary courts

It is necessary to explain the ways in which the various courts behave in practice versus how their functions may change in the future. Initially (in 2003), the Council of Ministers ruled that until the commercial courts were established as a subset of the ordinary courts, the administrative courts, overseen by the Board of Grievances, would have jurisdiction over any commercial dispute (including an M&A issue) that arose between merchants or corporations.⁹⁷ The Board of Grievances had commercial courts (the first instance) and commercial panels (the appeals level) that made decisions about commercial disputes (including M&A issues) that arose out of business activities; such disputes had to be filed by a merchant or a corporation, according to the old Commercial Court Law.⁹⁸ However, jurisdiction over commercial disputes has recently been moved over to the commercial courts and commercial panels that have been established in the ordinary courts.⁹⁹ This transition did not occur as quickly as many had hoped; indeed, the change has only just occurred (in March 2016).

On March 22, 2016, the Board of Grievances and the Ministry of Justice announced that the acting President of the Supreme Judicial Council (the Minister of Justice) and the President of the Board of Grievances signed a memorandum of understanding announcing that the

⁹⁷ Based on the Council of Ministers' Decision No. 261, dated 17/11/1423 (corresponding to 1/20/2003).

⁹⁸ See HYSHAM ALASKER, RIYADH CHAMBER OF COMMERCE AND INDUSTRY, available at http://www.alriyadhtrading.com/show_content_sub.php?CUV=73&Model=M&SubModel=22&ID=2373&ShowAll=On; EADALI HAMMAD, ALQADA' ALTAJARAA FA ZILL ALNNIZAM ALQADAYAA ALJADID (ALJUZ' ALTHHANAA), available at <http://www.afaqlaws.net/Views/ViewResearch.aspx?artid=18> (The Commercial judiciary under the new judiciary Law 2011). (last visited December 6, 2015)

⁹⁹ Okaz newspaper on October 14, 2014 contains an article about the delaying of the movement of commercial disputes from the administrative courts to the ordinary courts for 6 months, available in Arabic at <http://www.okaz.com.sa/new/Issues/20141024/Con20141024730470.htm> (last visited December 16, 2015)

commercial courts/panels have been established in the ordinary courts.¹⁰⁰ It has not yet been announced when the new commercial courts/panels will begin to operate within the ordinary courts. However, according to an official from the Ministry of Justice, who preferred to remain anonymous, these newly established commercial courts/panels will begin reviewing commercial disputes on 1/1/1438 (which corresponds to the date of October 2, 2016). This means that starting on that date, commercial disputes, including M&A disputes, will be heard in the commercial courts/panels in the ordinary courts. This long-awaited development represents a step forward in terms of enhancing the judicial system in Saudi Arabia and complying with the judicial reforms of 2007.

4. The semi courts

The semi courts or quasi courts, sometimes called dispute resolution committees, are committees that function like courts but are not part of the judicial branch; however, some committee decisions can be appealed before the administrative courts.¹⁰¹ Before moving to a discussion of these committees, some background information should be provided. First, because Saudi Arabia generally follows a system in which the ordinary courts deal with disputes between private parties, it also has administrative courts to deal with disputes involving public parties. In general, committee decisions are administrative decisions, which are subject to an appeal in the administrative courts. Second, there are several committees to which the law gives power to decide appeals that have been filed against other committee decisions. Therefore, it can be said that those committees do in fact participate in the courts' jurisdiction by law.

¹⁰⁰ The Board of Grievances' website, available at <http://www.bog.gov.sa/MediaCenter/News/Pages/news-360.aspx>; The Ministry of Justice's website, available at https://www.moj.gov.sa/ar/Pages/News_Details.aspx?NewsID=68. (last visited March 22, 2016)

¹⁰¹ OSAMA TAFRAN, SEMI COURT COMMITTEES IN SAUDI ARABIA, 158-68 (1996), available in Arabic at <http://www.al-eman.com/aleman/library/messages/01760.pdf>.

For many years, these committees were confusing for many lawyers in Saudi Arabia, partly because most did not know of their existence. Dr. Omar Alkoly made the first comprehensive effort to understand them, and he wrote a small book in Arabic called “The Shadow of Judicature,” which was published in 2010. Dr. Alkoly concluded that there were 99¹⁰² committees for dispute resolutions.¹⁰³ His book lists most of the committees and notes the subject matter of the disputes they handle, the process by which disputes are handled, the number of levels within the committees, and their limitations.¹⁰⁴ It is remarkable that this extraordinary number of committees performs court functions while not falling under the judicial branch. In saying this, the author does not intend to disregard the advantages of these committees; some have very qualified members, and many committees are able to specialize and focus on particular dispute areas, allowing them to resolve conflicts more quickly than the courts generally can. Dr. Alkoly remarks that these committees are essentially administrative committees whose decisions can be appealed before the administrative courts, and they become quasi-judicial committees when their decisions are final and cannot be appealed before the administrative body.¹⁰⁵ In other words, if the committees’ decisions are final, then these committees function exactly as the courts function, even though they do not fall under the judicial branch; therefore, Dr. Alkoly refers to this committee structure as “The Shadow of Judicature.”¹⁰⁶

5. M&A disputes

As noted above, commercial disputes that arise between merchants or corporations are currently heard in the commercial courts that are overseen by the Board of Grievances, unless the

¹⁰² In 2013, the Okaz newspaper reported that Dr. Omar stated that this number had reached 104 committees. See <http://www.okaz.com.sa/new/issues/20131129/Con20131129658064.htm>. I also contacted Dr. Omar and mentioned that in his book, the number of committees mentioned should have been 100 plus the new 4 committees, or should have noted the appeal for some committees that were formed after his book was published.

¹⁰³ OMAR ALKOLY, THE SHADOW OF JUDICATURE, 10 (Saudi Arabia, Riyadh, Economic and Legal Publisher, 2011).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

parties choose to arbitrate. This practice will continue until the commercial courts/panels that were formed within the ordinary courts in March 2016 begin to operate, likely in October 2016. As noted above, because these commercial courts/panels have now been established in the ordinary courts, M&A disputes will be heard in these commercial courts/panels (within the ordinary courts), rather than in the commercial courts that were temporarily overseen by the Board of Grievances. If a dispute is related to the Saudi M&A Regulation (discussed in Chapter 6), it will be heard in the Committee for the Resolution of Securities Disputes (which is discussed in the following Section). For procedural and administrative issues, the supervising authorities are the Ministry of Industry and Commerce and the Capital Market Authority. In a case in which one party is listed in the Saudi stock market, and/or certain authorities or agencies are involved, the type of transaction that is in question will determine the authority chosen to be involved with the case.

6. Arbitration

This paper must also address arbitration. The author interviewed a person, who asked to remain anonymous, who works for one of the business councils that arranges business between Saudi Arabia and foreign investors. He stated that most of the transactions he encounters include arbitration clauses that would send a dispute to arbitration rather than referring it to the Saudi courts; this is especially true of the more complex cases. However, several Saudi attorneys who have worked on M&A transactions affirmed that most of the agreements they work on have utilized Saudi law as the applicable law, and they have utilized the Saudi courts for disputes. These two pieces of evidence on their own do not predict how often companies choose to arbitrate, but they do suggest both the importance of arbitration for the resolution of M&A disputes and also the importance of using applicable laws to settle such cases.

Saudi Arabia became a signatory country of the New York Convention in 1994,¹⁰⁷ which was the first step toward becoming involved with the international community to resolve disputes arising over cross border agreements. As a student of Islamic law, the author can confirm that arbitration can be traced back to *Sharia* law, and is addressed in both the Qur'an and the *Sunnah*.¹⁰⁸ Even though Saudi enacted its first arbitration law in 1983,¹⁰⁹ the author has not been able to locate it. It may have been published in a book; in any case, it is not an active law, and it was criticized from many angles.¹¹⁰ In 2012, new arbitration legislation was enacted in Saudi.¹¹¹ Borrowing from, and mostly following, the UNCITRAL Model Law on International Commercial Arbitration, this legislation represents a great leap ahead and a promising step for foreign investment in Saudi.¹¹² The supervising court is the Board of Grievances, which has jurisdiction over foreign awards, including the ability to "Request[s] execution of foreign judgments and arbitral [awards]."¹¹³ The new arbitration law limits the authority of the Board of Grievances to reviewing the awards and ensuring they do not conflict with *Sharia* law, public

¹⁰⁷ New York Convention, available at <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states> (last visited December 5, 2015)

¹⁰⁸ George Sayen, *Arbitration, Conciliation, and the Islamic Legal Tradition in Saudi Arabia*, 24 J. INT'L LAW 918 (2014), available at <http://scholarship.law.upenn.edu/jil/vol24/iss4/3> (last visited December 29, 2015)

¹⁰⁹ Nabil A. Issa and Sanjarbek A. Abdukhalilov of King & Spalding, *Understanding Saudi Laws in M&A, PE Transactions*, (May 12, 2014 Thompson Reuters Zawya), available at http://www.kslaw.com/imageserver/KSPublic/library/publication/2013articles/10-8-13_Zawya.pdf. (last visited September 6, 2015).

¹¹⁰ See ABDULRAHMAN MAMDOH SALEEM, A CRITICAL STUDY ON HOW THE SAUDI ARBITRATION CODE COULD BE IMPROVED AND ON OVERCOMING THE ISSUES OF ENFORCING FOREIGN AWARDS IN THE COUNTRY AS A SIGNATORY STATE TO THE NEW YORK CONVENTION, (May 2012).

¹¹¹ Royal Decree No M/34 in 1433 AH (corresponding to 2012 AD) concerning the approval of the Law of Arbitration, Ministry of Industry and Commerce, available at <http://www.mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/AbitrationSystem/Pages/default.aspx>. (last visited March 6, 2014)

¹¹² Raza Mithani, *Saudi Arabia: The Emerging Arbitration Landscape, Reprinted From Corporate Disputes Magazine* Jan-Mar 2014, available at http://www.kslaw.com/imageserver/kspublic/library/publication/2014articles/14_corpdisputes.pdf (last visited December 12, 2015)

¹¹³ Board of Grievances Law, art. 13 (g).

policy, the arbitration agreement or previous judgments;¹¹⁴ these courts are not allowed to review the merits of the case that led to an award.¹¹⁵ Enforcement of foreign judgments, including arbitral awards or foreign judgments that need to be enforced in Saudi Arabia, has been moved from the administrative courts to the execution courts, as stated in Article 8 (3) and Article 96 of the Execution Law.¹¹⁶ The Execution Law in Article 11 states the requirements necessary to enforce foreign judgments:

Notwithstanding the provisions of treaties and conventions, the execution judge may not enforce any court judgments and orders passed in any foreign country except in cases of equal treatment and after verifying the following:

1. That the Saudi courts are not competent to hear the case in respect of which the court judgment or order was passed and that the foreign courts which passed it are competent in accordance with the international rules of jurisdiction set down in the laws thereof.
2. That the litigants to the case in respect of which the judgment was issued were duly summoned, properly represented and enabled to defend themselves.
3. That the court judgment or order has become final in accordance with the law of the court that passed it.
4. That the court judgment is in no way inconsistent with any judgment or order previously passed by the Saudi courts.
5. That the judgment does not provide for anything[,] which constitutes a breach of Saudi public order or ethics.¹¹⁷

The author was able to find the following excerpt, which is the provision pertinent to the applicable law and jurisdiction used in one of the SPAs; it includes some slight modifications, including an arbitration section:

APPLICABLE LAW AND JURISDICTION

¹¹⁴ Squire Patton Boggs and Wissam Hachem, *The New Saudi Arbitration Law: A Step Towards International Norms*, July 4, 2013, LEXOLOGY, available at <http://www.lexology.com/library/detail.aspx?g=eff5c2fd-dcdd-40e2-9592-c960b33b6458>. (last visited November 17, 2015)

¹¹⁵ *Id.*

¹¹⁶ Execution Law, which was enacted in 2012, available at <http://adl.moj.gov.sa/ENG/attach/257.pdf>. (last visited October 1, 2015)

¹¹⁷ Execution Law, art. 11.

1.1 This Agreement is governed by, and all disputes arising under or in connection with this Agreement shall be resolved in accordance with, the laws of the Kingdom of Saudi Arabia.

1.2 In the event of any dispute, difference, claim, controversy or question among the Parties, directly or indirectly, arising at any time under, out of, in connection with or in relation to this Agreement (or the subject matter of this Agreement) or any term, condition or provision hereof, including without limitation any of the same relating to the existence, validity, interpretation, construction, performance, enforcement and termination of this Agreement (a “Dispute”), the Parties shall first endeavor an amicable settlement by good faith consultation and negotiation.

1.3 If the Parties fail to reach such settlement within one (1) month, the Dispute shall be finally settled in accordance with the rules of the DIFC-LCIA Arbitration Centre (which rules are deemed incorporated by reference in this Agreement). The arbitration shall be conducted by an arbitration tribunal consisting of three (3) arbitrators. [Party 1] shall appoint one (1) arbitrator, the Representative shall appoint one (1) arbitrator and the arbitrators so appointed shall appoint one (1) arbitrator. In the event the two arbitrators appointed by [party 1] and the Representative fail to agree on a third arbitrator within thirty (30) days following their appointment, then such arbitrator shall be appointed by the Chairman of the DIFC-LCIA Arbitration Centre.

1.4 The arbitration shall take place in the English language and the seat shall be Dubai, United Arab Emirates.

1.5 Judgment for any award rendered may be entered in any court having jurisdiction or an application may be made to such court for a judicial recognition of the award or an order of enforcement thereof, as the case may be. Nothing in this Section 1.5 shall preclude any Party from seeking provisional measures to secure its rights from any court having jurisdiction or where any assets of the other Party may be found.

1.6 The arbitration proceedings contemplated by this paragraph and the content of any award rendered in connection with such proceeding shall be kept confidential by the Parties.

§2.8. Authorities Relevant to M&A

The following Sections will address the authorities and agencies that are relevant to business law, especially to M&A, and will provide a basic understanding of how these M&A activities and foreign investment in Saudi Arabia are related.

A. The Supreme Economic Council¹¹⁸

The Supreme Economic Council is one of the Kingdom's governmental authorities that guides the country's economy and reviews its economic performance and development.¹¹⁹ As stated in law, it also reviews whatever the Ministries Council may refer to it.¹²⁰ Article 5 of the Supreme Council's regulation states that it shall do the following:

1. [Deve]lop economic policy and determine appropriate options.
2. Promote coordination among the various government entities that are directly involved with the national economy, taking the necessary measures to ensure that their efforts are integrated and complementary.
3. Monitor the implementation of economic policy and the decisions of the Council of Ministers related to economic issues, and submit a periodic report to the Council of Ministers.
4. Review the following:
 - a. The general framework for the development plan prepared by the Ministry of Economy and Planning, the draft plan, progress reports on the plan, and the corresponding economic report.
 - b. Fiscal policy and guidelines for preparing the draft budget, and the expenditure priorities developed by the Ministry of Finance, which are used as a basis for preparing the budget.
 - c. The draft budget and the budgets of the various government entities that are prepared by the Ministry of Finance.
 - d. Domestic and international trade policies; regulations aimed at controlling the labor and capital markets, protecting the rights of consumers, and creating a suitable environment for investment and competition; agricultural and industrial policies developed by the competent authorities.

¹¹⁸ A few months after writing about the Supreme Economic Council in this paper, the author learned that many Councils were canceled by King Salman on January 29, 2015, one week after he became king. He created two new councils to replace the canceled councils that would focus on security and economic issues. See Ben Hubbard, *Saudi King Hands Out Pink Slips and Bonuses*, NY TIMES, (January 29, 2015), available at http://www.nytimes.com/2015/01/30/world/middleeast/saudi-king-hands-out-pink-slips-and-bonuses.html?_r=0 (last visited January 30, 2015) However, until informed otherwise, the author believes the policies of the old Supreme Economic Council will remain the same and will be transferred to the new council.

¹¹⁹ Supreme Economic Council Law, art. 5.

¹²⁰ *Id.*

- e. Reports and other matters submitted by government agencies, committees, or the Council of Ministers concerning such economic issues as prevailing prices, taxes and duties, government revenues, expenditures, investments, debts, and concessions, matters submitted by the Ministerial Privatization Committee, The Offset Program Committee, the ministerial committee established by Royal Order No. 154/8 of 27/1/1404 A.H. [November 3, 1983], and the activities of the joint economic committees; and the final account statements of the central government and the various relevant government agencies.
 - f. Draft regulations and instructions related to economic issues, draft commercial and economic agreements, and regulations aimed at protecting the environment, in cooperation with the competent agencies.
 - g. Matters submitted by the Council of Ministers or the Royal Chamber.
5. Take what is necessary to prepare studies and reports on economic issues, by requesting that from the relevant government agencies, or obtain assistance from outside experts and consultants. The Supreme Economic Council shall also listen to information, reports, and monetary policies submitted by the Saudi Arabian Monetary Agency.
 6. Prepare a periodic reports on the national economy, based on information submitted by the relevant agencies.
 7. Perform any other duties assigned to it by relevant legislation¹²¹

The King chaired the Council and appointed its members.¹²² The members were King Abdullah bin Abdul-Aziz, Prince Salman Bin Abdul-Aziz, Prince Saud bin Faisal bin Abdul-Aziz, Prince Mohammed bin Naif bin Abdul-Aziz, the Minister of State (who is a member of the Council of Ministers), the Minister of Labor, the Minister of Petroleum and Mineral Resources, the Minister of Finance, the Minister of Economy and Planning, the Minister of Water and Electricity, the Governor of the Saudi Arabian Monetary Agency and the Secretary-General of the Supreme Economic Council.¹²³ One of the most influential duties of the Supreme Council was to create

¹²¹ Supreme Economic Council Regulation, art. 5. See <http://www.sec.gov.sa/Council-Regulations.aspx?Page=4>.

¹²² See Supreme Economic Council. available at <http://www.sec.gov.sa/Council-Member.aspx> (last visited March 5, 2014).

¹²³ See *Id.*

the negative list.¹²⁴ The negative list is a list of sectors in Saudi Arabia in which foreign investors are prohibited from participating.¹²⁵

On January 29, 2015, King Salman issued a decree¹²⁶ establishing the Economic and Development Council, which replaced the Saudi Economic Council.¹²⁷ The King appointed prince Muhammad bin Salman as chairman, along with the following members: the Minister of Justice, the Minister of Labor, the Minister of Petroleum and Mineral Resources, the Minister of Finance, the Minister of Economy and Planning, the Minister of Water and Electricity, the Minister of Housing, the Minister of Pilgrims, the Minister of Commerce and Industry, the Minister of Transportation, the Minister of Communications and Technical Information, the Minister of Social Affairs, the Minister of Municipal and Rural Affairs, the Minister of Health, the Minister of Agriculture, the Minister of Education, the Minister of Civil Service and a number of Ministers of State.¹²⁸

B. The Saudi Arabian General Investment Authority (SAGIA)

SAGIA is a governmental entity, established in 2000, that is responsible for foreign investment; it reports to the president of the Economic Supreme Council.¹²⁹ SAGIA has the following functions:

1. Preparing state policies designed to promote and enhance local and foreign investment, and submitting them to [the] council.
2. Proposing implementation plans and criteria to improve the investment climate in the kingdom and submitting them to the council[.]

¹²⁴ See Supreme Economic Council. available at <http://www.sec.gov.sa/getdoc/be8e7887-27b1-4bb7-9879-bd75f8ad9acf/list-of-types.aspx> (last visited March 5, 2014).

¹²⁵ Saudi Arabian General Investment Authority's website, available at https://www.sagia.gov.sa/Documents/Download%20center/Business_not_permitted.pdf (last visited November 23, 2015).

¹²⁶ Royal Decree No. (69/A. 9/4/1436H (2015).

¹²⁷ The Saudi Press Agency, available at <http://www.was.sa/report-viewer.php?id=1322231¬report=1> (last visited February 1, 2015).

¹²⁸ *Id.*

¹²⁹ See <https://www.sagia.gov.sa/en/SAGIA/What-We-Do/> (last visited March 10, 2014).

3. Monitoring and evaluating the performance of local and foreign investment, and drafting a periodical report in this regard whose contents [sic] [are] to be specified in the rules[.]
4. Conducting studies on investment opportunities in the kingdom and promoting these opportunities[.]
5. Coordinating and cooperating with the pertinent governmental bodies to enable the Authority to accomplish its mission[.]
6. Organizing and participating in conferences, symposia, local and international exhibitions and workshops relevant to investment.
7. Developing [a] database and carrying out statistical surveys required for the conduct of its functions.
8. Any task officially assigned to the authority.¹³⁰

C. The Ministry of Commerce and Industry (MOCI)

The Ministry of Commerce and Industry is one of the two most important governmental executive offices besides the Capital Market Authority. The MOCI is essential in the sense that every company that seeks to invest in Saudi Arabia must register with it.¹³¹ The MOCI has many duties and responsibilities, including suggesting drafts to the Ministers Council.¹³² According to the MOCI's website, it serves as the center of trade authority in Saudi Arabia:

- 1) To participate in setting and carrying out the commercial policies in a way [that] achieves the [sic] efficiency and effectiveness for the sector and leads to diversify [sic] the productivity base and boost up [sic] the constructive competition among its institutions; and [also to] reinforce the role of the private sector in terms of the national economy.
- 2) To suggest issuing the commercial systems and regulations, [and] review the systems and regulations applied. To supervise applying all the commercial systems whether they were issued before establishing [sic] the Ministry of Commerce or after that[,] such as [the] Commercial System, Companies System, Commercial Record System, Commercial Agencies System, Commercial Chambers System, Benchmark System, Hotels System, Commercial Papers System, Commercial Fraud Combat System, Cover-up Combat

¹³⁰ *Id.*

¹³¹ See MOCI, available at <http://www.mci.gov.sa/en/AboutMinistry/Pages/Tasks-of-the-Ministry.aspx> (last visited March 11, 2014).

¹³² See MOCI, available at <http://www.mci.gov.sa/en/AboutMinistry/Pages/Tasks-of-the-Ministry.aspx> (last visited March 11, 2014).

System, Calibration and Metrology System, Precious Metals and Gems, Legal Accountants System, Trading Books System, Arbitration System, Professional Companies System, Israel Boycott System, Relation between the Foreign Contractor and their Saudi Agent, [and] Settlement Protecting against Bankruptcy System, among others of [sic] systems, regulations, and instructions determining the commerce and provision work, and the relations associated with the businessmen's community.

3) To regulate the means of internal commerce development, supervise the internal markets and protect them against exploitation, monopoly, [and] price control. To review ways of commercial work practice and develop methods and procedures in line with the public interest.

4) To issue licenses necessary for setting up the commercial industrial chambers and their branches; and to follow up the activities of all the chambers and their budget[s] and supervise the elections of their boards. To approve of its [sic] organizing for the exhibits and markets and its participation in the conferences related to its activity. To organize and receive the commercial and industrial delegates and set up the training centers, and all that can contribute to advancing and developing the commerce and industry in line with the provisions of the commercial, industrial chambers system.

5) To develop the external commercial relations with all the brotherly and friendly states and advance them in a way [that] copes with the fast-moving changes and developments at [sic] the economical, international arena, and protect the Kingdom's interests in all the regional and international forums.[...]15) To study the requests of establishing companies and branches for them, [to help with] auditing their contracts, and completing the procedures of establishing and amending; and to encourage the establishment of more joint-stock companies which have economic components, also the national companies and hi-tech-oriented companies, along with encouraging the merging of companies and the individual bodies into large units. This is in order to provide the capital intensive [sic] and complete the establishing, specializing, registering procedures, monitor their work, scrutinize the budgets of the joint stock companies, [and] partnership limited by shares, and limited liability companies, supervise the work of company liquidation, and carry out the provisions of Companies System.

16) To study the requests of company registration and individual bodies, and their branches in all the economic activity sections and issue registration, amendment, renewal, and deletion certificates, and have them monitored; and to detect irregularities and carry out the provisions of the Commercial Record System.

17) To study requests of the foreign companies, and launch scientific and technical offices for them in the Kingdom, as well as the requests sent to the Ministry of Commerce and Industry (MCI) with regard to launching representative offices and completing statutory procedures for that.

18) To study the contracts and documents of the executive and consulting companies, and those contracted with the governmental bodies, [and to] issue the necessary licenses to

have offices registered for them in the Kingdom, renew licenses and finish them, study the contracts of the commercial agents, and have them registered.

19) To study requests and contracts of the commercial agencies and complete the registration procedures for all kinds of agencies, and all the amendments they undergo; and to issue the necessary registration certificates, monitor the work of commercial agencies, detect irregularities, and [to] adjudicate the public interest litigation, and carry out the provisions of the system.

20) To study requests of trademark registration and have them examined thoroughly; and to have them classified, registered, [and] protected, and [to] follow up the latest about trademarks in terms of moving, commissioning, or changing, and [to] monitor the usage of trademarks; and to combat their counterfeit [sic] and detect irregularities according to the system.

21) To study requests of the professional company establishment [sic] and have their contracts examined and registered; and to follow up what undergoes [sic] their data in terms of amendments, and to supervise the work of their classification and carry out the professional companies provisions.

22) To study license requests of launching liberal professions offices with [sic] all their kinds such as engineering[,] accounting, legal consultations, and others; and have them registered; and to follow up all [of] what they undergo in terms of amendment, renewal, or deletion, [to] develop these professions, and carry out the provisions of the rules and the decisions and instructions issued about them.

23) To issue the necessary licenses for public service offices and have them registered.

24) To study investment projects in terms of the hotel projects and their economic feasibility, and issue the decisions of establishing and registering hotels and lounges after having them established and equipped; and to issue the decisions of classifying and pricing for hotels and have them monitored with the aim of upgrading their services and providing them with safety terms, and [to] make sure of their implementing for the provisions of the Hotels system.

25) To apply the decimal system for weights and measures, [to] examine, and monitor the weight and measurement devices with gas station pumps included.

26) To study the license requests of gold shops and forges and have them registered; and to monitor the gold artifacts hallmark[s] and have them examined and analyzed; and to issue licenses for those working at the precious stones forges and gems.

27) To combat the commercial fraud with all its forms and detect irregularities by detection bodies all over the Kingdom's cities and have them verified; and to issue the adjudication decisions of all fraud cases through the committees set up for that, in cooperation with concerned bodies.

28) To participate in combating cover-up and detect its cases, and investigate them; and to issue the adjudication decisions of cover-up cases through the committees set up for that.

29) To study the commercial papers cases: check, promissory note, and work on solving them peacefully through Protest Offices; and to issue the adjudication decisions with regard to the cases that are hard to be solved [sic], and the cassation [sic] decisions through the adjudication committees and offices regarding the commercial papers cases.[...].¹³³

1. The Council of Competition

The Council of Competition¹³⁴ is chaired by the Minister of Commerce and Industry.¹³⁵ It is given the power by law¹³⁶ to review and make decisions about whether to approve certain mergers and acquisitions based on their likely impact on competition in Saudi Arabia;¹³⁷ this will be addressed in greater detail in Chapter 4. This Council also reviews complaints and criminal charges related to the possible violation of the Competition Law.¹³⁸ Article 8 states that the Council has the following powers:

- a) [Grant] Approval of merger[s], acquisition[s], [and the] joining [of] two managements or more into one joint management resulting in a dominant position in the market.
- b) [Issue] Order[s] to take actions of inquiry and collecting evidence pertaining to complaints and practices in violation of provisions of this Law, as well as order[s] for investigation and prosecution therein.
- c) [Grant] Approval to commence criminal case procedures against violators of provisions of the Law.
- d) Suggesting relevant draft Laws that affecting [sic] competition in the light [sic] of variables developed to the market, and proposing necessary amendments to provisions of this Law.
- e) Issuing the Implementing Regulation of this Law.

¹³³ See MOCI, available at <http://www.mci.gov.sa/en/AboutMinistry/Pages/Tasks-of-the-Ministry.aspx>. (last visited March 11, 2014).

¹³⁴ *Id.*

¹³⁵ The Competition Law, art. 8. *See* <http://www.mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/CompetitionSystem/Pages/default.aspx>. (last visited March 12, 2014).

¹³⁶ Competition Law, art. 8.

¹³⁷ *Id.*

¹³⁸ *Id.* at art. 9.

f) Preparing annual report[s] of the Council's activities and future plans.¹³⁹

2. The Saudi Organization for Certified Public Accountants (SOCPA)

a. Introduction

In 1992, Saudi Arabia issued the Saudi Certified Public Accountants Law¹⁴⁰ and established the Saudi Organization for Certified Public Accountants (SOCPA) with headquarters in Riyadh.¹⁴¹ The SOCPA administratively reports to the Ministry of Commerce and Industry, which means that the Ministry supervises the SOCPA.¹⁴² The Saudi Organization for Certified Public Accountants operates through 8 committees: Accounting Standards, Auditing Standards, Professional Ethics, Examinations, Quality Review, Training, Public Relations and Consulting Services; all of these committees report to the board of organization.¹⁴³ The Saudi Certified Public Accountants Law states that the board of the Saudi Organization for Certified Public Accountants is to be chaired by the minister of Commerce and Industry and must consist of 15 members as per the following stipulations:

- The Minister of Commerce or his delegate - Chairman
- The Deputy Minister of Commerce - Member
- The Deputy Minister of Finance and National Economy for Financial Affairs and Accounts or any official of grade 14 and above appointed by the Minister of Finance and National Economy. - Member
- The Vice President of the General Controller's Bureau or any official of grade 14 and above appointed by the President of the General Controller's Bureau. - Member

¹³⁹ *Id.*

¹⁴⁰ Council of Ministers Decree No. 40 dated 12/05/1412 AH (corresponding to 11/19/1992), available at <http://mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/LegalAccountantsSystem/Pages/21-4.aspx> (last visited December 22, 2015).

¹⁴¹ See the website of the Saudi Organization for Certified Public Accountants, available at <http://www.socpa.org.sa/Homepage/About-us> (last visited December 22, 2015).

¹⁴² The Saudi Certified Public Accountants Law, art. 19.

¹⁴³ See the website for the Saudi Organization for Certified Public Accountants, available at <http://www.socpa.org.sa/Homepage/About-us?lang=en-US> (last visited December 22, 2015).

- Two Saudi members of the teaching staff of the accounting department of one or more of the universities of the Kingdom , to be appointed by the Minister of Commerce upon the nomination of the Minister of Higher Education.
- A representative for the Council of Chambers of Commerce and Industry , to be appointed by the Minister of Commerce upon nomination by the said Council. - Member
- Six members from among Saudi practitioner Certified Public Accountants to be elected by the Organization's general meeting for a term of three years , renewable for one more term. By way of exception , these members shall be appointed in [sic] the first Board of Directors for five years by a reso[l]u[tion to this effect from the Minister of Commerce.¹⁴⁴

b. The duty of the Saudi Organization for Certified Public Accountants

The Saudi Certified Public Accountants Law designates that in addition to approving the accounting and auditing standards, the SOCPA shall have several other duties:

- Review, develop and approve accounting and auditing standards.
- Establish the necessary rules for [the] fellowship certificate examination[,] provided that such rules cover the professional , practical , [and] theoretical aspects of the audit profession[,] including all Regulations pertaining to the profession.
- Organize courses of continuous education.
- Conduct special research work and studies covering accounting, auditing and other allied subjects.
- Publish periodicals, books and bulletins covering accounting and auditing subjects.
- Establish an appropriate quality review program in order to ensure that Certified Public Accountants comply with accounting and auditing standards and the provisions of these Regulations and its by - laws.
- Participate in local and international committees and symposiums [sic] relating to the profession[s] of accounting and auditing.¹⁴⁵

¹⁴⁴ The Saudi Certified Public Accountants Law, art. 24.

¹⁴⁵ *Id.* at art. 19.

c. Accounting standards in Saudi Arabia

The SOCPA at one time applied its own accounting standards, which were guided by British, American and international standards.¹⁴⁶ However, in 2013, the SOCPA board announced that it would apply, and require companies in Saudi Arabia to apply, two specific international standards: the International Financial Reporting Standards (IFRSs) and the International Auditing and Assurance Board Standards (IAASB).¹⁴⁷ The requirement to apply these standards begins in 1/1/2017 for listed companies and in 1/1/2018 for medium- and smaller-sized entities.¹⁴⁸

According to the most recently updated list provided by SOCPA, 150 certified accounting firms and offices are registered in Saudi Arabia as of January 7, 2016.¹⁴⁹ The “big four” accounting firms in Saudi Arabia that provide services such as audit, tax and advising are KPMG,¹⁵⁰ PwC,¹⁵¹ Deloitte¹⁵² and EY.¹⁵³

d. The Investigation Committee of Violations of the Certified Public Accountants Law

The Committee of Investigation of the Violation of the Certified Public Accountants Law, led by Deputy Minister of Commerce, a Saudi legal consultant and a member of the

¹⁴⁶ SOCPA, *Project for Transition to International Accounting & Auditing Standards*, which was authorized during SOCPA board meeting no. 10 in the 6th session, 26/03/1433, corresponding to 18/02/2012, 15, available at http://www.socpa.org.sa/News-Attachments/international_standard (last visited December 24, 2015).

¹⁴⁷ SOCPA’s announcement on its website, available at <http://www.socpa.org.sa/Socpa/Home/Projects/aa.aspx?lang=en-us>. See also the *SOCPA Project for Transition to International Accounting & Auditing Standards* (last visited December 24, 2015).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ KPMG’s website in Saudi Arabia, available at <http://www.kpmg.com/sa/en/about/pages/kpmginsaudi Arabia.aspx> (last visited February 22, 2016).

¹⁵¹ PwC’s website in Saudi Arabia, available at <http://www.pwc.com/gx/en/about/office-locations/saudi-arabia.html> (last visited February 22, 2016).

¹⁵² Deloitte’s website in Saudi Arabia, available at <http://www2.deloitte.com/sa/en/legal/about-deloitte-saudi-arabia.html> (last visited February 22, 2016).

¹⁵³ Ernst & Young’s website in Saudi Arabia, available at <http://www.ey.com/EM/en/about-us/Saudi-Arabia> (last visited February 22, 2016).

SOCPA's board, was established according to the Certified Public Accountants Law.¹⁵⁴ It was given the authority to investigate and suspend licenses and to impose penalties for any violation of the Certified Public Accountants Law.¹⁵⁵ Any suits filed against or by a certified accountant relating to the violation of the Certified Public Accountants Law are to be heard before the Board of Grievances.¹⁵⁶

D. The Saudi Arabian Monetary Agency (SAMA)

SAMA, created in 1952, is known by the international community as the central bank of the country.¹⁵⁷ It plays a crucial role in protecting Saudi's local currency. It has been assigned the following duties and responsibilities by several laws and royal decrees and orders:¹⁵⁸

- To deal with the banking affairs of the Government;
- Minting and printing the national currency (the Saudi Riyal), [and] strengthening the Saudi currency and stabilizing its external and internal value, in addition to strengthening the currency's cover;
- Managing the Kingdom's foreign exchange reserves;
- Managing the monetary policy for maintaining the stability of prices and exchange rate[s];
- Promoting the growth of the financial system and ensuring its soundness;
- Supervising commercial banks and exchange dealers;
- Supervising cooperative insurance companies and the self-employment professions relating to the insurance activity;
- Supervising finance companies;
- Supervising credit information companies.¹⁵⁹

¹⁵⁴ The Saudi Certified Public Accountants Law, art. 29.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at art. 32.

¹⁵⁷ SAMA's website, *see* at <http://www.sama.gov.sa/sites/samaen/AboutSAMA/Pages/SAMAFuction.aspx> (last visited February 22, 2016).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Saudi Arabia does not have an exchange control.¹⁶⁰

E. The Department of Zakat and Income Tax (DZIT)

The Department of Zakat and Income Tax was established in 1970. It operates according to its own law to implement regulations that govern taxes in Saudi Arabia.¹⁶¹ This Department is responsible for collecting taxes from investors;¹⁶² it is overseen by the Ministry of Finance and is discussed in considerable detail in Chapter 7 of this dissertation.¹⁶³ Tax issues are also discussed in Chapter 7.

F. The Saudi Capital Market Authority

As a result of the Council of Ministers enacting the Capital Market Law, the Capital Market Authority was created¹⁶⁴ to supervise and regulate parties that are covered by the Capital Market Authority's Law or by any of its Implementing Regulations.¹⁶⁵ The Capital Market Authority is administered by the Council of Ministers.¹⁶⁶ It has the authority to enact regulations that will improve Saudi's capital market and has the authority to create any legal rules that will enhance the successful and professional application of the Capital Market Law (CML).¹⁶⁷ The Capital Market Authority is responsible for implementing the M&A Regulation (takeover code), which will be discussed in Chapter 6.

The Capital Market Authority's duties include the following:

- Regulate and develop the capital market, and seek to develop and improve the practices of entities trading in securities.

¹⁶⁰ See KPMG, available at <https://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/thinking-beyond-borders/Documents/saudi-arabia-2013.pdf> (last visited February 29, 2016).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ DZIT's website, see at <https://dzit.gov.sa/en/brief-about-dzit> (last visited March 29, 2014).

¹⁶⁴ Royal Decree No. (M/30) in 1424H, corresponding to 2003.

¹⁶⁵ The Capital Market Authority Report 2012, 16, available at <http://www.cma.org.sa/En/Publicationsreports/Pages/AnnualReport.aspx> (last visited March 16, 2014).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

- Protect investors in securities from unfair and unsound practices, or acts involving fraud, deception, cheating, manipulation or insider trading.
- Develop control mechanisms that mitigate the risks associated with securities transactions.
- Regulate and monitor the issuance of and trading in securities.
- Regulate and monitor business activities of parties subject to the CMA's supervision.
- Regulate and monitor the full disclosure of information pertaining to securities and their issuers, the
- dealings of informed persons and investors, and specify and provide the information that should be disclosed by participants in the market to shareholders and the public.¹⁶⁸

1. Parties that fall under the Capital Market Authority's regulations

The parties that fall under the Capital Market Authority's rules include the Saudi Stock Exchange Co. (*Tadawul*), certain authorized persons, listed companies, capital market dealers/participants, Special Purpose Entities (SPEs) and credit rating agencies.¹⁶⁹

2. The Saudi Stock Exchange (*Tadawul*)

The following excerpt is a summary of how the Saudi Stock Exchange began, how many companies existed at its inception, and how the exchange has developed since its establishment:

Saudi joint stock companies had their beginnings in the mid 1930's, when the "Arab Automobile" company was established as the first joint stock company. By 1975 there were about 14 public companies. The rapid economic expansion, besides the Saudisation of part of the foreign banks['] capital in the 1970's[,] led to the establishment of a number of large corporations and joint stock banks. The market remained informal, until the early 1980's when the government embarked on forming a regulated market for trading together with the required systems. In 1984, a Ministerial Committee composed of the Ministry of Finance and National Economy, Ministry of Commerce and Saudi Arabian Monetary Agency (SAMA) was formed to regulate and develop the market. SAMA was the government body charged with regulating and monitoring market activities until the Capital Market Authority (CMA) was established in July 2003 under the Capital Market Law (CML) by Royal Decree No. (M/30). The CMA is the sole

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 23.

regulator and supervisor of the capital market[;], it issues the required rules and regulations to protect investors and ensure fairness and efficiency in the market.¹⁷⁰

This excerpt suggests that there was a rapid increase in the number of companies listed with Saudi's exchange, and it suggests that many more have been listed since 1975. It indicates how Saudi Arabia is growing and what Saudi Arabia aims to achieve with its stock market.

3. The Committee for the Resolution of Securities Disputes (CRSD)

This committee is one of the semi courts mentioned earlier in this chapter, and it is among the most important committees within the business field in Saudi Arabia. According to the Capital Market Law, the Capital Market Authority (CMA) must establish a committee that reviews and addresses any disputes related to the Capital Market Authority's Law or to any of its regulations, as stated in Article 25(a):

The Authority shall establish a committee known as the "Committee for the Resolution of Securities Disputes" [CRSD], which shall have jurisdiction over the disputes falling under the provisions of this Law, its Implementing Regulations, and the regulations, rules and instructions issued by the Authority and the Exchange, with respect to the public and private actions. The Committee shall have all necessary powers to investigate and settle complaints and suits, including the power to issue subpoenas, issue decisions, impose sanctions and order the production of evidence and documents.¹⁷¹

Therefore, the CMA established the CRSD in 2004 and issued certain rules and regulations, as authorized by the law, that dictate how to file a complaint. The claimant must file the complaint with the CMA first and then wait until a prescribed 90-day waiting period passes, or until the CMA notifies the claimant that his claim has been accepted.¹⁷² If the 90-day waiting period

¹⁷⁰ Saudi Stock Exchange, available at http://www.tadawul.com.sa/wps/portal/!ut/p/c0/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g_A-ewIE8TIwMLj2AXA0_vQGNzY18Q10A_ODVPvyDbUREAVie-Cw!!/. (last visited December 25, 2015).

¹⁷¹ Capital Market Law, art. 25 (a).

¹⁷² Committee for the Resolution of Securities Disputes, available at <http://www.crsd.org.sa/En/Dispute/Pages/AboutMOC.aspx> (last visited November 8, 2015). *See also* the Capital Market Law, art. 25(e).

passes without the claimant hearing word from the CMA, then the claimant has the right to submit his claim to the CRSD.¹⁷³

4. The subject matter of the CRSD

As summarized and defined by law, the subject matter of the CRSD, and its jurisdiction, pertain to any disputes that are linked to, or covered by, the Capital Market Law.¹⁷⁴ In addition, any regulations that the CMA has enacted or will enact fall under the CRSD's jurisdiction.¹⁷⁵ This means that means any violation of the M&A Regulation (takeover code) falls under the CRSD committee's purview. The law also stipulates more precisely that the CRSD shall:

1. Review claims against decisions taken and procedures adopted by [the] CMA or the Exchange Market, [in] what is known as [an] Administrative Suit.
2. Review complaints arising between investors relating to the Capital Market Law and its Implementing Regulations as well as [the] CMA and the Exchange Market regulations, rules and instructions in terms of public and private actions, [in] what is known as [a] Civil Suit
3. Consider suits brought by [the] CMA – as a general prosecutor – against violators of the Capital Market Law and its Implementing Regulations, [in] what is known as [a] Penal Suit.¹⁷⁶

The CRSD provides on its website the full text, in both Arabic and English, of its written decisions. Even though it does not provide every decision, many are published, which is a progressive step compared to other Saudi committees and even to some of Saudi's courts.

¹⁷³ Capital Market Law, art. 25(e).

¹⁷⁴ Capital Market Law, art. 25 (a).

¹⁷⁵ *Id.* at (a).

¹⁷⁶ Committee for the Resolution of Securities Disputes, available at <http://www.crsd.org.sa/En/Dispute/Pages/authority.aspx> (last visited 15 March, 2016).

5. The Appeal Committee for the Resolution of Securities Conflicts (ACRSC)

To ensure the precision, justice and accuracy of the CRSD's judgments, the possibility of appealing a decision handed down by the CRSD is necessary. The Capital Market Law authorizes the CMA to establish an appeal of the CRSD, as stated in the Capital Market Law:

f. The Committee's decision may be appealed before the Appeal Panel within thirty days from their [sic] notification date.

g. An Appeal Panel is to be formed by a Council of Ministers' decision, and it shall have three members representing the Ministry of Finance, the Ministry of Commerce and Industry and the Bureau of Experts at the Council of Ministers. The members of the Appeal Panel shall be appointed for a three-year term renewable. The Appeal Panel shall have the discretion to refuse to review the decisions of the Committee for the Resolution of Securities Disputes, to affirm such decisions, [or] to undertake a [*de novo*] review of the complaint or suit based on the record developed at the hearing before the Committee[,] and to issue such decision as it deems appropriate in relation to the complaint or the suit. The decisions of the Appeal Panel shall be final.¹⁷⁷

Thus, the Appeal Committee for the Resolution of Securities Conflicts was established and began working in 2005; it provides the right to file an appeal before the ACRSC of a CRSD decision.¹⁷⁸ Any such appeal must be requested within 30 days starting from the day that the decision was delivered to the appealing party.¹⁷⁹

6. The authority and jurisdiction of the ACRSC

The Capital Market Law states the functions of the ACRSC as follows:

discretion to refuse to review the decisions of the Committee for the Resolution of Securities Disputes, to affirm such decisions, to undertake a [*de novo*] review of the complaint or suit based on the record developed at the hearing before the Committee and to issue such decision as it deems appropriate in relation to the complaint or the suit.¹⁸⁰

¹⁷⁷ Capital Market Law, Articles 25(f) and (g).

¹⁷⁸ Appeal Committee for the Resolution of Securities Conflicts, available at <http://www.crsd.org.sa/En/Conflict/Pages/ACRSC.aspx> (last visited November 8, 2015).

¹⁷⁹ *Id.*

¹⁸⁰ Capital Market Law, art. 25(f).

7. The oversight of M&A transactions¹⁸¹

The Ministry of Commerce and Industry oversees any M&A transaction between unlisted (closely held) joint-stock companies.¹⁸² Such closely held corporations are governed by the Saudi Companies Law 2015 (which is discussed in Chapter 5). The Capital Market Authority oversees any M&A transaction that occurs between two listed companies, or between two companies in a situation when at least one party is a listed company,¹⁸³ under the Saudi M&A Regulation; this is often known in other countries as the takeover code, which the author discusses in Chapter 6. The Ministry of Commerce and Industry oversees any M&A transactions between unlisted or private companies.¹⁸⁴ However, depending on the sector of the transaction, and also on the nationality of the parties if at least one party is foreign, other governmental agencies may be involved and other governmental approvals may be required.¹⁸⁵ In such cases, the Saudi Arabian General Investment Authority will be involved.¹⁸⁶

§2.9. Foreign Investment in Saudi Securities

A. Introduction

Permissions for foreign investment in the Saudi Capital Market intersect with Saudi M&A activity. This section presents the rules that govern foreign investment in the Saudi stock exchange and explains how these rules affect M&A. The section also addresses the policy that

¹⁸¹ This is a summary only. This paper will discuss these issues in the more depth with examples and further explication of the relevant laws in dedicated sections later in this dissertation.

¹⁸² Certain Articles regulate merger transactions in the Saudi Companies Law 1965, art. 210-215, and in the Saudi Companies Law 2015, art. 190-193). Articles that address mergers and acquisition transactions closely held corporations are addressed in Chapter 5.

¹⁸³ M&A Regulation, art. 2.

¹⁸⁴ Certain Articles regulate merger transactions in the Saudi Companies Law 1965, art. 210-215) and in the Saudi Companies Law 2015, art. 190-193). Articles that address mergers and acquisition transactions are addressed in Chapter 6.

¹⁸⁵ For example, the acquisition of Vella by Albahri, which required the approval of the Supreme Council of Petroleum and Mineral Affairs. *See* ALBAHRI, available at <http://www.bahri.sa/article-details.php?id=330&from=30&cat=11> (last visited October 14, 2015).

¹⁸⁶ *See* information about SAGIA's mission on its website, available at <http://www.sagia.gov.sa/en/SAGIA/What-We-Do/> (last visited December 20, 2015).

lies behind the granting of permission for foreign investment in the Saudi stock market. Understanding Saudi policy in this regard will help to explain the Saudi Capital Market Authority's goals for developing a certain volume of M&A activity. Finally, this section analyzes the existence of certain legislative contradictions among the various regulations, and should therefore be a helpful foundation for the reader's understanding of Saudi's public takeover rules (according to Saudi's M&A Regulation), all of which this paper discusses in more detail in Chapter 6.

B. Permissions for foreign investors investing in the Saudi stock market

Saudi Arabia opened its stock market to foreign investors in June 15, 2015¹⁸⁷ and issued rules known as the "Rules for Qualified Foreign Financial Institutions Investment in Listed Shares" (the Rules).¹⁸⁸ These Rules limit the activity of foreign¹⁸⁹ financial institutions and investors; for example, they specify the minimum amount of assets each financial institution must have under management in order to invest in Saudi's market, and they also limit the ownership stake in a company that a foreign investor may acquire.

C. Limitations and requirements for foreign investment in the Saudi market

1. Minimum assets under management required to be eligible

The Rules state that for a financial institution to be eligible to invest and trade in the Saudi stock market, it must have a minimum of assets under management (AUM) of SAR

¹⁸⁷ Ahmed Al Omran and Nikhil Lohade, *Saudi Arabia to Open Stock Market to Foreign Investors on June 15*, THE WALL STREET JOURNAL, April 16, 2015, available at <http://www.wsj.com/articles/saudi-arabia-to-open-stock-market-to-foreign-investors-on-june-15-1429191506> (last visited December 20, 2015).

¹⁸⁸ The Rules were issued by the Board of the Capital Market Authority on 15/7/1436H, which corresponds with 4/5/2015G, according to its Resolution No. 1-42-2015. See more information on this website: <http://www.cma.org.sa/En/Documents/Rules%20for%20Qualified%20Foreign%20Financial%20Institutions%20Investment%20In%20Listed%20Shares.pdf>

¹⁸⁹ Gulf States citizens and corporations are not considered foreigners and are treated as Saudi corporations according to Qualified Foreign Financial Institutions Investment in Listed Shares Rules, Article 2, and also according to the regulation of the Supreme Council of the Cooperation Council for the Arab States of the Gulf, as specified in Article 2 of the Rules.

18,750,000,000 (equivalent to approximately USD 5 billion).¹⁹⁰ The Rules also state that the Capital Market may at its discretion reduce this requirement to SAR 11,250,000,000 (equivalent to approximately USD 3 billion).¹⁹¹ The assets under management could be owned by the applying institution or by other persons, but the assets must be shown to be under the management of the applying institution.¹⁹² Moreover, the Rules require that the applying institution must have at least 5 years of experience engaging in the securities business.¹⁹³

2. Ownership limitation

The Rules place limits on the stake that qualified foreign investors may acquire as per the following:

- 1) Each QFI,¹⁹⁴ together with its affiliates, or each approved QFI client together with its affiliates, may own a maximum of 5% of the shares of any issuer whose shares are listed.
- 2) Where a QFI invests on behalf of an approved QFI client, it must not execute a transaction which would result in the relevant client, together with its affiliates, owning more than 5% of the shares of any issuer whose shares are listed.
- 3) The maximum proportion of the shares of any issuer whose shares are listed that may be owned by all foreign investors (in all categories, whether residents or non-residents) in aggregate is 49%, including interests under swaps.
- 4) The maximum proportion of the shares of any issuer whose shares are listed that may be owned by QFIs and approved QFI clients is 20%.
- 5) The maximum proportion of the shares of all issuers whose shares are listed that may be owned by QFIs and approved QFI clients in aggregate is 10% by market value, including any interests under swaps.¹⁹⁵

These limitations as outlined in the Rules restrict the investments of foreign investors.

While Saudi Arabia has opened its stock market for foreign investors, the Kingdom still places limitations on foreign investors' stakes in the market generally, as well as in any given individual

¹⁹⁰ Qualified Foreign Financial Institutions Investment in Listed Shares Rules, art. 6(b) 1.

¹⁹¹ *Id.*

¹⁹² *Id.* at 2.

¹⁹³ *Id.* at (c).

¹⁹⁴ "QFI" stands for Qualified Foreign Investors.

¹⁹⁵ Qualified Foreign Financial Institutions Investment in Listed Shares Rules, art. 21, 1-5.

company. For example, the Rules set a limit that no foreign investor may have a stake that exceeds 49% of a listed company; this prevents foreign investors from becoming the controlling shareholders of a company listed on the Saudi market. Moreover, foreign investors and their qualified clients jointly may not own more than 10% of the market value of the shares of any listed companies. The Rules place an ownership ceiling on listed shares of a company of no more than 5% for any given foreign investor; this means that each qualified foreign investor and his or her qualified clients may own no more than 20% of a listed company.¹⁹⁶ This 20% limit prevents a foreign investor and his or her clients from having the opportunity to control a company.

3. The question of whether a foreign parent company may establish a subsidiary company in Saudi and acquire listed companies

One might ask whether a foreign company may establish or form a subsidiary in Saudi Arabia, and then, as a Saudi subsidiary company, acquire more than 49% of a listed company without triggering limitations placed on foreigners by the Capital Market Authority. The answer is that this mechanism would not work and would be prevented by the Saudi Capital Market Authority. The Foreign Investment Law 2000¹⁹⁷ defines a foreign investor as a natural person who does not hold a Saudi nationality, or as an entity that is not 100% owned by Saudi natural persons.¹⁹⁸ Even the certificate of the company labels the company as a foreign company, not as a Saudi company. This means that a subsidiary of a foreign parent formed in Saudi will not be considered a Saudi company that may acquire freely in the Saudi stock market; rather, such a subsidiary will fall under the Capital Market Authority's rules regarding foreign acquisition of Saudi stock.

¹⁹⁶ *Id.* at 1 and 4.

¹⁹⁷ Royal Decree No. (M/1) dated 5/1/1421H (Corresponding to 10/4/2000AD).

¹⁹⁸ Saudi Investment Law, art. 1.

D. The Qualified Foreign Institutions Investment in Listed Shares Rules and their affect on M&A

Even though the Rules state that they (the Qualified Foreign Financial Institutions Investment in Listed Shares Rules) shall be read in conjunction with other regulations, such as the M&A Regulation,^{199, 200} the author notes that the M&A Regulation does not apply to qualified foreign investors. The M&A Regulation only applies to offers that are controlling (which this paper asserts are approximately 30% of all offers),²⁰¹ and the Rules state that no foreign investor can own more than 5% of a listed company, and that qualified foreign investors and their qualified clients jointly can own no more than 20% of a listed company. Therefore, the M&A Regulation—which only applies in cases involving ownership percentages higher than 20%—cannot apply to qualified foreign investors. Put a different way, the mandatory offer required by the M&A Regulation will not apply or be triggered, nor will the permissible offer be triggered, unless an acquisition offer exceeds 50% of the target company; likewise, the permissible offer is triggered only if the offer or purchase request exceeds 30% of the target/acquired company.²⁰² Therefore, if the M&A Regulation does not apply to qualified foreign investors, then the Capital Market Authority will need special rules to regulate stock purchases made by foreign investors.

E. Policy

The restrictions placed on ownership of listed companies in the Saudi stock market suggest that the Kingdom is not aiming to invite outside cash and capital into Saudi. In fact, the Saudi Capital Market Authority states its objectives for opening its stock market to foreign

¹⁹⁹ Qualified Foreign Financial Institutions Investment in Listed Shares Rules, art. 1-2.

²⁰⁰ Qualified foreign investors and their clients fall under the listing rules for conditions such as reportable ownerships when they own 5% of a listed company. *See* Listing Rules, art. 45(a) 1.

²⁰¹ *See* Section 6.3 in Chapter 6.

²⁰² *Id.*

investors. The Capital Market Authority states five main objectives: enhancing institutional investments in the Saudi stock market, transferring sophisticated experience and knowledge to the investors in the Saudi market, raising the level of required disclosures transparency and professionalism of listed companies, enhancing the Saudi market to help Saudi become a leader in the world market, and improving the evaluations and studies conducted about the Saudi stock market to produce fair evaluations and studies to dealers and investors.²⁰³ In other words, the Capital Market Authority aims to invite only those sophisticated foreign investors who can successfully complete the evaluation process required by the Qualified Foreign Financial Institutions Investment in Listed Shares Rules. This goal is supported by Saudi's imposition of the minimum assets under management requirement of USD 5 billion,²⁰⁴ as well as by the requirement of five years of experience in securities activities.²⁰⁵ The goal of attracting only the most sophisticated foreign investors is further bolstered by the requirement that investors originate from countries that apply standards similar to those being applied by the Saudi Capital Market Authority.²⁰⁶

F. Legislative issue

The Qualified Foreign Financial Institutions Investment in Listed Shares Rules state that the Capital Market Authority has the right to exempt an applicant partially or totally from the Rules. Consider the following language:

The Authority may waive a provision of these Rules in whole or in part as it applies to an applicant, a QFI or any of their clients[,] or an authorized person[,] either on an

²⁰³ Objectives of Opening the Saudi Stock Market for Foreign Investment, a paper provided by the Capital Market Authority, 2, available at <http://www.cma.org.sa/En/Documents/QFIBrochure-EN-Web.pdf> (last visited December 20, 2015). See also The Capital Market Authority Chairman's statement about the goals of Saudi Arabia in opening its stock market to foreign investors, available at <http://www.cma.org.sa/En/MediaCenter/PR/Pages/Chairman-statement-on-QFI.aspx> (last visited December 20, 2015).

²⁰⁴ Qualified Foreign Financial Institutions Investment in Listed Shares Rules, art. 6(d).

²⁰⁵ *Id.* at 1.

²⁰⁶ *Id.* at (a) 2.

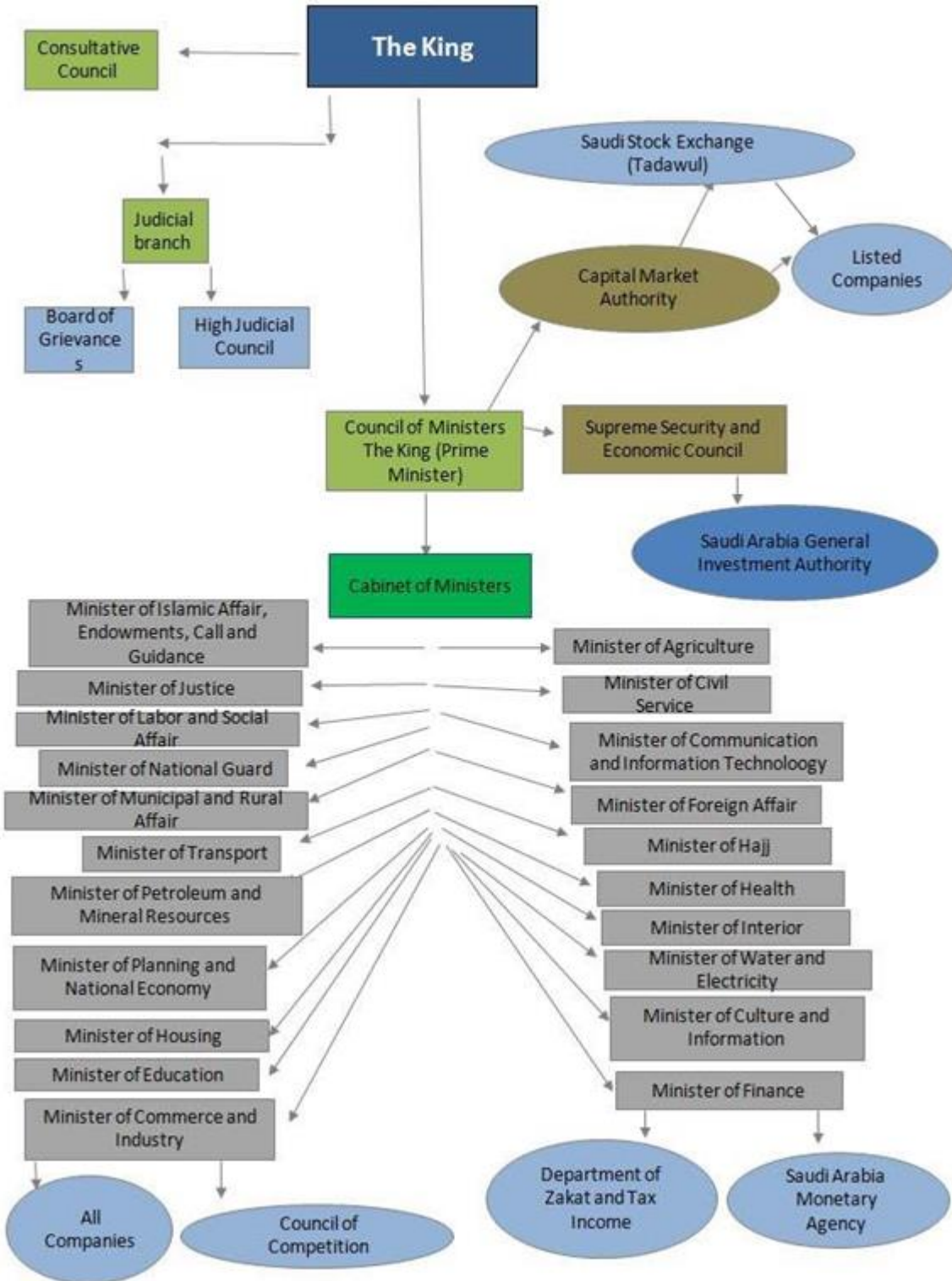
application from any of the aforementioned persons or on the Authority's own initiative.²⁰⁷

The Article gives the Capital Market Authority unlimited discretion to waive and exempt any applicant the Authority designates from having to comply with the Rules. The Article does not state what exceptions the Authority may make or in which areas the Authority might be flexible. By definition, laws and rules are meant to be general and abstract, and to not discriminate amongst parties or give an advantage to one party over another. The Article just noted, which gives the CMA discretion to pick and choose whether to enforce the Rules, raises the potential for inequality, vagueness and lack of objectivity among investors and applicants. Therefore, the Article should either be eliminated or amended to provide more specific details about why and when exceptions and exemptions may be needed, about which areas and issues may be exempted, and about the process for obtaining an exemption or exception.

²⁰⁷ *Id.* at art. 3.

Figure 2.4

The structure of the entire governmental system of Saudi Arabia



Chapter 3: Business Activities and M&A Transactions in Saudi Arabia²⁰⁸

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²⁰⁸ Relevant articles and rules cited in this chapter are provided in Appendix 3.

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§3.1. Scope

This chapter introduces the activities of Saudi Arabia's business organizations and highlights the volume of mergers and acquisitions (M&A) transactions in Saudi that require advanced regulation. The chapter addresses the role that M&A plays in the Saudi economy and evaluates the importance of this activity to the overall economy.

Section 3.2 of this chapter illustrates Saudi Arabia's business organizations, and Section 3.3 presents the value of Saudi's exports. Section 3.4 discusses how Saudi Arabia's debt has been decreasing every year since 1999. Section 3.5 introduces Saudi's business activities. Section 3.6 details the increase in the number of listed companies critical to M&A activity in Saudi, and Section 3.7 addresses the strength and liquidity of the Saudi stock market. Section 3.8 addresses the role of family businesses in Saudi Arabia; Section 3.9 addresses the role, number and economic size of closely held corporations in Saudi that impact M&A activities in the Kingdom. The volume and impact of foreign investment and cash flowing into and out of Saudi Arabia are addressed in Section 3.10. Section 3.11 describes the business councils in Saudi Arabia that facilitate business among foreign and Saudi investors, while Section 3.12 discusses business sectors that are growing within Saudi Arabia. Finally, Section 3.13 lists the number of M&A transactions that have occurred in Saudi in recent years.

§3.2. Business organizations

A. Introduction

Business organizations in Saudi Arabia were once governed by the Companies Law of 1965 (the Saudi Companies Law 1965),²⁰⁹ which comprises 232 articles and numerous

²⁰⁹ Royal Decree No. (M/6) Dated 22/3/1385H (corresponding to 22/7/1965AD). *See* <http://www.mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/CompaniesSystem/Pages/16-1.aspx>.

amendments that regulate many different kinds of organizations. As noted, the first Saudi Companies Law was enacted in 1965.²¹⁰ While some scholars²¹¹ have long considered the 1965 law to be outdated, it took more than 6 years for a draft of the second Saudi Companies Law (the Saudi Companies Law 2015) to be approved by the Ministers Council.²¹² The Saudi Companies Law 2015 was issued on November 9, 2015.^{213, 214}

B. General rules for companies

The Saudi Companies Law 1965 acknowledges a specific list of certain types of business organizations, along with those that are well known in Islamic Law.²¹⁵ Any other type of business organization was considered null and void, according to provisions in Articles 1 and 2 of the Saudi Companies Law 1965:

Article (1):

A company is defined as a contract under which two or more persons undertake to participate in an enterprise for profit, by contributing a share in the form of money or work, with a view to dividing any profits (realized) or losses (incurred) as a result of such enterprise.^{216, 217}

²¹⁰ Ministry of Commerce and Industry, available at <http://www.mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/CompaniesSystem/Pages/16-1.aspx> (last visited December 29, 2015).

²¹¹ See Alsubaie, Mohammed Bin Fahad Aljiday, *Corporate crimes committed during the phase of incorporation of companies in Saudi Arabia: A legal analysis*, 6, 7, 236, 237 (Doctor of Philosophy thesis, Faculty of Law, University of Wollongong, 2012), available at <http://ro.uow.edu.au/theses/3669/> (last visited January 2, 2016).

²¹² See Abulslam Albalwye, *Alshura* (the Consultative Council) approves the draft of the Saudi Companies Law, stressing taking into consideration the Islamic rules governing loans, in Arabic, *Alriyadh Newspaper*, Issue No. 15582, February 21, 2011, available at <http://www.alriyadh.com/606824>. (last visited December 29, 2015).

²¹³ The Ministry of Commerce and Industry's website, available at <https://mci.gov.sa/en/MediaCenter/News/Pages/09-11-15-01.aspx> (last visited December 29, 2015).

²¹⁴ Because the Saudi Companies Law 2015 has not been translated, this paper will translate the articles relevant to the topic in a way that reflects the exact meaning in Arabic. Also, since there are many articles that have not been changed from the Saudi Companies Law 1965, or were only slightly restructured without changing the substance of the law, the translation of the articles of the Saudi Companies Law 2015 might have similarities with the translation of the Saudi Companies Law 1965, or with the future translation of the Saudi Companies Law 2015. The translation of the language of the Saudi Companies Law 2015 addressed here reflects how the articles should read. The improper translation of some Articles or words in the Saudi Companies Law 1965 is addressed when found to be the case.

²¹⁵ The Saudi Companies Law 1965, art. 2.

²¹⁶ *Id.*

²¹⁷ This Article remains unchanged in the Saudi Companies Law 2015, art. 2.

Article (2):

The provisions of this Law, as well as such conditions laid down by the Partners and such customary rules that are consistent with this Law, shall apply to the following companies:

A. 1) General partnership; 2) Limited partnership; 3) Joint venture; 4) Joint-stock corporation; 5) Partnership limited by shares; 6) Limited liability partnership; 7) company with variable capital; and 8) Cooperative company. Without prejudice to such companies known in Islamic jurisprudence, any company that does not assume one of the mentioned forms shall be (considered) null and void, and the persons who have made contracts in its name shall be personally and jointly liable for the obligations arising from such a contract.²¹⁸

C. Types of business organizations

The Saudi Companies Law 2015 retains the rule set out in the 1965 law that states that a company that does not take one of the forms prescribed in (3) of Article 3 shall be considered null.²¹⁹ As the Saudi Companies Law 1965 states, a corporation that was formed not in accordance with either the Companies Law 1965 or Islamic Law would be declared null and void by the Companies Law 1965, and the individuals or entities that formed it would be held jointly liable for any company-related obligations.²²⁰

However, the Saudi Companies Law 2015 limits the number of permitted types of company to just five, whereas the 1965 law recognizes eight.²²¹ The Saudi Companies Law 2015 states that companies that incorporate in the kingdom must take one of the following forms: (a) general partnership; (b) limited partnership; (c) special partnership;²²² (d) joint-stock; (e) limited liability.²²³

Thus, the Saudi Companies Law 2015 cancels three types of companies that are listed in the Saudi Companies Law 1965: partnership limited by shares, company with variable capital

²¹⁸ The Saudi Companies Law 1965, art. 2.

²¹⁹ The Saudi Companies Law 2015, art. 3 (3).

²²⁰ The Saudi Companies Law 1965, art. 2.

²²¹ The Saudi Companies Law 2015, art. 3 (1).

²²² The English translation of the term “special partnership” as “joint venture” in the Saudi Companies Law 1965, Article 2 is not accurate. Joint ventures are completely different from partnerships.

²²³ The Saudi Companies Law 2015, art. 3 (1).

and cooperative company.²²⁴ The Saudi Companies Law 2015 dedicates individual chapters for each type of company that it does recognize according to the following rubric: the general partnership is addressed in Chapter 2, Articles 17 to 37; the limited partnership is addressed in Chapter 3, Articles 38 to 42; the special partnership is addressed in Chapter 4, Articles 43 to 51; the joint stock company is addressed in Chapter 5, Articles 52 to 150; and the limited liability company is addressed in Chapter 6, Articles 151 to 182.

The Saudi Companies Law 2015 makes amendments to the joint stock category with respect to the minimum amount of capital required; namely, the 2015 law reduces this amount to SAR 500,000²²⁵ (equivalent to approximately USD 133,000).²²⁶ The 2015 law also makes amendments to both joint stock and limited liability companies with respect to the minimum number of shareholders or persons required to establish a company.^{227, 228}

In order to fully illustrate the differences between the two laws in this regard, the author provides the following excerpt from a review of the 1965 law conducted by a law firm;²²⁹ it provides a brief picture of permissible business organizations according to the Saudi Companies Law 1965:

1. Collective name partnerships, or general partnerships (Arabic: sharikat al-tadamun, French: société en nom collectif), which are partnerships as the term is understood in Common Law jurisdictions, with all partners being fully liable for the partnership's debts (Companies Regulation, Articles 16 to 35).

²²⁴ See The Saudi Companies Law 2015, art. 3 (3) and the Saudi Companies Law 1965, art. 2.

²²⁵ The Saudi Companies Law 2015, art. 54.

²²⁶ Khalid Al-Abdulkareem, Omar Rashid, Mansoor Alhagbani, Majid Al-Sheikh, Sahel Mughal, Daniel Royle, Badria Modir, *New Saudi Arabian Companies Law, Clifford Chance Law Firm, Client Briefing*, November 11, 2015, available at http://www.cliffordchance.com/briefings/2015/11/new_saudi_arabiancompanieslaw.html (last visited December 29, 2015).

²²⁷ *Id.*

²²⁸ See also The Saudi Companies Law 2015, Articles 2 and 55 for Joint-stock Company and Article 154 for Limited Liability Company.

²²⁹ Hatem Abbas Ghazzawi & Co. This was only the law firm the author could identify that provided a relatively comprehensive description of company structures under the previous Saudi Companies Law 1965.

2. Simple commandite partnerships, or limited partnerships (Arabic: sharikat al-tawsiya, al basita, French: société en commandite simple), which consist of at least one general name[d] partner who is responsible to the extent of his entire fortune for the partnership's debts, and at least one limited and unnamed partner who is responsible for the partnership's debts to the extent of his interest in the partnership's capital (Companies Regulation, Articles 36 to 39).
3. Joint ventures (Arabic: sharikat al mahasu, French: société en participations), which have no legal personality and which may be formed without this being publici[z]ed (Companies Regulation, Articles 40 to 47).
4. Joint stock companies (Arabic: sharikat al musahama, French: société[Janonyme), which are the equivalent of the Common Law public limited company (Companies Regulation, Articles 48 to 148).
5. Share commandite companies (Arabic: sharikat al-tawsiyabi'lashum, French: société en commandite par actions), which consist of at least one general shareholder who is responsible to the extent of his entire fortune for the company's debts, and at least four limited shareholders who are responsible for the company's debts to the extent of their interest in the company's capital (Companies Regulation, Articles 149 to 156).
6. Limited liability companies (Arabic: al-sharikadhatmas'uliyya al mahdudah, French: société à responsabilité limitée), which are the equivalent of Common Law limited liability companies (Companies Regulation, Articles 158 to 180).
7. Variable capital companies (Arabic: al-sharikadhatras al mal al qabil li tarir, French: société au capital variable), which are companies which provide in their articles of association or bylaws that their capital may be increased by additional payments made by the shareholders or by the admission of new shareholders, or that their capital may be reduced by withdrawal of shareholders' shares from the capital (Companies Regulation, Article 181 to 188).
8. Co-operative companies (Arabic: al-sharikata'awuniyya), which are joint stock companies or limited liability companies[,] which are incorporated as co-operatives (Companies Regulation, Articles 189 to 209).²³⁰

D. The difference between joint-stock and limited liability companies

Joint-stock companies are governed by the joint-stock company provision, which is outlined in Chapter 5 of the Saudi Companies Law 2015. Limited liability companies are governed by the limited liability company provision, which is outlined in Chapter 6 of the Saudi Companies Law 2015. Although the rules for joint-stock and limited liability companies are

²³⁰ Hatem Abbas Ghazzawi, *Companies and Partnerships, Saudi Arabian Law overview*. Available at http://www.saudilegal.com/saudilaw/06_law.html. (last visited March 20, 2014).

similar, there are some differences. One of the main differences is that according to the Saudi Companies Law 2015, the limited liability company may have a maximum of 50 shareholders,²³¹ while the joint-stock company does not have this limitation. If the number of shareholders of a limited liability company exceeds 50 shareholders, the limited liability company shall transform into a joint-stock company within a year, or the limited liability company shall end its operations according to the law.²³² Another difference is that while the limited liability company's area of business operations cannot be in finance, banking, insurance, investment and certain other business areas,²³³ joint-stock companies have no such restrictions.

Yet a third difference is that the Saudi Companies Law 2015 enumerates conditions that a shareholder in a limited liability company must meet if he or she wants to sell shares: the seller must inform the other shareholders of the intent to sell and provide them the opportunity to buy such shares within 30 days.²³⁴ If none of the shareholders so informed exercises this right, the selling shareholder may sell his or her stock to any third party.²³⁵ However, a joint-stock company, per the Saudi Companies Law 2015, may restrict the trading of its shares, unless such restriction would mean an absolute prohibition of the trading of the company's shares.²³⁶ In other words, while the 2015 law explicitly stipulates preemptive rights (also known as first refusal rights) for limited liability companies,²³⁷ it does not stipulate these rights for joint-stock companies, although they may be included in the joint-stock company's bylaws.²³⁸

²³¹ The Saudi Companies Law 2015, art. 151 (1).

²³² *Id.* at (2).

²³³ *Id.* at art. 153 (1).

²³⁴ *Id.* at art. 161 (1).

²³⁵ *Id.*

²³⁶ *Id.* at art. 108.

²³⁷ *Id.* at art. 161 (1).

²³⁸ *Id.* at art. 108.

Also, while the limited liability company can be managed by one or two managers and a board of directors,²³⁹ a joint-stock company must be managed by a board of directors containing a minimum of three directors.²⁴⁰ A limited liability company cannot issue tradable certificates,²⁴¹ whereas a joint-stock company may issue tradable share certificates.²⁴² The shareholders of the limited liability company will be held personally liable if the person or persons running the company do not separate their personal lives from the company's business affairs.²⁴³ In this dissertation, the author will focus on M&A transactions between joint-stock companies.

E. Joint-stock and limited liability companies established by one person

Article 2 of the Saudi Companies Law 2015 provides—for all types of companies—that a company is a contract between two or more persons that binds each one of them to make a contribution of money or services, or a combination of the two, in a project for the purpose of generating profits, and that these parties shall divide any profits and losses that may result from the project.²⁴⁴ That means that the minimum number of persons required to establish any company is two. The Saudi Companies Law 1965 also requires a minimum number of persons for each company—five shareholders for a joint-stock company²⁴⁵ and two for a limited liability company.²⁴⁶ Thus, one can see that the 2015 law changes the requirement for the number of shareholders required for the joint-stock company from five (in the 1965 law) to two, according to Article 2 of the 2015 law.²⁴⁷

²³⁹ *Id.* at art. 164 (1) (2).

²⁴⁰ *Id.* at art. 68 (1).

²⁴¹ *Id.* at art. 153 (2).

²⁴² *Id.* at art. 52.

²⁴³ *Id.* at art. 155 (b).

²⁴⁴ *Id.* at art. 2.

²⁴⁵ *Id.* at art. 48.

²⁴⁶ *Id.* at art. 157.

²⁴⁷ *See also* Khalid Al-Abdulkareem, *supra* note 226.

The Saudi Companies Law 2015 permits the joint-stock company to be established by one shareholder, which provides an exception to Article 2.²⁴⁸ Specifically, the law states that it is permissible for the government, public persons, wholly governmentally-owned companies and companies with capital of no less than SAR 5 million (equivalent to approximately USD 1.3 million) to establish a joint-stock company with one shareholder; this shareholder shall have authority over the general assembly meetings, including authority over the founding assembly.²⁴⁹ This means that if a joint-stock company held by one shareholder fails to meet the conditions prescribed in Article 55 of the 2015 law, the shareholder must adjust the company to comply with Article 55 or convert the company into a limited liability company; otherwise, by law the company must be dismantled.²⁵⁰

Article 154 of the Saudi Companies Law 2015 permits a limited liability company to be established and held by one person. This is another exception to Article 2 of the 2015 law; this exception (again) makes it permissible for a limited liability company to be established by one person, or to have all of its shares devolve to one person; in such a case, the liability for that person shall be equal to the amount of money that person dedicated as the company's capital.²⁵¹

The Saudi Companies Law 2015 places some restrictions on acquisitions for limited liabilities companies held by one person.²⁵² The Saudi Companies Law 2015 states that in any case, it is prohibited for a natural person to establish or own more than one limited liability company held by one person, and it is also prohibited for a limited liability company held by one

²⁴⁸ *Id.*

²⁴⁹ The Saudi Companies Law 2015, art. 55. *See also* Khalid Al-Abdulkareem, *supra* note 226.

²⁵⁰ *Id.* at art. 149.

²⁵¹ *Id.* at art. 154 (1).

²⁵² *Id.* at art. 154 (2).

person (public or natural person) to establish or own more than one limited liability company held by one person.²⁵³

F. Holding companies

The Saudi Companies Law 2015 includes rules governing holding companies and subsidiaries,²⁵⁴ while the Saudi Companies Law 1965 does not. The 2015 law defines the holding company as: (1) a joint-stock or limited liability company that aims to control other companies; or (2) a joint-stock or limited liability company with named subsidiaries that is formed through the ownership of more than half of the capital of such companies or through control of the election of the company's board.²⁵⁵

The Saudi Companies Law 2015 states that it is prohibited for the subsidiary to own shares or in-kind stakes in the holding company, and that any action that results in the transfer of shares or stakes in kind from the holding company to the subsidiary shall be null.²⁵⁶

§3.3. Saudi Arabia's Exports

The value of Saudi Arabia's oil exports decreased from USD 285 billion in 2014 to USD 157 billion in 2015 due to a decline in oil prices.²⁵⁷ The value of Saudi Arabia's non-oil exports was USD 47 billion in 2015.²⁵⁸ The value of Saudi's imports was approximately USD 141 billion in 2015.²⁵⁹ In 2014, Saudi economic growth had increased 3.5% versus 2013;²⁶⁰ however,

²⁵³ *Id.* at art. 154 (2).

²⁵⁴ *Id.* at art. 182-86.

²⁵⁵ *Id.* at art. 182 (1).

²⁵⁶ *Id.* at art. 184.

²⁵⁷ Jadwa Investment, *Saudi Arabia's 2016 fiscal budget*, December 30, 2015,15, available at <http://www.jadwa.com/en/researchsection/research/economic-research> (last visited February 29, 2016). See also The Ministry of Finance's statement on the Government's budget for 2015-2016, 1-5, available at [https://www.mof.gov.sa/Arabic/DownloadsCenter/DocLib/%D8%AA%D9%81%D8%A7%D8%B5%D9%8A%D9%84%20%D8%A7%D9%84%D8%A8%D9%8A%D8%A7%D9%86%20\(PDF\).pdf](https://www.mof.gov.sa/Arabic/DownloadsCenter/DocLib/%D8%AA%D9%81%D8%A7%D8%B5%D9%8A%D9%84%20%D8%A7%D9%84%D8%A8%D9%8A%D8%A7%D9%86%20(PDF).pdf) (last visited February 29, 2016)

²⁵⁸ *Id.*

²⁵⁹ The performance of the Saudi Economy for 2015, a report by CNN, December 28, 2015, available at <http://arabic.cnn.com/business/2015/12/28/saudi-budget-2016-highlights> (last visited February 29, 2016).

economic growth then decreased in 2015 by 3.4%.²⁶¹ In 2015, Saudi's total revenues were USD 162 billion (SAR 608 billion). Of this total, revenues from oil contributed 73%, a decrease versus 2014.²⁶² The remaining 23% of total revenues in 2015 came from non-oil products, which represents a 29% growth in non-oil revenue compared to 2014, and this change reflects the steps Saudi has taken at a national level to diversify the country's sources of revenue.²⁶³

§3.4. Saudi Arabia's Debt

Saudi Arabia's debt in relation to its GDP has steadily declined since 1999.²⁶⁴ Starting at 103.50% of Saudi's total GDP in 1999,²⁶⁵ the debt declined over the next decade all the way down to 13.2% of GDP in 2008.²⁶⁶ After a slight bump back up to 15.9% in 2009, the debt decreased each year until 2015, posting the following numbers: 9.8% in 2010, 6.1% in 2011,²⁶⁷ 3.7% in 2012,²⁶⁸ 2.2% in 2013 and 1.6 in 2014.²⁶⁹ In 2015, Saudi's debt increased to 5.8% of total GDP, rising from approximately USD 2 billion to USD 37 billion.²⁷⁰

²⁶⁰ Saudi Arabian Monetary Agency Annual Report 51 (2015), 23, available at http://www.sama.gov.sa/en-US/EconomicReports/AnnualReport/5600_R_Annual_En_51_Apx.pdf (last visited February 29, 2016).

²⁶¹ Jadwa Investment, *supra* note 257.

²⁶² The Ministry of Finance's statement on the Government's budget for 2015-2016 (last visited February 29, 2016).

²⁶³ *Id.*

²⁶⁴ Trading Economics, available at <http://www.tradingeconomics.com/saudi-arabia/government-debt-to-gdp>.

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Saudi Arabian Monetary Agency Annual Report 48 (2012), 94, available at http://www.sama.gov.sa/sites/samaen/ReportsStatistics/ReportsStatisticsLib/5600_R_Annual_En_48_2013_02_19.pdf (last visited March 20, 2016).

²⁶⁸ Saudi Arabian Monetary Agency Annual Report 49 (2013), 130, available at http://www.sama.gov.sa/sites/samaen/ReportsStatistics/ReportsStatisticsLib/5600_R_Annual_En_49_Apx.pdf.

²⁶⁹ Saudi Arabian Monetary Agency Annual Report 51 (2015) (last visited February 29, 2016).

²⁷⁰ Jadwa Investment, *supra* note 257. See The Ministry of Finance's statement on the Government's budget for 2015-2016 (last visited February 29, 2016).

§3.5. Business activities in Saudi Arabia

This excerpt from the 2015 Saudi Arabia Monetary Agency (SAMA)'s annual report provides a high-level look at the robust condition of Saudi Arabia's commercial and industrial sectors:

The commerce and industry sectors continued to record remarkable growth rates. During 2014, the Ministry of Commerce and Industry issued commercial registers for the establishment of 11,986 new different companies, increasing by 25.7 percent from 9,533 companies established in 2013. The number of commercial registers issued for companies up to the end of 2014 reached 103.6 thousand, spreading over the various regions of the Kingdom in varied shares. [The] Riyadh region accounted for the largest share with 39.2 percent, followed by [the] Makkah region with 27.2 percent, and the Eastern region with 20.7 percent of the total number of commercial registers issued for the establishment of companies up to the end of 2014. As for industry, the Ministry of Commerce and Industry issued industrial licenses issued [sic] for this year. At the end of 2014, the total cumulative number of industrial units existing in the Kingdom licensed by the Ministry of Commerce and Industry under the Protection and Encouragement of National Industries' Law and Foreign Investment Law rose to 6,871 producing industrial units with a total finance of SAR 993.3 billion, providing nearly 935.3 thousand jobs. A breakdown of the producing industrial units by type of industrial activity and total finance indicates that the total finance for chemical materials and products [from] manufacturing accounted for 674 industrial units with a capital amounting to SAR 456.0 billion[,] or 45.9 percent of the total finance of the existing units in the Kingdom, followed by the industry of coke and refined oil products[,] for 140 industrial units with SAR 140.9 billion or 14.2 percent of total finance.²⁷¹

According to the *Washington Post*, an estimated 90 percent of companies in Saudi Arabia are family owned/run companies, while only 70 percent of companies in the European Union are family owned.²⁷² The prevalence of family-owned businesses in Saudi Arabia and their importance for the Saudi economy will be discussed in more detail later in this chapter.

²⁷¹ Saudi Arabian Monetary Agency, 51st Annual Report Latest Economic Developments 1436H, (2015G), 28-9, available at http://www.sama.gov.sa/en-US/EconomicReports/AnnualReport/5600_R_Annual_En_51_Apx.pdf (last visited February 25, 2016).

²⁷² Marco Venditti, *Join the Family Firm*, WASHINGTON POST, available at <http://www.washingtonpost.com/wp-adv/specialsales/spotlight/saudi/family.html>. (last visited January 24, 2015).

§3.6. Listed companies

The Saudi stock market started in the 1930s and by 1975, the stock market had 14 listed companies.²⁷³ By 2012, the number of listed companies reached 158,²⁷⁴ and this number expanded to 166 by 2014, according to the Capital Market Authority's report of 2014.²⁷⁵ The number of initial public offerings was 5 in 2014 in the total amount of SAR 25.2 billion (equivalent to approximately USD 6 billion).²⁷⁶ The number of listed companies in 2015 reached 171.²⁷⁷

§3.7. The growth of the stock market in Saudi Arabia in 2015 Report

The following excerpt from the 2015 SAMA report explains the rise of trading in the Saudi stock market:

[The Tadawul All Share Index] TASI closed at 8,333.3 at the end of 2014 compared to 8,535.6 at the end of 2013, which represented a slight decline of 2.4 percent. TASI registered its highest closing point of 11,149.4 on September 9, 2014. The market capitalization of issued shares increased by 3.4 percent to SAR 1,812.9 billion at the end of 2014 from SAR 1,752.9 billion at the end of the preceding year. The number of shares traded during 2014 went up by 34.1 percent to 70.1 billion from 52.3 billion in the preceding year (not adjusted to account for corporate actions). The total value of shares traded increased by 56.7 percent to SAR 2,146.5 billion from SAR 1,369.7 billion in the preceding year. The number of transactions also went up by 23.5 percent to 35.8 million in 2014 from 29.0 million in the preceding year [...]. The daily average value of traded shares was SAR 8.6 billion in 2014 compared to SAR 5.5 billion in the preceding year, rising by 55.5 percent. The daily average number of traded shares increased by 31.2 percent to 283.2 million in 2014 from 215.8 million in the previous year. The daily average number of executed transactions also went up by 22.5 percent to 143.0 thousand from 116.8 thousand in 2013. The value of shares traded through the internet in 2014 totaled SAR 1,483.1 billion compared to SAR 942.6 billion in the preceding year, increasing by 57.3 percent and accounting for 69.1 percent of the total value of shares

²⁷³ Saudi Stock Market (Tadawul)'s website, available at: <http://www.tadawul.com.sa> (last visited March 27, 2014).

²⁷⁴ Saudi Arabian Monetary Agency, 49th Annual, 29-30.

²⁷⁵ The Capital Market Authority's Annual Report (2014), 73, available at <http://www.cma.org.sa/En/Publicationsreports/Reports/CMA%20Annual%20Report%202014.pdf>. (last visited February 28, 2016).

²⁷⁶ *Id.*

²⁷⁷ Sustainable Stock Exchanges Initiative's website, available at <http://www.sseinitiative.org/factsheet/tadawul/> (last visited February 28, 2016).

traded during 2014 compared to 68.8 percent in the preceding year. Their number rose by 35.9 percent to 49.4 billion in 2014 from 36.3 billion in 2013, accounting for 69.7 percent of the total number of shares traded in 2014 against 69.4 percent in the preceding year. The number of transactions executed through the internet increased by 25.2 percent to 27.1 million in 2014 from 21.6 million in the previous year, representing 75.7 percent of the total number of transactions executed in 2014 against 74.6 percent during the preceding year [...].²⁷⁸

The value of the Saudi stock market in January 2015 was SAR 1,917,73 trillion (equivalent to approximately USD 511,660 billion).²⁷⁹

§3.8. Family Businesses in Saudi Arabia

The structure of society in Saudi Arabia is based mostly on families and tribes. Both the *Arab News* and the *Economic Times* have referred to the Jeddah Chamber of Commerce's statement that family businesses produce 25% of Saudi Arabia's gross domestic product, which amounts to SAR 350 billion²⁸⁰ (equivalent to approximately USD 93 billion). These publications also stated that there are 5,000 family companies in Saudi, while only 156 are listed on the Saudi stock market.²⁸¹ A family business in Saudi Arabia normally starts as a small business, which then grows in size until it becomes a business group; often this type of growth occurs after the founder dies. The business may ultimately result in many spin-offs, such as has been the case with the Al-Rajihi group and many other similar family businesses.²⁸² The Ministry of Commerce and Industry published a manual on its website titled Guidelines of Family

²⁷⁸ Saudi Arabian Monetary Agency, 51st Annual Report.

²⁷⁹ *The Saudi Stock Exchange (Tadawul) Statistical Report January 2015*, The Saudi Stock Exchange (*Tadawul*)'s website, available at http://www.tadawul.com.sa/static/pages/en/Publication/PDF/Monthly_01_2015.pdf (last visited February 29, 2016).

²⁸⁰ Family Businesses in Saudi Arabia Make Up 25% to GDP, (July 26, 2012), available at http://articles.economicstimes.indiatimes.com/2012-07-26/news/32869781_1_businesses-saudi-arabia-investment-strategy; Diana Al-Jassem, *Family Businesses Contribute 25% of GDP* (July 25, 2012), available at <http://www.arabnews.com/family-businesses-contribute-25-gdp>. (last visited March 25, 2014).

²⁸¹ *Id.*

²⁸² Venditti, *supra* note 272.

Companies' Governance Project.²⁸³ It appears that this project will offer guidelines to help family companies run their businesses in a professional way.

§3.9. Closely Held Corporations

The number of closely held companies in Saudi Arabia has been growing in recent years.²⁸⁴ This growth may be attributed to a gradual shift toward this structure instead of the traditional family-owned structure, given the issues and disputes that often arise for companies during their formation, particularly for companies other than joint-stock companies (listed and unlisted), and especially for family businesses or family corporations. When the founder (usually the family father) of a family-owned business dies, disputes often arise regarding how many shares each son is entitled to, who can sell shares, and many other issues that may take years to resolve. Negotiating the fair division of the business, which is ultimately the goal, can cause disputes that may damage the company's reputation if the disagreements become public. It seems that the Minister of Commerce and Industry (MOCI) has realized that family-owned businesses must evolve toward a more modern form, and that the structure of a closely held company may be more optimal than that of a family-owned company.²⁸⁵ Therefore, the MOCI has encouraged the transition to the structure of the closely held company by facilitating the process of becoming one.²⁸⁶ Closely held companies in Saudi Arabia numbered 700 in 2014, with total capital of SAR

²⁸³ Ministry of Commerce and Industry, available at <http://mci.gov.sa/projectideas/Pages/default.aspx?pid=1>.

²⁸⁴ Muhammad Alhumadi, *Saudi Arabia: The wave of massive conversion of \$10 billion to entities «contribution» within a year*, ALSHARQ ALAOSAT NEWSPAPER, (Jan. 03, 2008), available at <http://archive.aawsat.com/details.asp?section=48&article=452348&issueno=10628#.VmhbhXarTIU> (last visited March 14, 2014).

²⁸⁵ See Fahad Althunyan, *MOCI: Family Businesses should transfer into Closely Held Corporations*, ALRIYADH NEWSPAPER, (Apr. 03, 2013), available at <http://www.alriyadh.com/822916> (last visited November 19, 2015).

²⁸⁶ *Id.*

240 billion (equivalent to USD 64 billion).²⁸⁷ From February 2012 to January 2015, more than 35 entities incorporated as closely held companies, and more than 72 companies transitioned into closely held companies.²⁸⁸ Even for a market the size of the Saudi market, this can be considered evidence of a growing trend toward closely held companies.

However, currently, the Saudi Companies Law 2015 does not refer to unlisted (closely held) corporations, although they are covered by the joint stock provisions that are contained in the Saudi Companies Law. The current Companies Law 2015 does not even mention the word “closely”; indeed, the word itself is not commonly used in Saudi Arabia. There was a ministerial decision made in 2008 by the Minister of Commerce and Industry, which stated that if a company wants to transition into a closely held company, it must follow the rules regarding the process of establishing a publicly held company in compliance with the Companies Law 1965.²⁸⁹ This meant that the Companies Law 1965 would apply to closely held companies, and that they would be under the jurisdiction of the Ministry of Commerce and Industry.²⁹⁰ Now, closely held corporations are covered by the joint stock chapter (Chapter 5) of the Saudi Companies Law 2015.

²⁸⁷ *Stock Market is The Golden Path In Assuring the Continuity of Family Businesses*, ALJAZIRAH NEWSPAPER, Economic Studies and Reports Division (Jul. 13, 2014), available at <http://www.al-jazirah.com/2014/20140713/ec2.htm> (last visited December 29, 2015).

²⁸⁸ The decisions regarding announcing and approving the actions of the transferring companies can be found at the Ministry of Commerce and Industry’s website, available at <http://www.mci.gov.sa/MediaCenter/Decisions/Pages/default.aspx> (last visited December 29, 2015).

²⁸⁹ Ministerial Decision of the Ministry of Commerce and Industry No. (117/R), dated 03/04/1429 (corresponding to April 9, 2008), available at <http://mci.gov.sa/MediaCenter/News/Pages/33-10.aspx> (last visited December 29, 2015).

²⁹⁰ The author recommends that Saudi Arabia’s legislature issue a law, make amendments to the Companies Law, or include rules in the draft of the new Companies Law, regarding closely held companies. Since there is a growing trend toward structuring companies as closely held companies, there should be laws that govern specific issues that arise for closely held corporations but not for publicly held companies. The author believes that creating special rules for closely held corporations will make investors, especially family businesses, more confident in the viability of this type of corporate structure and more willing to invest in closely held companies.

§3.10. Foreign Investment in Saudi Arabia

In 2000, Saudi Arabia enacted the Foreign Investment Law to improve its commercial sectors and effect major changes.²⁹¹ Then and now, Saudi Arabia has continued to be the third largest recipient of foreign investment of all the countries in its region; Turkey receives the most foreign investment, and the UAE is second, according to a World Bank report from 2015.²⁹² This report also states that Saudi Arabia is the most accessible MENA²⁹³ country for investment and is number 11 on the list of the world's most accessible countries in which to do business.²⁹⁴

While financial flows from foreign investors into Saudi Arabia have decreased by 24 percent to USD 9.3 billion over the past few years, Saudi is still considered the third largest economy on the Arabian Peninsula in terms of foreign investment.²⁹⁵ Barron's magazine provides an example of one foreign investment in Saudi Arabia in the amount of USD 210 million that occurred in the form of a joint venture between one of the largest gold mining companies in the world (Barrick Gold) and Ma'aden, which is controlled by the Saudi government.²⁹⁶ Saudi Arabia has opened its stock market—which is currently valued (the total value of all of its listed companies) at

²⁹¹ United Nations Conference on Trade and Development (UNCTAD), *Investment Country Profiles Saudi Arabia 2013*, 2. See the MOCI's website, available at <https://mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/Documents/a4.pdf> (last visited December 29, 2015).

²⁹² United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015*, 54, available at http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf. (last visited February 29, 2016).

²⁹³ The MENA means The Middle East and North Africa and includes Iran, Kuwait, Bahrain, United Arab Emirates, Qatar, Oman, Saudi Arabia, Yemen, Iraq, Syria, Jordan, West Bank and Gaza, Israel, Lebanon, Egypt, Algeria, Djibouti, Libya, Malta, Morocco and Tunisia. See World Bank website, available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/0,,menuPK:247619~pagePK:146748~piPK:146812~theSitePK:256299,00.html>. (last visited November 29, 2014).

²⁹⁴ Nasser Alshareef, *The Opportunities and Limitations of FDI in Saudi Arabian Financial Sector*, p. 2.

²⁹⁵ United Nations Conference on Trade and Development (UNCTAD), *supra* note 292, at 58.

²⁹⁶ Ben Levisohn, *Barrick Gold: The Hidden Value of Its Saudi Joint Venture* (July 14, 2014), BARRON'S MAGAZINE, available at <http://blogs.barrons.com/stockstowatchtoday/2014/07/14/barrick-gold-the-hidden-value-of-its-saudi-joint-venture/> (last visited December 20, 2015).

approximately USD 531 billion and trades USD 2 billion a day—to foreign investment, making it the second largest emerging market behind China.²⁹⁷

An article in the *Washington Post* entitled “Join the family firm” touched upon foreign investment in Saudi Arabia and emphasized that Shell Oil wanted to invest in Riyadh but failed to do so because it did not partner with a local Saudi investor.²⁹⁸ Investing successfully in Saudi Arabia requires certain kinds of crucial information and know-how that only a local investor could understand and share.²⁹⁹ The article also mentioned Muhammad Alrajhi, whose business is a spinoff of his brothers’ group; Alrajhi’s spinoff consists of three steel factories with the capacity to produce 250 million tons of steel every year.³⁰⁰ Currently, the Alrajhi group has partnered with the Swiss group Mövenpick in a joint venture to develop several groups of hotels.³⁰¹ There are 726,000 operating facilities in Saudi owned by Saudis, compared to 5,195 entities owned by foreigners,³⁰² and 1,815 entities that are shared between Saudis and

²⁹⁷ Shuli Ren, *Saudi Arabia To Open Stock Market; How Big Is Saudi?* (July 22, 2014), BARRON’S MAGAZINE, available at <http://blogs.barrons.com/emergingmarketsdaily/2014/07/22/saudi-arabia-to-open-stock-market-how-big-is-saudi/> (last visited December 20, 2015). See also Deema Almashabi, Zahra Hankir and Weiyi Lim, *Saudi to Open \$531 Billion Stock Market to Foreigners* (July 22, 2014), BLOOMBERG, available at <http://www.bloomberg.com/news/2014-07-22/saudi-to-open-up-531-billion-stock-market-to-foreigners.html> (last visited December 20, 2015). However, according to the Saudi Exchange Market (*Tadawul*)’s website and January 2015 report, total market capital was SAR 1,918.73 billion (USD 511.66) at the end of January. This represents an increase over the past month of 5.84%. The *Tadawul*’s website also announced that the value of shares traded in January 2015 was SAR 162.47 billion (USD 43.33 billion), which was a decrease of approximately 19.97% versus the previous month. Finally, 7.74 billion was cited as the number of shares traded in January 2015, which was also a decrease (of approximately 12.87%) versus the previous month. See Saudi Stock Exchange (*Tadawul*) Statistical Report, January 2015, 2, available at http://www.tadawul.com.sa/static/pages/en/Publication/PDF/Monthly_01_2015.pdf (last visited December 20, 2015). See also the announcement regarding the performance of the Saudi Stock Market 2015 made by *Tadawul* on February 1, 2015, available at http://www.tadawul.com.sa/wps/portal/!ut/p/c1/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g_A-ewIE8TIwN_D38LA09vV7NQP8cQQ3dnA6B8JJK8e0CYqYGniU-wUXCAI7GBpxEB3cGJRfp-Hvm5qfoFuRHIAmbJQJY!/dl2/d1/L0IHSkovd0RNQUprQUVnQSEhL1ICWncvZW4!/?x=1&PRESS_REL_NO=4021_ (last visited December 20, 2015).

²⁹⁸ Venditti, *supra* note 272.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² Central Department of Statistics and Information, *Economic Entities Report 2010*, 5, available at <http://cdsi.gov.sa/2010-07-31-07-01-16>. (last visited April 15, 2015).

foreigners.³⁰³ In 2014, there were 155,106 Certificates of Incorporation on file in Saudi Arabia.³⁰⁴ Approximately 4,000 Certificates are issued each year.³⁰⁵

Table 3.1

Operating establishments by capital & administrative area³⁰⁶

Administrative Area		Operating establishments by capital ownership			
		Total	Joint	Foreign	Saudi
1	Riyadh	185,799	663	1,544	183,592
2	Makkah	181,853	458	1,560	179,853
3	Madinah	46,910	52	110	46,748
4	Qassim	41,746	41	35	41,670
5	[Eastern Provinces]	113,706	335	495	112,876
6	Asir	46,432	30	201	46,201
7	Tabuk	22,184	52	130	22,002
8	Hail	22,579	18	66	22,495
9	North Border	8,268	1	5	8,262
10	Jazan	27,566	117	825	26,624
11	Najran	13,355	2	28	13,325
12	Al-Baha	8,784	6	1	8,777
13	Al-Jouf	14,110	40	195	13,875
Total		733,292	1,815	5,195	762,282

³⁰³ *Id.*

³⁰⁴ This is the number of Certificates of Incorporation that were already on file in 2014.

³⁰⁵ The Ministry of Commerce and Industry's website in Arabic, available at <http://www.mci.gov.sa/MediaCenter/Reports/Statistics/Pages/stat-063.aspx>. See also The Ministry of Commerce and Industry Report 2014, 27 and 37, available at <http://mci.gov.sa/MediaCenter/Achievements/Documents/report-2014.pdf> (last visited February 29, 2016).

³⁰⁶ Central Department of Statistics and Information, *Economic Entities Report 2010*, 5.

Table 3.2

FDI flows, by region and economy, 2008-2014, according to the (UNCTAD) 2015 Report³⁰⁷

	FDI inflows							FDI outflows						
	2008	2009	2010	2011	2012	2013	2014	2008	2009	2010	2011	2012	2013	2014
Saudi Arabia	39,456	36,458	29,233	16,308	12,182	9,298	8,012	3,498	2,177	3,907	3,430	4,402	4,943	5,396

(Amounts shown are in millions of USD)

Table 3.3

FDI stock, by region and economy, for the years 1990, 2000, 2013 and 2014, according to the (UNCTAD) 2015 Report³⁰⁸

	FDI inward stock				FDI outward stock			
	1990	2000	2013	2014	1990	2000	2013	2014
Saudi Arabia	15,193a	17,577	208,330a	215,909	2,328a	5,285a	39,303a	44,699

(Amounts shown are in millions of USD)

³⁰⁷ United Nations Conference on Trade and Development, *World Investment Report 2015*, *supra* note 292, at 238.

³⁰⁸ *Id.*

§3.11. Business Councils

Business councils play a crucial role in facilitating foreign investment in Saudi Arabia. Business councils, with the permission of the Ministry of Commerce and Industry, were established between Saudi Arabia and other countries, allowing businesspeople from each country to fund these councils to facilitate their businesses.³⁰⁹ There are 33 business councils in Saudi Arabia:

- 1- Saudi – Japanese Business Council
- 2- Saudi – Algerian Business Council
- 3- Saudi – Ukrainian Business Council
- 4- Saudi – Tunisian Business Council
- 5- Saudi – Moroccan Business Council
- 6- Saudi – Indian Business Council
- 7- Saudi – Singapore Business Council
- 8- Saudi – Italian Business Council
- 9- Saudi – Bahraini Business Council
- 10- Saudi – Czech Business Council
- 11- Saudi – French Business Council
- 12- Saudi – Egyptian Business Council
- 13- Saudi – Russian Business Council
- 14- Saudi – Swiss Business Council
- 15- Saudi – Turkish Business Council
- 16- Saudi – Filipino Business Council

³⁰⁹ Ministry of Commerce and Industry's website, available at <http://www.mci.gov.sa/en/AboutMinistry/Pages/CoordinatingCouncils.aspx>. (last visited December 15, 2015).

- 17- Saudi – Korean Business Council
- 18- Saudi – Polish Business Council
- 19- Saudi – Syrian Business Council
- 20- Saudi – South African Business Council
- 21- Saudi – Lebanese Business Council
- 22- Saudi – Yemeni Business Council
- 23- Saudi – Jordanian Business Council
- 24- Saudi – Omani Business Council
- 25- Saudi – Sudanese Business Council
- 26- Saudi – Kazakhstani Business Council
- 27- Saudi – Qatari Business Council
- 28- Saudi – Canadian Business Council
- 29- Saudi – Spanish Business Council
- 30- Saudi – Pakistani Business Council
- 31- Saudi – Malaysian Business Council
- 32- Saudi – Chinese Business Council
- 33- Saudi – British Business Council.³¹⁰

§3.12. Business sectors in Saudi Arabia (SA-US and Saudi-British Business Councils)

A. In general

The US-Saudi Arabian Business Council (USSABC), which was created in 1993, is a non-profit organization that promotes business and trades among Saudi and US companies and

³¹⁰ *Id.*

investors.³¹¹ The Saudi-British Joint Business Council (SBJBC), which was established in 1999, is a private organization that promotes business and trades among Saudi and UK companies and investors.³¹²

Many Saudi business sectors provide opportunities for foreign investors, including: healthcare and life sciences, consumer and luxury goods, power, including nuclear and renewable energy, oil, gas and petrochemicals, mining, defense and security, mass transport infrastructure including new rail, metro and bus links, financial and professional services, information and communications technologies, environmental technology and services, water and wastewater and education, training and human capital development.³¹³

B. Business sectors in Saudi Arabia³¹⁴

1. Construction and real estate

Saudi Arabia has designated USD 630 billion to complete 1000 projects in construction, making it the largest construction market among the Gulf States (GCC) at 42%, with an estimated yearly growth of 4% during the period from 2013 to 2017.³¹⁵ Saudi also is planning to increase its spending on infrastructure to 30% by 2016.³¹⁶ All of this suggests that Saudi Arabia is looking for companies in the infrastructural sector with which it can partner to develop the sector.

³¹¹ The U.S.-Saudi Arabian Business Council (USSABC)'s website, available at <http://www.us-sabc.org/i4a/pages/Index.cfm?pageID=3278> (last visited March 1, 2016).

³¹² The Saudi British Joint Business Council (SBJBC)'s website, available at <http://www.sbjbc.org/about-us/>. See also <http://www.saudiarabia.doingbusinessguide.co.uk/supporting-organisations/saudi-british-joint-business-council/> (last visited March 1, 2016).

³¹³ *Doing Business in Saudi Arabia, the Guide*, in association with the Saudi-British Council and Investment & Trade available at <http://www.saudiarabia.doingbusinessguide.co.uk/the-guide/opportunities-in-saudi-arabia/> (last visited November 12, 2015).

³¹⁴ The author obtained some briefs about business activities in Saudi Arabia from the SA-US Business Council and summarized and presented them. The information provided in this paper for each sector is adapted from the briefs sent to the author by the Council with some added explanation. The author presents these briefs in the Appendix for the reader's further reference.

³¹⁵ *Id.*

³¹⁶ *Id.*

2. Information and communications technology (ICT)

Among the countries of the Middle East, the Kingdom of Saudi Arabia is considered to have the largest information and technology market, and the Kingdom has plans to educate its students and supply schools and universities with technologically advanced equipment.³¹⁷ Some experts estimate that the government of Saudi Arabia invested USD 5.7 billion in the ICT market in 2014.³¹⁸ Because Saudi Arabia has 54 million mobile phone users,³¹⁹ it is an attractive country for mobile device investors in the Middle East.

3. Medical, healthcare and pharmaceutical sectors

In 2014, Saudi Arabia planned to establish 11 new hospitals and 11 medical centers.³²⁰ Saudi Arabia designated USD 73 billion to build 117 hospitals, 750 primary care centers and 400 emergency facilities that were to be completed by 2015.³²¹ An additional 132 projects have already been put into construction.³²² All of these planned and in-process projects indicate Saudi Arabia's commitment to investing in and developing its healthcare sector.

4. Petrochemicals and plastics

ARAMCO, the Saudi National Oil Company, and Saudi Basic Industries Corporation (SABIC), a corporation of which the government owns 70%, are two of the world's top companies in petrochemicals and gas.³²³ The National Industrial Clusters Development Program is a Saudi Arabian program initiated in 2008 to develop five types of manufacturing sectors: plastic packaging, consumer goods, construction, automotive, and metals and processing.³²⁴ The

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

goal of this program was to make Saudi Arabia a desirable and attractive place for foreign investors to establish partnerships that would help Saudi develop its level of manufacturing and production to be more competitive globally.

5. Power generation

It has been estimated that the power sector in Saudi Arabia provides USD 91 billion in investment opportunities, which is a large portion of the USD 1.4 trillion total investment in power.³²⁵ Further investments in the power sector are expected until at least 2020.³²⁶ In addition, Saudi Arabia plans to develop and establish its nuclear power sector, aiming to build 16 nuclear reactors by 2032 at an expenditure of USD 7 billion per reactor.³²⁷

6. Agriculture

Since Saudi Arabia suffers from scarce water resources, it has started a plan to decrease its production of commodities that require a great deal of water—such as wheat—to 80%.³²⁸ This has caused Saudi Arabia to become one of the largest importers of food in the world.³²⁹ Thus, Saudi Arabia is an attractive country for investments in food products of almost every kind.

§3.13. Mergers and Acquisitions in Saudi Arabia³³⁰

One commercial aspect that has grown rapidly in Saudi Arabia is the field of M&A transactions. In conducting research for this dissertation, the author tracked M&A transactions that have been negotiated in Saudi Arabia from the beginning of 2014 until January 24, 2016 through the website Argaam.com, which focuses on M&A transactions. The website is in

³²⁵ *Id.*

³²⁶ *Id.*

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.*

³³⁰ This will be discussed in more detail in Chapter 6.

Arabic.³³¹ Table 3.4 shows the monetary value represented by cross-border M&As. This data is from 2007 to 2014 and is taken from the 2015 report of the United Nations Conference on Trade and Development (UNCTAD). The author translated each piece in order to discern what type of company is involved in each transaction, and to determine if the company in question is publicly held.

Table 3.4

Value of cross-border M&As by region/economy of seller/purchaser during the period from 2007 to 2014 according to the (UNCTAD) 2015 Report³³²

Year / Value	Net sales (immediate acquired company)								Net purchases (ultimate acquiring company)							
	2007	2008	2009	2010	2011	2012	2013	2014	2007	2008	2009	2010	2011	2012	2013	2014
Saudi Arabia	125	330	42	297	657	1,429	291	235	16,010	1,518	121	1,698	107	294	520	674

(Amounts shown are in millions of US dollars)

Tables 3.5 to 3.22 provide more details about M&A transactions in Saudi Arabia, which, as noted above, the author takes from Argaam.com. To reiterate, the author translated each

³³¹ See Argaam's website, available at <http://www.argaam.com/company/mergerandacquisition/pageno/4> (last visited February 27, 2016). It is important to note that this number cannot be accurate, because there are no rules that require private companies to disclose their M&A transactions, which almost certainly means that Argaam's reported numbers will be imprecise.

³³² United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2015*, *supra* note 292, at 245. The number of Saudi cross-border M&As has recorded 230% in growth in 2015 according to UNCTAD's estimate, which was not yet published at the time of the writing of this paper. Saudi cross-border M&A activity jumped to achieve 230% growth in 2015. See also Majed Aljameel, ALEQTISADIAH NEWSPAPER, Issue No. 8076, November 21, 2015, available at https://www.aleqt.com/2015/11/21/article_1008270.html (last visited March 3, 2016).

record from Argaam.com into English, checking what form of business is involved in each transaction, discerning what is meant when a transaction is considered a share of an establishment, and breaking down five charts that show different kinds of data for the years 2013, 2014 and 2015. Note that the highlighted rows in these tables represent the acquiring company, while the target companies are the names that are not highlighted. The financial institution (Argaam) upon which the author relies refers, in many cases, to certain joint-stock companies that were publicly traded while not being listed with the Capital Market Authority, at least at the time the acquisitions were made. Note that the tables refer in some cases to transactions that are termed a “share of establishment”—in keeping with how they are cited on the website under M&A transactions—however, these transactions are not acquisitions, and they are clearly not mergers. This lack of clarity in the naming conventions on the Argaam website demonstrates that the concept of M&A is new to Saudi Arabia and some confusion about its technical and functional parameters remains, even at a time when M&A business in Saudi is growing rapidly and is expected to continue to grow dramatically in the years to come.³³³

³³³ In these charts, the first party listed in the “Company” column, in the box highlighted in gray, is the acquiring company, while the second party listed is the acquired company. For example, in Row 1 of Table 3.5 (Canceled Transactions), Al Babtain is the acquiring company while Energya is the acquired company.

Tables

(1) 2013

Table 3.5

Canceled transactions³³⁴

	Date (D/M/Y)	Company (Acquiring/ Acquired)	State	Sector	Value	Type	Status
1	1/12/2013	Al-Babtain	Saudi Arabia	Industry	-	Acquisition	Canceled
		Energya	Saudi Arabia	Industry			
2	28/11/2013	Mobily Joint-stock (publicly held)	Saudi Arabia	Communications	-	Acquisition	Canceled
		Etihad Atheeb Telecommunication Company	Saudi Arabia	Communications			
3	17/9/2013	Najran Cement Company	Saudi Arabia	Cement and Building Materials	-	Acquisition	Canceled
		Projects Supply (limited liability company)	Saudi Arabia	Transportation			
4	13/2/2013	Saudi Vitrified Clay Pipes Co.	Saudi Arabia	Cement and Building Materials	-	Acquisition	Canceled
		ACWAPIPE (limited liability company)	Saudi Arabia	Industry			
5	15/1/2013	Arabian Pipes Company Joint-stock (publicly held)	Saudi Arabia	Industry	-	Acquisition	Canceled
		Welspun Middle East (limited liability company)	Saudi Arabia	Industry			
6	15/1/2013	Arabian Pipes Company Joint-stock (publicly held)	Saudi Arabia	Industry	-	Acquisition	Canceled
		Welspun Middle East (limited liability company)	Saudi Arabia	Industry			

³³⁴ See Argaam.com, available at <http://www.argaam.com/company/mergerandacquisition>. (last visited February 27, 2016).

Table 3.6

Consummated transactions (Saudi-Saudi)³³⁵

	Date (D/M/Y)	Company (Acquiring/ Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	2/12/2013	Makkah Construction and Development Co. Joint-stock (publicly held)	S. A.	Real Estate Development	133 M	E	C
		Jerhm Development Co. (closed joint-stock company)	S. A.	Not Listed			
2	14/11/2013	Savola Group Joint-stock (publicly held)	S. A.	Food Industry	190 M	A	C
		Al Azizia Panda United Company Joint-stock (publicly held)	S. A.	Trade and Retail			
3	14/11/2013	Savola Group Joint-stock (publicly held)	S. A.	Food Industry	167 M	A	C
		Savola Foods (holding)	S. A.	Food Industry			
4	14/11/2014	Abdul Kadir Al Muhaidib and Sons Group (limited liability company)	S. A.	Industry	357 M	-	C
		Savola Group Joint-stock (publicly held)	S. A.	Food Industry			
5	31/10/2013	Stc	S. A.	Communications	-	A	C
		Bravo (limited liability)	S. A.	Communications			
6	8/10/2013	Aseer Co.	S. A.	Investment	151 M	A	C
		Alessa Industries (closed joint-stock company)	S. A.	Industry			
7	26/9/2013	General Organization for Social Insurance	S. A.	Investment	23 M	A	C
		Cooperative Real Estate Investment Company Joint-stock (publicly held)	S. A.	Real Estate Development			
8	26/9/2013	Public Pension Agency	S. A.	Investment	23 M	A	C
		Cooperative Real Estate Investment Company Joint-stock (publicly held)	S. A.	Real Estate Development			
9	5/8/2013	Fawaz Alhokair Group (limited liability)	S. A.	Trade and Retail	11 M	P	C
		Al Azizia Panda United Company Joint-stock (publicly held)	S. A.	Trade and Retail			
10	20/4/2013	Eastern Province Cement Company Joint-stock (publicly held)	S. A.	Cement and Building Materials		A	C
		Briansa Arabia Pre-made Concrete	S. A.	Cement and Building Materials			
11	20/4/2013	Manafea Holding Company (closed)	S. A.	Investment	-	A	C
		First Markets Co. (limited liability)	S. A.	Trade and Retail			
12	6/4/2013	Al-Tayyar Travel Tourism and Cargo Co. Ltd. (limited liability)	S. A.	Hotels and Tourism	91 M	A	C
		Muthmerah Real Estate Investment	S. A.	Real Estate Development			
13	25/3/2013	Almarai Joint-stock (publicly held)	S. A.	Food Industry	-	E	C
		Allied Farmers Company (limited liability)	S. A.	Agriculture			
14	17/3/2013	Amiantit (limited liability)	S. A.	Industry	2 M	A	C
		Fiberglass Pipe Factory, Ltd.	S. A.	Industry			
15	11/3/2013	Al Oula Real Estate Development Holding Joint-stock (publicly held)	S. A.	Real Estate Development	-	A	C
		The Stability of Real Estate Development	S. A.	Real Estate Development			
16	6/2/2013	Red Sea Housing Services Company Joint-stock (publicly held)	S. A.	Contracting	3 M	A	C
		Premier Paint Company	S. A.	Cement and Building Materials			
17	13/1/2013	Public Pension Agency	S. A.	Investment	-	-	C
		ACWA Power International Joint-stock (publicly held)	S. A.	Energy			
18	13/1/2013	Sanabil Investments (closed joint-stock company)	S. A.	Investment	-	-	C
		ACWA Power International Joint-stock (publicly held)	S. A.	Energy			
19	8/1/2013	Al-Babtain	S. A.	Industry	15 M	A	C
		Al-Babtain Liblank	S. A.	Communications			
20	7/1/2013	Jadwa Investment (closed joint-stock company)	S. A.	Brokerage and Asset Management	-	A	C
		Al Hammadi Company For Development and Investment	S. A.	Investment			

^a S. A.=Saudi Arabia; ^b E=Establishment, A=Acquisition, P=Purchase of share, ^c C=Consummated; M=Million

³³⁵ Id.

Table 3.7

Transactions under negotiation (Saudi-Saudi)³³⁶

	Date (D/M/Y)	Company (Acquiring/ Acquired)	State	Sector	Value	Type	Status
1	5/12/2013	Sahara Petrochemical Co. (public joint-stock)	Saudi Arabia	Petrochemicals	\$1,779 M	Merger	Under Negotiation
		Sipchem	Saudi Arabia	Petrochemicals			

Table 3.8

Consummated transactions (Saudi-foreigner)³³⁷

	Date (D/M/Y)	Company (Acquiring/ Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	9/12/2013	Alkhabeer Capital Joint-stock (publicly held)	S.A.	Brokerage and Asset Management	-	A	C
		Emirates Express Group	Dubai	Not listed			
2	8/12/2013	Almarai Joint-stock (publicly held)	S.A.	Food Industry	4 M	A	C
		Mead Johnson Nutrition	U.S.A	Food Industry			
3	24/11/2013	LG Electronics	Korea	Industrial Investment	1 M	p	C
		Al Hassan Ghazi Ibrahim Shaker	S.A.	Industry			
4	3/11/2013	Qurain Petrochemical Industries Company (holding)	Kuwait	Petrochemicals	232 M	A	C
		Sadafco (Public Joint-stock)	S.A.	Food Industry			
5	25/9/2013	Investcorp Joint-stock (publicly held)	Bahrain	Investment	-	A	C
		Theeb Rent a Car Company	S.A.	Transportation			
6	15/9/2013	Alkhabeer Capital Joint-stock (publicly held)	S.A.	Brokerage and Asset Management	-	A	C
		Anchor Allied Factory LTD.	Dubai	Industry			
7	15/9/2013	Investcorp Joint-stock (publicly held)	Bahrain	Investment	-	A	C
		Leejam Sports Company	S.A.	Health Care			
8	11/9/2013	Al Salam Bank-Bahrain B.S.C.	Bahrain	Islamic Banks	-	A	C
		Education Experts Co. (limited liability)	S.A.	Education and Training			
9	28/7/2013	Al Hassan Ghazi Ibrahim Shaker	S.A.	Industry	2 M	A	C
		Energy Management Services Company (EMS)	Dubai	Energy			
10	23/6/2013	Gulftainer Co. (limited liability)	Abu Dhabi	Public Utilities	133 M	A	C
		Gulf Stevedoring Contracting Company (limited liability)	S.A.	Transportation			
11	18/6/2013	Investcorp Joint-stock (publicly held)	Bahrain	Investment	-	A	C
		AYTB (limited liability)	S.A.	Oil and Gas			
12	18/2/2013	Northern Region Cement Company Joint-stock (publicly held)	S.A.	Cement and Building Materials	32 M	A	C
		Iraqi Cement State Company	Iraq	Cement and Building Materials			
13	23/1/2013	Sadafco (Public Joint-stock)	S.A.	Food Industry	-	A	C
		SADAFCO Kuwait Joint-stock (publicly held)	Kuwait	Food Industry			

^a S. A.=Saudi Arabia; A=Acquisition, P=Purchase of share, ° C=Consummated; M=Million

³³⁶ Id.

³³⁷ Id.

Table 3.9

Transactions under negotiation (Saudi-foreigner)³³⁸

	Date (D/M/Y)	Company (Acquirer/ Acquired)	State	Sector	Value	Type	Status
1	18/11/2013	Al-Hokair	S.A.	Trade and Retail	-	A	Under Negotiation
		Blanco	Spain	Trade and Retail			
2	10/11/2013	Almunajem (closed joint-stock company)	S.A.	Trade and Retail	-	A	Under Negotiation
		Doux	France	Food Industry			

^a S. A.=Saudi Arabia; A=Acquisition.

(2) 2014

Table 3.10

Canceled transactions³³⁹

	Date (D/M/Y)	Company (Acquiring/Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	19/6/2014	Saudi Fas Holding Company	S.A.		87 M	A	Canceled
		Mohammed Al Mojil Group Company (MMG) Joint-stock (publicly held)	S.A.	Construction			
2	20/3/2014	Saudi Vitrified Clay Pipes Co. Joint-stock (publicly held)	S.A.	Construction	-	A	Canceled
		Ceramic Company for pipes Joint-stock (publicly held)	S.A.				

^a S. A.=Saudi Arabia; A=Acquisition.

³³⁸ *Id.*

³³⁹ *Id.*

Table 3.11

Consummated transactions (Saudi-Saudi)³⁴⁰

	Date (D/M/Y)	Company (Acquiring/Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	9/9/2014	Swicorp (holding)	S.A.	Not Listed	-	A	C
		BRC Industrial (Saudi) Ltd. (limited liability company)	S.A.	Not Listed			
2	28/9/2014	Alkhabeer Capital Joint-stock (publicly held)	S.A.	Not Listed	-	A	C
		Ajaji Medical Group (limited liability company)	S.A.	Not Listed			
3	27/8/2014	Elkhereiji Investment Company	S.A.	Not Listed	26 M	P	C
		ACE Arabia Cooperative Insurance Company Joint-stock (publicly held)	S.A.	Insurance			
4	26/6/2014	Sabic	S.A.	Petrochemicals	360 M	A	C
		Saudi Arabian Methacrylate Company (SAMAC)	S.A.	Not Listed			
5	16/6/2014	FALCOM Financial Services	S.A.	Not Listed	-	P	C
		Nayifat Finance Company	S.A.	Not Listed			
6	12/6/2014	Olayan Saudi Investment (limited liability company)	S.A.	Not Listed	133 M	P	C
		Gulf Union Food Company	S.A.	Not Listed			
7	3/4/2014	ACWA Power International Joint-stock (publicly held)	S.A.	Not Listed	-	P	C
		Shuqaiq Water & Electricity Co. Joint-stock (publicly held)	S.A.	Not Listed			
8	26/3/2014	Hotels Co. Joint-stock (publicly held)	S.A.	Hotels and Tourism	4 M	P	C
		Saudi Hotel Services Company	S.A.	Not Listed			
9	19/3/2014	Abdullatif Alissa Group Holding Company (AAGH) (limited liability company)	S.A.	Not Listed	-	A	C
		Tanya Plant for Bottled Drinking Water, Ltd. (limited liability company)	S.A.	Not Listed			

^a S. A.=Saudi Arabia; A=Acquisition, P=Purchase of share, ^c C=Consummated; M=Million

³⁴⁰ *Id.*

Table 3.12

Transactions under negotiation (Saudi-Saudi)³⁴¹

	Date (D/M/Y)	Company (Acquiring/Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	1/10/2014	Dallah Healthcare Holding Company Joint-stock (publicly held)	S.A.	Retail	-	A	Under Negotiation
		Bagedo & Dr. Erfan General Hospital Company	S.A.	Not Listed			
2	28/9/2014	National Industrialization Company Joint-stock (publicly held)	S.A.	Petrochemicals	482 M	A	Under Negotiation
		The National Titanium Dioxide Co. Ltd. (limited liability company)	S.A.	Not Listed			
3	13/10/2014	Company Markets Abdullah Alothaim	S.A.	Retail	27 M	E	Under Negotiation
		Agad United Company for Investment	S.A.	Not Listed			
4	11/9/2014	Al Hassan Ghazi Ibrahim Shaker Co Joint-stock (publicly held)	S.A.	Industrial Investment	5 M	A	Under Negotiation
		Company Providing Gulf Trade (limited liability company)	S.A.	Not Listed			
5	23/7/2014	Takween Advanced Industries Joint-stock (publicly held)	S.A.	Industrial investment	-	A	Under Negotiation
		Savola Packaging Systems Co. (limited liability company)	S.A.	Not Listed			
6	1/4/2014	Bawan Joint-stock (publicly held)	S.A.	Construction	-	A	Under Negotiation
		Inma Pallets Co. Ltd. (limited liability company)	S.A.	Not Listed			
7	3/3/2014	Arriyadh Development Co.	S.A.	Real Estate Development	-	E	Under Negotiation
		Al Bassami International Group Joint-stock (publicly held)	S.A.	Not Listed			

^a S. A.=Saudi Arabia; ^b E=Establishment, A=Acquisition; M=Million

³⁴¹ *Id.*

Table 3.13

Consummated transactions (Saudi-foreigner)³⁴²

	Date (D/M/Y)	Company (Acquiring/ Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	26/6/2014	China Power Investment Corporation (CPIC)	China	Construction	28 M	P	C
		Amiantit Co. Joint-stock (publicly held)	S.A.	Construction			
2	9/5/2014	Zahid Group (limited liability company)	S.A.	Not Listed	-	P	C
		.total	France	Oil and Energy			
3	31/3/2014	Al-Tayyar Travel Group (closed joint-stock company)	S.A.	Hotels and Tourism	11 M	A	C
		Alhanov for Tourism and Services	Egypt	Not Listed			
4	4/8/2014	Saudi Binladin Group (SBG)	S.A.	Not Listed	60 M	P	C
		Marmi Di Carrere	Italy	Construction			
5	26/3/2014	HANCO	S.A.	Not listed	163 M	A	C
		Bayern Investment Co., Ltd.	UAE	Investment			
6	8/2/2014	Al-Tayyar Travel Group (closed joint-stock company)	S.A.	Hotels and Tourism	23 M	A	C
		Elegant Resorts Inc.	Britain	Hotels and tourism			

^a S. A.=Saudi Arabia; UAE=United Arab Emirates, A=Acquisition, P=Purchase of share, ° C=Consummated; M=Million

³⁴² *Id.*

Table 3.14

Transactions under negotiation (Saudi-foreigner)³⁴³

	Date (D/M/Y)	Company (Acquirer/Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	21/8/2014	Citadel Capital SAE (CCAP)	Egypt	Investment	180 M	A	Under Negotiation
		Construction Products Holding Company (CPC) Joint-stock (publicly held)	S.A.	Not Listed			
2	13/8/2014	Savola Group Joint-stock (publicly held)	S.A.	Agriculture and Food Industries	5 M	A	Under Negotiation
		Kuwait Food Company Joint-stock (publicly held)	Kuwait	Consumer Goods			
3	16/6/2014	Buruj Cooperative Insurance Company Joint-stock (publicly held)	S.A.	Insurance	320 K	E	Under Negotiation
		Bahrain Gulf Guarantees Company	Bahrain	Not Listed			
4	10/6/2014	Abraaj Capital (limited liability company)	Dubai	Not Listed	400 M	A	Under Negotiation
		Kudu	S.A.	Not Listed			
5	15/9/2014	Al-Babtain	S.A.	Construction	-	A	Under Negotiation
		Al Babtain Contracting Company	Qatar	Not Listed			
6	28/5/2014	Al-Tayyar Travel Group (closed joint-stock company)	S.A.	Hotels and Tourism	23 M	A	Under Negotiation
		C.T.M	Britain	Travel and Tourism			
7	14/5/2014	Sabir	S.A.	Petrochemicals	-	E	Under Negotiation
		Lockheed Martin Co.	U.S.A	Oil and Energy			
8	25/2/2014	Kingdom Holding Joint-stock (publicly held)	S.A.	Multilateral Investment	200 M	P	Under Negotiation
		Square Co.	U.S.A	Information Technology			

^a S. A.=Saudi Arabia; ^b E=Establishment, A=Acquisition, P=Purchase of share, ^c C=Consummated; M=Million, K= 000

³⁴³ Id.

(3) 2015

Table 3.15

Consummated transactions (Saudi-Saudi)³⁴⁴

	Date (D/M/Y)	Company (Acquiring/Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	26/1/2015	Mubarrad	S.A.	Transportation	48 M	P	C
		Arab Company for Security and Safety Services (Flamenco)	S.A.	Not Listed			
2	4/3/2015	Imran International Investment and Real Estate Development	S.A.	Not Listed	3 M	P	C
		Eastern Development Company	S.A.	Agriculture and Food Industry			
3	19/3/2015	Ahsa Development Co.	S.A.	Investment	11 M	A	C
		Al-Ahsa Medical Services Co.	S.A.	Healthcare			
4	3/5/2015	Saudi Industries Development Company	S.A.	Not Listed	8 M	P	C
		Qassim Cement Company – QACCO	S.A.	Cement			

^a S. A.=Saudi Arabia; A=Acquisition, P=Purchase of share, ^c C=Consummated; M=Million

Table 3.16

Transactions under negotiation (Saudi-Saudi)³⁴⁵

	Date (D/M/Y)	Company (Acquiring/Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	17/3/2015	Takween Advanced Industries	S.A.	Industrial Investment	243 M	A	Under Negotiation
		Savola Packaging Systems	S.A.	Not Listed			
2	23/3/2015	Mubarrad	S.A.	Transportation	-	P	Under Negotiation
		Melhem & Trading & Transport (limited liability company)	S.A.	Not Listed			
3	7/5/2015	Albaha Co.	S.A.	Multi-Investment		A	Under Negotiation
		The members of the Board of Directors Company	S.A.	Not Listed			
4	24/5/2015	Zoujaj	S.A.	Industrial Investment	-	P	Under Negotiation
		(SANLEC) Saudi National Company for Lighting and electricity	S.A.	Not Listed			

^a S. A.=Saudi Arabia; A=Acquisition, P=Purchase of share, M=Million

³⁴⁴ Id.

³⁴⁵ Id.

Table 3.17

Consummated transactions (Saudi-foreigner)³⁴⁶

	Date (D/M/Y)	Company (Acquiring/Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	4/3/2015	Public Investment Fund	S.A.	Not Listed	1 B	P	C
		Posco	Korea	Industry			
2	10/3/2015	Al Hassan Ghazi Ibrahim Shaker Company	S.A.	Industry	-	A	C
		UAE Energy Management Services Company	Dubai	Energy			
3	10/3/2015	Gulf Insurance Group	Kuwait	Insurance	-	P	C
		Bruges Cooperative Insurance Company	S.A.	Insurance			
4	4/5/2015	Pharmaceutical Co.	S.A.	Industrial investment	19 M	A	C
		Mevo of International Pharmaceutical Industries	Egypt	Not Listed			
5	4/5/2015	Al Muhaidib Group	S.A.	Not Listed	-	A	C
		Abyat Megastore	Kuwait	Not Listed			
6	5/5/2015	Printing & Packaging	S.A.	Media and Publishing	175 M	A	C
		Emirates National Factory for Plastic Industries	Dubai	Not Listed			
7	6/5/2015	American OPCW company	U.S.A	Industrial investment	65 M	P	C
		Pharmaceutical co.	S.A.	Industrial investment			

^a S. A.=Saudi Arabia; A=Acquisition, P=Purchase of share, ° C=Consummated; B= Billion, M=Million

Table 3.18

Canceled transactions³⁴⁷

	Date (D/M/Y)	Company (Acquiring/Acquired)	State	Sector	Value	Type	Status
1	30/11/2015	Rapid Group	S.A.	Industrial Investment	-	A	Canceled
		Jackson Carpet	China	Industry			
2	11/8/2015	Al Fakhareyah	S.A.	Construction	-	A	Canceled
		Arab Company for Water "Aqua Pipe Tubes"	S.A.	Not Listed			
3	10/9/2015	Moprd	S.A.	Transportation	-	A	Canceled
		Future Melhem & Trading & Transport	S.A.	Not Listed			

^a S. A.=Saudi Arabia; A=Acquisition.

³⁴⁶ Id.

³⁴⁷ Id.

Table 3.19

Consummated transactions (Saudi-Saudi)³⁴⁸

	Date (D/M/Y)	Company (Acquirer/Acquired)	State	Sector	Value	Type	Status
1	26/1/2015	Moprd	S.A.	Transportation	SAR 180,3 M	A	C
		Arab Company for Security and Safety Services (Flamenco)	S.A.	Not Listed			
2	4/3/2015	Imran International Investment and Real Estate Development	S.A.	Not Listed	\$3 M	P	C
		East Development	S.A.	Agriculture and Food Industry			
3	19/3/2015	Al-Ahsa Development	S.A.	Investment	\$11 M	A	C
		Ahsa Medical Services	S.A.	Healthcare			
4	3/5/2015	Saudi Industries Development	S.A.	Not Listed	\$8 M	P	C
		Qassim Cement	S.A.	Cement			
5	17/3/2015	Cutting-edge Industries Formation	S.A.	Industrial investment	SAR 910 M	A	C
		Savola Packaging Systems	S.A.	Not Listed			
6	24/5/2015	Glass	S.A.	Industrial Investment	SAR 15,4 M	P	C
		Saudi National for Lighting and Electricity (Sanlk)	S.A.	Not Listed			
7	3/6/2015	Al-Ahas Development	S.A.	Investment	SAR 6,9 M	P	C
		Al-Ahsa Medical Services	S.A.	Healthcare			
8	14/07/2015	Private Air Arabia	S.A.	Not Listed	-	A	C
		Saudi Private Airline	S.A.	Not Listed			
9	13/08/2015	Al Tayyar Travel Group	S.A.	Hotels and tourism	SAR 8 M	A	C
		Aakonuks Group Ltd.	S.A.	Not Listed			
10	28/10/2015	United Industries Company Cartoon	S.A.	Not Listed	SAR 22 M	P	C
		Aseer	S.A.	Multi-Investment			
11	1/11/2015	NCB Capital Fund No. (13) and (4)	S.A.	Not listed	SAR 1,55 B	A	C
		Research and Marketing	S.A.	Media and Publishing			
12	7/12/2015	Al Tayyar Travel Group	S.A.	Hotels and Tourism	SAR 22 M	A	C
		Saudi Arabia Traveler Company	S.A.	Not Listed			
13	24/12/2015	Kingdom Holding	S.A.	Multi-Investment	SAR 393,3 M	A	C
		American Lift Transport Services Company (Lyft)	S.A.	Transportation			

^a S. A.=Saudi Arabia; A=Acquisition, P=Purchase of share, ° C=Consummated; B= Billion, M=Million, \$=U.S. dollar, SAR= Saudi riyal

³⁴⁸ Id.

Table 3.20

Transactions under negotiation (Saudi-Saudi)³⁴⁹

	Date (D/M/Y)	Company (Acquirer/Acquired)	State	Sector	Value	Type	Status
1	7/6/2015	United Electronics - Extra	S.A.	Retail	-	A	Under Negotiation
		International Regions Company	S.A.	Not Listed			
2	23/3/2015	Moprd	S.A.	Transportation	-	P	Under Negotiation
		Future Melhem & Trading & Transport	S.A.	Not Listed			
3	7/5/2015	Baha	S.A.	Multi-Investment	-	A	Under Negotiation
		High-end Centers, Ltd.	S.A.	Not Listed			
4	15/07/2015	ENOC Retail Arabia	S.A.	Not Listed	\$9 M	P	Under Negotiation
		Drees	S.A.	Retail			
5	16/08/2015	Al Tayyar Travel Group	S.A.	Hotels and Tourism	SAR 803,8 M	P	Under Negotiation
		Zakhr Development Company and Real Estate Investment	S.A.	Not Listed			
6	7/9/2015	Baha	S.A.	Multi-Investment	SAR145 M	A	Under Negotiation
		High-end Centers, Ltd.	S.A.	Not Listed			
7	13/09/2015	Abdul Qadir al-Bakri and His Sons Holding	S.A.	Not Listed	-	P	Under Negotiation
		Moprd	S.A.	Transportation			
8	13/09/2015	Moprd	S.A.	Transportation	-	P	Under Negotiation
		Sea World Inc.	S.A.	Not Listed			
9	28/10/2015	Saudi Arabia and a Number of Tools (Sacco)	S.A.	Retail	-	A	Under Negotiation
		Mdscan Terminal Co. Ltd.	S.A.	Not Listed			
10	16/11/2015	Glass	S.A.	Industrial Investment	-	A	Under Negotiation
		Guardian Glass Arabia	S.A.	Not Listed			
11	25/11/2015	Sophisticated	S.A.	Multi-Investment	SAR 120,5 M	P	Under Negotiation
		Saudi Calcined Petroleum Coke	S.A.	Not Listed			

^a S. A.=Saudi Arabia; A=Acquisition, P=Purchase of share, M=Million, \$=U.S. dollar, SAR= Saudi riyal

³⁴⁹ *Id.*

Table 3.21

Consummated transactions (Saudi-foreigner)³⁵⁰

	Date (D/M/Y)	Company (Acquirer/Acquired)	State	Sector	Value	Type	Status
1	4/3/2015	Public Investment Fund	S.A.	Not Listed	\$1 B	P	C
		Posco	Korea	Industry			
2	10/3/2015	Hassan Shaker	S.A.	Industry	SAR 1,5 M	P	C
		Energy Management Services	Dubai	Energy			
3	10/3/2015	Gulf Insurance Group	Kuwait	Insurance	-	P	C
		Bruges Cooperative Insurance	S.A.	Insurance			
4	4/5/2015	Pharmaceutical	S.A.	Industrial Investment	\$19 M	A	C
		Mevo International Pharmaceutical Industries	Egypt	Not Listed			
5	4/5/2015	Mhaideb group	S.A.	Not Listed	-	A	C
		Verses Megastore	Kuwait	Not Listed			
6	5/5/2015	Printing and Packaging	S.A.	Media and Publishing	SAR 114,1 M	A	C
		Emirates National Plastic Industries Plant	Dubai	Not listed			
7	6/5/2015	US OPCW company	USA	Industrial Investment	\$65 M	P	C
		Pharmaceutical	S.A.	Industrial Investment			
8	14/07/2015	Investcorp	Bahrain	Investment	-	A	C
		Corrosion Prevention Services Company (NDT)	S.A.	Not Listed			
9	9/8/2015	Holding the Secretariats	Dubai	Services	\$48 M	A	C
		Global Stillness	S.A.	Not Listed			
10	7/10/2015	Kingdom Holding	S.A.	Investment	SAR 187,5 M	P	C
		Twitter	USA	Information technology			
11	19/11/2015	Saudi Telecom	S.A.	Telecommunications	SAR 4,6 B	A	C
		Viva Kuwait	Kuwait	Telecommunications			
12	29/11/2015	Pharmaceutical	S.A.	Industrial Investment	SAR 74,9 M	A	C
		Mevo International Pharmaceutical Industries	Egypt	Industrial Investment			
13	3/12/2015	French Sovereign Fund	France	Investment	SAR 563 M	A	C
		Kingdom Holding	S.A.	Multi-Investment			
14	24/01/2016	Investcorp	Bahrain	Investment	-	P	C
		Bin Dawod Holding Group	S.A.	Not Listed			

^a S. A.=Saudi Arabia; A=Acquisition, P=Purchase of share, ^c C=Consummated; B= Billion, M=Million, \$=U.S. dollar, SAR= Saudi riyal

³⁵⁰ Id.

Table 3.22

Under negotiation (Saudi-foreigner)³⁵¹

	Date (D/M/Y)	Company (Acquirer/Acquired)	State	Sector	Value in U.S. dollars	Type	Status
1	24/06/2015	Global Sipchem	S.A.	Petrochemicals	100 M	A	Under Negotiation
		Ikarus Petroleum Industries	Kuwait	Oil and Gas			
2	16/11/2015	Glass	S.A.	Industrial Investment	-	A	Under Negotiation
		Qardian International Glass Float Glass (Qardian Ras Al Khaimah)	Abu Dhabi	Not Listed			

^a S. A.=Saudi Arabia; A=Acquisition, M=Million.

Additional Charts

Further data on M&A activities in Saudi Arabia was obtained from a different resource:

MergerMarket.³⁵² Table 3.23 was accompanied by the following note:

Based on announced deals, excluding lapsed and withdrawn bids, [and] based on [the] dominant geography of Target Company being Saudi Arabia, [this] includes all deals valued over USD 5m[;] where [the] deal value [is] not disclosed, [the] deal has been entered based on turnover of target exceeding USD 10m, and activities excluded from [the] table include property transactions and restructurings where the ultimate shareholders' interests are not changed.³⁵³

It is difficult to calculate M&A numbers with 100% accuracy because parties involved in private M&A transactions are not required, by law, to disclose the details of their deals. This makes it difficult (and in some cases impossible) to determine the exact number of M&A deals occurring in any given country in any given time frame. The Ministry of Commerce and Industry should have the exact number of M&A deals for Saudi Arabia.

³⁵¹ *Id.*

³⁵² The author obtained this data directly through email from MergerMarket. Their website is available at <http://www.mergermarket.com/info/> (last visited January 22, 2015).

³⁵³ *Id.*

Table 3.23

The number and value of M&A deals in Saudi Arabia and in the Middle East

	Saudi Arabia		Middle East ³⁵⁴		Saudi share in total middle East value
	Deal value (US \$M)	Deal count	Deal value (US \$M)	Deal count	
2007	3,179	15	27,778	173	11.4%
2008	3,050	19	17,955	201	17.0%
2009	728	13	18,502	124	3.9%
2010	56	7	14,073	147	0.4%
2011	2,257	20	13,150	141	17.2%
2012	1,223	13	19,560	152	6.3%
2013	2,493	28	24,648	163	10.1%
2014	1,657	22	22,917	187	7.2%
2015	1,319	21	20,371	164	6.5%

³⁵⁴ *Id.* As the email mentioned, the charts presented in this chapter contain data run from January 1, 2007 to December 31, 2014, and updated by the author as of January, 2016.

Chapter 4: M&A and the Saudi Competition Law (Antitrust)³⁵⁵

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³⁵⁵ Relevant articles and rules cited in this chapter are provided in Appendices 4A, 4B, and 4C.

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§4.1. Scope

This chapter begins (Section 4.2) with a very brief overview of microeconomics, discusses general principles of antitrust laws and merger control regulations, introduces the Saudi Competition Law, and provides basic illustrations. The rules that govern the pre-merger notification process are addressed in Section 4.3, including rules pertaining to the right and process of appealing the Competition Council's decisions. Section 4.4 explains the principles of the Competition Law and analyzes the rules governing M&A economic concentration requests. Several decisions rendered by the Competition Council regarding M&A are discussed in Section 4.5. Sections 4.6 and 4.7 detail interviews conducted by the author with members of the Competition Council. Section 4.8 provides a critique of the Saudi Competition Law regarding M&A. Section 4.9 considers the South African Competition Law, which the author addresses in order to provide suggestions that Saudi legislators may use to improve the rules of the Saudi Competition Law. Section 4.10 offers a comprehensive list of recommendations that may be used to improve, amend and enhance the provisions of the Saudi Competition Law that govern M&A transactions.

§4.2. Introduction

This Introduction aims to provide a brief economic background and basic economic principles that may facilitate the reader's understanding of the issues surrounding M&A transactions in Saudi Arabia. It also briefly touches on Saudi's policy regarding antitrust laws. Finally, this section introduces the Saudi Competition Law.

A. Economic background

1. Four market structures

Microeconomics generally contemplates four types of market structure: perfect competition, monopolistic competition, oligopoly and monopoly.³⁵⁶ These are the characteristics of the four structures: 1) perfect competition—the number of firms is many, the product type is identical and the ease of entry into the marketplace is high; 2) monopolistic competition—the number of firms is many, the product type is differentiated and the ease of entry is high; 3) oligopoly—the number of firms is few, the product type is identical or differentiated and the ease of entry is low; 4) monopoly—the number of firms is one, the product type is unique and entry to the marketplace is blocked.³⁵⁷

2. The effects of the market structure on price and production

Market profit maximization is an economic concept that determines the output that a firm can produce.³⁵⁸ Market profit maximization is reached when the marginal revenue equals the marginal cost.³⁵⁹ In a situation of perfect competition, a firm sells a product at a price that is equal to the marginal cost for as long as consumers are willing to buy the product.³⁶⁰ In contrast, in a monopolistic market, the monopolist sells a product at a price that is higher than the marginal cost, and the firm's output does not always meet consumer demand.³⁶¹ Therefore, the monopolist may cause a decrease in consumer surplus and an increase in producer surplus, which may result in deadweight loss, which decreases the economic efficiency of the market.³⁶²

³⁵⁶ ASHRAF EID, AMANY EL ANSHASY, R. GLENN HUBBARD, & ANTHONY O'BRIEN, *ECONOMICS*, 266 (England, Essex, Pearson Education Limited, 2011).

³⁵⁷ *Id.* See also JEFFREY M. PERLOFF, *MICROECONOMICS*, 7th ed, 426 (New Jersey, Prentice Hall, 2014).

³⁵⁸ ASHRAF EID, *supra* note 356, at 270-72.

³⁵⁹ *Id.*

³⁶⁰ *Id.* at 369-70.

³⁶¹ *Id.*

³⁶² *Id.* at 370.

Firms in a situation of perfect competition are known as price takers,³⁶³ which means they accept prices as they are; they do not have influence over prices, and they cannot determine product output.³⁶⁴ On the other hand, the monopolist firm operating in a monopolistic market is known as a price maker, meaning that the monopolist determines price and output.³⁶⁵ In perfect competition, firms cannot influence price; if a firm tries to raise a price, consumers switch to another firm's product that is selling at a lower price, which typically causes the firm that raised its prices to lose sales and perhaps to lose market share permanently.³⁶⁶ Two main economic objectives are achieved in a perfect competition market: (1) productive efficiency, which means that products are produced at the lowest cost possible, and (2) allocative efficiency, which means that production meets the consumer's preference, or (in other words), that "every good or service is produced up to the point where the last unit provides a marginal benefit to consumers equal to the marginal cost of producing."³⁶⁷ Although conditions of either perfect competition or monopoly are rare, they establish a benchmark (respectively) for how firms would behave in a perfectly competitive market and of how a monopolist firm would behave in a monopolistic market.³⁶⁸

Products produced by firms acting in an oligopoly may be differentiated or identical; the oligopoly's most important characteristic is that it contains only a few firms in competition with each other.³⁶⁹ Firms in an oligopolistic market decide price and output based on the behavior of

³⁶³ FRED M. GOTTHEIL, *PRINCIPLES OF ECONOMICS*, 7th ed, 257 (Mason, Ohio, Cengage Learning, 2013).

³⁶⁴ *Id.* at 251. See also ASHRAF EID, *supra* note 356, at 365.

³⁶⁵ *Id.* See also ASHRAF EID, *supra* note 356, at 365.

³⁶⁶ ASHRAF EID, *supra* note 357, at 267.

³⁶⁷ *Id.* at 288 and 315. See also ROBERT S. PINDYCK AND DANIEL L. RUBINFELD, *MICROECONOMICS*, 5th ed, 288-94, (New Jersey, Prentice Hall, 2000).

³⁶⁸ ASHRAF EID, *supra* note 356, at 358.

³⁶⁹ PINDYCK AND RUBINFELD, *supra* note 367, at 430.

their competitors.³⁷⁰ This makes this type of market very complicated, because a firm's decisions are determined by the reactions of its competitors.³⁷¹

Note that monopolistic competition is similar to perfect competition, except that in a monopolistic competition, products are differentiated.³⁷² In a situation of monopolistic competition, firms have little influence over prices, and little ability to raise prices, because monopolistic competition by definition means the existence of a variety of substitutes; therefore, products become less differentiated, and close substitutes become available if prices do rise, because consumers will rapidly and predictably switch to a close substitute instead of paying a higher price for the original product.³⁷³ Productive efficiency and allocative efficiency are achieved in a perfect competition, and they are not achieved in a monopolistic competition.³⁷⁴ However, it is possible in some cases that consumers may benefit from monopolistic competition,³⁷⁵ if companies become motivated to compete and innovate in order to attract the interest of consumers who may be willing—based on their taste for a specific iteration of a product, rather than on an inelastic (simple) need for any version of that product—to pay a slightly higher price for the differentiated version of the product.³⁷⁶

3. Market power

This brief microeconomic introduction provides a glimpse of the importance of market factors in relation to mergers and acquisitions activity. Market factors shape the power and ability of a firm to affect prices, which is an essential concern for regulators attempting to ensure

³⁷⁰ *Id.* at 429-30.

³⁷¹ *Id.*

³⁷² GOTTHEIL, *supra* note 363, at 251.

³⁷³ *Id.*

³⁷⁴ ASHRAF EID, *supra* note 356, at 315.

³⁷⁵ *Id.*

³⁷⁶ *Id.*; PERLOFF, *supra* note 357, at 425.

that such power is limited or prevented.³⁷⁷ However, as the following quote illustrates, not every market power needs to be regulated by the intervention of antitrust laws, because some work themselves out organically:

Market power is a seller's ability to exercise some control over the price it charges. In our economy, few firms are pure price takers facing perfectly elastic demand.[...] For example, the unique location of a dry cleaner may confer slight market power because some customers are willing to pay a little more rather than walk an extra block or two to the next-closest dry cleaner. Economists say the dry cleaner possesses market power, if only to a trivial degree. Virtually all products that are differentiated from one another, if only because of consumer tastes, seller reputation, or producer location, convey upon their sellers at least some degree of market power. Thus, a small degree of market power is very common and understood not to warrant antitrust intervention[...]³⁷⁸

Governments regulate mergers, because mergers can increase the market power of the merging firms, which may in turn lead to a reduction of output and an increase in prices.³⁷⁹ Governments usually establish laws designed to evaluate the tradeoff between the market power that may result from the merger and the efficiency that the merger (if allowed) may create in the market.³⁸⁰

B. Policy of antitrust laws

1. In general

Antitrust laws may be applied to prohibit monopolization and attempted monopoly that may cause unfair or unreasonable conduct in the marketplace that limits and restrains competition.³⁸¹ In general, economists recognize certain factors that should be regulated in a marketplace for the purposes of competition; for example, a company may be regulated in order

³⁷⁷ *Id.* at 346, 395.

³⁷⁸ U.S. Department of Justice, *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008)*, Chapter 2, Section I, available at http://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2#N_7_ (last visited February 26, 2016).

³⁷⁹ ASHRAF EID, *supra* note 356, at 372.

³⁸⁰ ASHRAF EID, *supra* note 356, at 372-73.

³⁸¹ WILLIAM S. COMANOR AND AKIRA GOTO, *COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR CO-OPERATION*, 373 (New York, Routledge, 2005). See also The Federal Trade Competition's website, available at <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined> (last visited February 26, 2016).

to fix a market failure or to find a solution for a political conflict.³⁸² The majority of economists agree that the main goal of antitrust legislation is to enhance and promote economic efficiencies.³⁸³ Many scholars have debated what factor is most important in determining a policy of antitrust regulation: economic efficiencies, consumer welfare or incentivizing innovation.³⁸⁴ Market inefficiencies may arise from monopolization and a company's exertion of monopolistic power.³⁸⁵ The damage that a monopoly³⁸⁶ or a monopolistic market may cause includes low output of product, higher prices³⁸⁷ and less innovation.³⁸⁸ Saudi legislators should consider the goals of economic efficiency, consumer welfare and innovation as they examine different antitrust policies;³⁸⁹ maintaining a focus on these goals may inspire them to find

³⁸² See Richard E. Caves, *American Industry: Structure, Conduct, Performance*, 7th ed, Chapter 7 (New Jersey, Prentice Hall, 1992). See also George J. Stigler, *The Theory of Economic Regulation*, THE BELL JOURNAL OF ECONOMICS AND MANAGEMENT SCIENCE, Vol. 2, No. 1 (Spring, 1971), 3-21; James Q. Wilson, *The Politics of Regulation*, (New York, Basic Books, 1980); Alfred E. Kahn, *The Economics of Regulation: Principles and Institutions*, (Boston, MA, The MIT Press, 1988); Alfred E. Kahn, *Lessons from Deregulation: Telecommunications and Airlines after the Crunch*, (AEI-Brookings Joint Center for Regulatory Studies, 2003); and Thomas B. Nachbar, *Monopoly, Mercantilism, and The Politics of Regulation*, 1313-1379, VIRGINIA LAW REVIEW, Volume 91, October 2005, Number 6.

³⁸³ DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION, 634 (4th ed, Pearson Addison Wesle, 2005).

³⁸⁴ See THOMAS E. SULLIVAN, HERBERT HOVENKAMP, HOWARD A. SHELANSKI, ANTITRUST LAW, POLICY AND PROCEDURE: CASES, MATERIALS, PROBLEMS, Chapter 1, Section 1 (Aspen Publishing, 2014).

³⁸⁵ CARLTON AND PERLOFF, *supra* note 383, at 686.

³⁸⁶ The case of a natural monopoly in some markets may be an exception to this statement; specifically, a situation in which one company provides all of the product at price lower than would be the case if two or more companies were providing product may benefit the monopolist as well as the consumer; see CARLTON AND PERLOFF at 104-05 and 691-92.

³⁸⁷ CARLTON AND PERLOFF, *supra* note 383, at 635-38.

³⁸⁸ *Id.* at 99 and 691.

³⁸⁹ It is vital for Saudi Arabia to focus on finding the most effective and efficient economic policy that fits its geography, size, culture and future, rather than adopting regulations derived from countries that have worked for decades to find suitable models for their own unique economies. The content of this footnote is the result of the author observing that Saudi has not adopted a clear and particular economic policy. Policies and economic goals should be clear to legislators, economists and investors. Professor Bhattacharjea states that developed countries have adopted and developed competition laws with various goals such as "legitimizing the growing role of big business by giving the impression that its worst features would be controlled; protecting small firms, or employee or investors in the bigger firms that were in danger of failing; building "national champions"; controlling prices; or integrating the European market." See ADITYA BHATTACHARJEA, COMPETITION LAW AND DEVELOPMENT: WHO NEEDS ANTITRUST?, 65. Professor Bhattacharjea suggests that developing countries should build their antitrust laws on indisputable economic principles and, further, that developing countries would be better served by learning from the experiences of their (developing) peer countries, rather than that of already developed countries. See Chapter 3 at 52-3. For more observations and approaches about economic policy regarding competition, see JALAL AMEEN, THE PHILOSOPHY OF ECONOMICS (RESEARCH ON THE BIAS OF ECONOMISTS AND UNSCIENTIFIC FOUNDATION OF

policies that best fit the needs and situation of the Kingdom.³⁹⁰ Competition laws created by developed countries such as the United States and Europe are generally what might be called “economic-based model[s].”³⁹¹ Competition laws that are based on economic models generally tend to be rational, neutral, predictable and tool-supported; they encourage factual reasoning in application and only allow intervention when an economic justification is proved.³⁹²

2. Policy of merger control

Merger control regulations focus on the market power and dominance of companies.³⁹³ Such regulations aim to determine how the market will look before and after the merger, in terms of price increases that may result from an economic concentration caused by the merger.³⁹⁴ These regulations attempt to define the product and geographic areas relevant to the merging companies in order to understand the market share controlled by these companies, and thus to better understand their market power.³⁹⁵ However, market share is not only the factor that can be

ECONOMICS), 44, 108-40, (Dar Alshrooq, Cairo, Egypt, 2009). [in Arabic] See also EAMONN BUTLER, AUSTRIAN ECONOMICS: A PRIMER, (Ludwig Von Mises Institute, 2009); JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY, (CreateSpace Independent Publishing Platform, 2011); NOAM CHOMSKY, PROFIT OVER PEOPLE: NEOLIBERALISM & GLOBAL ORDER, (Seven Stories Press, 1999).

³⁹⁰ Saudi lawmakers should determine whether they wish to enact antitrust laws and regulations in order to enhance the economic efficiency of the Saudi market, or to protect consumer welfare, or both. This task is not easy and will require exhaustive work at the legislative, executive, judicial and academic (theoretical) levels. Professor Paul Krugman describes antitrust policy as “a blunt instrument” that can be used by different people in different ways. See Paul Krugman, *Barons of Broadband*, THE NEW YORK TIMES, February 16, 2014, available at <http://mobile.nytimes.com/2014/02/17/opinion/krugman-barons-of-broadband.html?referrer=&r=0> (last visited December 17, 2015). See also SUSAN P. CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE, (Yale University Press, 2013). For instance, while antitrust policy in the United States has caused allocation inefficiencies, it has also encouraged technical efficiency and innovation. Professor Porter calls for new policies that would revise treatment of mergers and joint ventures to focus on productivity growth. See Michael E. Porter, *Competition and Antitrust: A Productivity-Based Approach*, Revised May 30, 2002, Institute for Strategy and Competitiveness, Harvard Business School, 11-12, available at <http://www.isc.hbs.edu/Documents/pdf/053002antitrust.pdf> (last visited December 17, 2015). See also Michael E. Porter, *The Five Competitive Forces That Shape Strategy*, January 2008 Issue, Harvard Business School, available at <https://hbr.org/2008/01/the-five-competitive-forces-that-shape-strategy/ar/1>. (last visited December 17, 2015).

³⁹¹ D. DANIEL SOKOL, THOMAS K. CHENG, AND IOANNIS LIANOS, COMPETITION LAW AND DEVELOPMENT SERIES: GLOBAL COMPETITION LAW AND ECONOMICS, 13-7, (Stanford University Press, 2003).

³⁹² *Id.* at 26-7.

³⁹³ CARLTON AND PERLOFF, *supra* note 383, at 642.

³⁹⁴ *Id.* at 642-44.

³⁹⁵ *Id.* at 644.

utilized to determine the market power of merging companies.³⁹⁶ In order to control mergers and prevent concentrating actions that might strengthen a company's market power, merger control regulations around the world tend to set value thresholds.³⁹⁷ These thresholds take the form of certain values in certain currencies; if merging companies trigger the thresholds, they must notify the relevant authorities, which may review the companies to ensure they will not have an anti-competitive affect on a particular market.³⁹⁸

C. Introduction to the Saudi Competition Law

1. In general

Beginning with the creation of the Saudi Antitrust Law in 2004,³⁹⁹ this Subsection discusses how Saudi M&A Regulation requires that the takeover of a publicly-held corporation must comply with the Saudi Competition Law during the period of offer—this subject is addressed in more detail in Chapter 6. Although the provisions of Subsection C.3 may appear obvious to a legal practitioner, this paper provides this Subsection in order to help the average Saudi reader comprehend the Saudi Competition Law. Subsection C.4 briefly introduces the focus, approach and relationship of the M&A Regulation and the Competition Law in Saudi Arabia.

³⁹⁶ *Id.* at 644.

³⁹⁷ See the list of merger control thresholds around the globe, Practical Law's website, Thompson Reuters, available at <http://us.practicallaw.com/2-557-0145?source=relatedcontent> (last visited February 29, 2016).

³⁹⁸ *Id.*

³⁹⁹ The Competition Law, Royal Decree No. M/25, Dated 4/5/1425H, amended in 2013; Royal Decree No. M/25, Dated 11/4/1435H. See The Competition Council's website, available at <http://mci.gov.sa/en/LawsRegulations/SystemsAndRegulations/CompetitionSystem/Pages/default.aspx> (last visited November 3, 2015).

2. The enactment of the Saudi Competition Law

The Saudi Competition Law was enacted in 2004.⁴⁰⁰ It established the Competition Council⁴⁰¹ and assigned to it the duty of enacting a regulation that would explain and clarify the Competition Law.⁴⁰² The regulation that was thus created is known as the “Implementing Regulation of the Competition Law.”

3. The Competition Law’s provision for listed corporations in public takeovers

In Saudi Arabia, any mergers and acquisitions activity that falls within the scope of the Competition Law must comply with that law, and parties wishing to undertake M&A activity must receive approval from the Competition Protection Council.⁴⁰³ The M&A offer must state that if the offer is rejected by the Competition Protection Council, the offer will be withdrawn.⁴⁰⁴ In such a case, a new offer may be made within 21 days of the Competition Protection Council’s decision of refusal, as stated in Article 16 of the M&A Regulation:

Compliance of the Offer with Competition Law

(a) Notification, where an offer would, if completed, be subject to the Competition Law, the offeror must state that this is the case in its announcement. The offeree company and the offeror must notify the Council of Competition Protection pursuant to the provisions of the Competition Law.

(b) Requirement for Appropriate Term in Offer, Where an offer would, if completed, be subject to the Competition Law, it must be a term of the offer that it will lapse if the Council of Competition Protection notifies the offeror or the offeree company in writing that it objects to the deal or has placed it under study and review as specified in the Competition Law.

(c) Offer Period Ceases During Competition Reference Period, When an offer or possible offer is objected to by the Council of Competition Protection, placed under study or

⁴⁰⁰ *Id.*

⁴⁰¹ The Saudi Competition Law, art. 8(1).

⁴⁰² The Saudi Competition Law, art. 9(6).

⁴⁰³ M&A Regulation, art. 16. The M&A Regulation was enacted by the Capital Market Authority in 2007. *See* <http://www.alriyadh.com/284496>.

⁴⁰⁴ *Id.*

forms the subject of proceedings or inquiries pursuant to paragraph (b), the offer period will end. Any new offer must be announced within 21 days after the announcement of a final decision made that the transaction is permissible under the Competition Law. A new offer period will be deemed to begin on the date on which a final decision made that the transaction is permissible under the Competition Law. If there is no announcement of a new offer within 21 days after the announcement of a final decision [is] made that the transaction is permissible under the Competition Law, this offer period will last until either the expiry of the 21 day period or the announcement by all relevant offerors (affected by the decision that the transaction is permissible under the Competition Law) that they do not intend to make an offer, whichever is earlier.⁴⁰⁵

Even though the M&A Regulation only applies to listed companies, the Competition Law covers all M&A transactions that fall under the meaning of the Saudi Competition Law and its Implementing Regulation, because the law is general and does not specify specific forms of corporations. Thus, the author mentions the related M&A Regulation Articles in order to provide more details regarding listed companies. Other than these details, all M&A transactions follow the same steps that the Competition Law and its Implementing Regulation require.

4. Clarification of the use of mergers and acquisitions in the Competition Law

This Subsection arises as result of discussions held by the author with several Saudi attorneys and legal consultants during the course of researching this dissertation.

Given that Saudi's M&A Regulation deals only with listed companies and require any acquisition offers to comply with the Competition Law, and given that the Competition Law specifies only merger agreements, one may believe there is a contradiction between the two laws. Article 6 specifies that mergers and other types of purchase agreements, such as asset purchase agreements or stock purchase agreements, must be approved by the Council under certain

⁴⁰⁵ M&A Regulation, art. 16.

conditions; however, the Competition Law does not mention the word “acquisitions.”⁴⁰⁶

However, this assumption, that the Competition Law does not cover acquisitions, is not accurate, because stock purchases and asset agreements are types of acquisitions, and they are specifically mentioned in Article 32 of the Implementing Regulation of the Competition Law. This section notes that the Competition Council has the authority to prevent one of the parties from acquiring part or all of another company, as such an acquisition could cause an economic concentration that could be harmful to the overall economy. Moreover, there are requests before the Council to approve acquisition transactions, as this paper will discuss, which will show that the Saudi Competition Law does indeed cover acquisitions. Therefore, one may conclude that the Competition Law does apply to listed companies’ acquisitions and mergers that are accomplished in specific ways and/or between certain types of business.

D. How does the offer of M&A fall within the Competition Law?⁴⁰⁷

This Subsection addresses the origins of M&A and the Competition Law in Saudi Arabia, focusing on the point at which M&A and general marketplace competition intersect.

The Competition Law focuses on one element of M&A activity: once an M&A agreement causes the combination of the two entities being merged to become “dominant” (this term is defined below), then such an agreement must be submitted to the Competition Protection Council for approval, as Article 6 of the Saudi Competition Law states:

- 1) Firms involved in merger operations or firms desiring to acquire assets, proprietary rights, usufructs or shares, which causes [sic] them to be in a dominating position, shall notify the Council in writing at least sixty days prior to completion of the same.

⁴⁰⁶ The word “acquisition” is mentioned only in the English version of the Saudi Competition Law in Article 9(1), as will be briefly addressed later in this chapter (*see* footnote 74).

⁴⁰⁷ This section will give a general picture of the issue before going into more depth and adding a more analytical explanation of the issues. Some discussions may seem repetitive; however, some repetition of certain discussions is needed to address different issues.

2) Competing firms desiring to combine two or more managements into one joint management, shall if that results in a dominant status, notify the Council in writing at least sixty days prior to completion of the same.

3) The Regulations shall specify times [sic] of such notification, its form and content, information and documents required[,] procedures to be followed in submitting it[,] as well as the due fees for the inspection thereof.

4) The Council may review all necessary information prior to issuing a decision of approval or rejection of the notification submitted thereto, in accordance with the provisions of paragraphs (1) and (2) above, giving justification in each case.⁴⁰⁸

A “domination” is explained in Article 2 of the Saudi Competition Law as:

Domination: A situation where a firm or a group of firms are [sic] able to influence the market prevailing price through controlling a certain percentage of the total supply of a commodity or service in the industry of its business. The Regulations shall specify this percentage according to criteria, which include the market structure, the easiness of market entry by other firms, and any other criteria determined by the Council.⁴⁰⁹

Two companies can proceed in their agreement in any one of the following three cases:

(1) if they receive Council approval, (2) if a period of 60 days has expired after the Council has been notified about the transaction without informing the two parties of any objection, or (3) if 90 days has expired after the Council has been notified of a transaction already in progress.⁴¹⁰ In the last case, the parties may proceed with the transaction, as stated in Article 7:

The firm referred to in Article Six of this Law may complete the procedures of merger, acquisition or combining two or more managements into one joint management in the following cases:

1) Upon notification in writing of the approval by the Council.

2) Upon expiration of sixty days from the date of notification without being notified by the Council in writing of its objection to the deal or of [sic] that it is under study and investigation.

⁴⁰⁸ The Saudi Competition Law, art. 6.

⁴⁰⁹ *Id.* at art. 2.

⁴¹⁰ *Id.* at art. 7.

3) Upon expiration of ninety days from the date of notification with the deal being under review and investigation, without being notified by the Council in writing of its approval or rejection.⁴¹¹

§4.3. Pre-Merger Notification

Saudi Arabian law takes a different approach than what is found in the laws of most other countries with respect to determining when a transaction must be reported to its (Saudi's) M&A governing body, the Competition Council; according to Saudi law, notifying the Council is required when a proposed merger or acquisition would give the resulting entity a 40% market share of the total sales of a particular product.⁴¹² What makes up this 40% is determined by the Council, according to broad guidelines⁴¹³ given to it by the Implementing Regulation of the Competition Law.⁴¹⁴

A. The trigger

The Saudi Competition Law recognizes two factors as potentially triggering the dominating position for a particular transaction, as stated in the Implementing Regulation of the Competition Law:

Dominant position or domination is realized where [sic] an entity or a group of entities has a market share of at least 40% of total sales of a good or service for a period of 12 months or the entity or group of entities is in a position to influence the prevailing price in the market.⁴¹⁵

This definition of a “dominant” position is important, because Article 6 of the Competition Law states that if any company wants to merge with another company, and the resulting merged entity may ultimately occupy a dominating position, then this company must submit the request to merge to the Council for approval.

⁴¹¹ *Id.*

⁴¹² Implementing Regulation of Competition Law, Articles 2 and 27.

⁴¹³ The substance and guidelines will be discussed in greater detail in the following sections of this chapter.

⁴¹⁴ As stated in the Implementing Regulation of the Competition Law, art. 27.

⁴¹⁵ *Id.* at art. 8.

The Competition Council has started to require that every M&A transaction be filed with the Competition Council.⁴¹⁶ When the author states that there have been many M&A transactions that have not been filed with the Competition Council, the Council members with whom the author spoke responded that they have been working to coordinate M&A review among multiple governmental bodies, including the Ministry of Commerce and Industry, the Capital Market Authority, the Saudi Arabia Monetary Agency, the Communication and Information Technology Commission and other governmental agencies.⁴¹⁷

B. A note on the rules that are applicable to dominating positions and economic concentration

The Council of Competition initially adopted rules governing economic concentration that relied partially on the Law of Competition and its Implementing Regulation; the Council took this action because there were not enough rules to help guide the Council's consideration of concentration questions.⁴¹⁸ However, these rules were ultimately incorporated into the Implementing Regulation of the Competition Law when it was updated in 2014, at which time the Council ceased to maintain its own separate set of economic concentration rules.⁴¹⁹

C. The waiting period

The Implementing Regulation of the Competition Law stipulates a waiting period of 90 days for notification of mergers and acquisitions; this period begins on the date the request is

⁴¹⁶ See the interview with the Competition Council in Section 4.6 of this chapter. In this interview, the author brought questions to the Competition Council.

⁴¹⁷ See Section 4.6 of this chapter.

⁴¹⁸ The Implementing Regulation of the Competition Law is the most updated version of the Competition Regulation and was published by the Competition Council under the Resolution of Competition Council No. 126, dated 4/9/1435 AH (1/7/2014 AD), available at <http://www.ccp.org.sa/go/p.vbhtml?lang=en-sa&page=requulations&id=15&tag=Requulations> (last visited November 3, 2015).

⁴¹⁹ *Id.*

submitted to the Competition Council.⁴²⁰ Parties can close a deal if 90 days pass without an objection from the Council.⁴²¹

D. The request fee

In order to submit an Economic Concentration application or request, a fee of SAR 1000 must be paid (Article 22 of the Implementing Regulation of the Competition Law). However, Article 22 does not specify which party must pay the fee, the acquirer or the acquired entity. This ultimately creates a gap that must be fixed, or at the least is an issue to be considered. The author asked a representative from the Competition Council which party pays for the request fee and was told that, according to Article 22 of the Implementing Regulation of the Competition Law (as noted earlier), the party making the request pays the fee; in the case of merger transactions, this would be the acquiring company. Indeed, in the case of merger transactions, payment of the fee is fairly straightforward, as the two entities will ultimately be combined into one. In the case of acquisition agreements, the fee scenario is different, because the selling company will not necessarily cease to exist after it has sold some part to the buying company. This reinforces the author's point that the fee payment is a contractual matter that both companies should discuss, even though the fee is only SAR 1000, which is a small amount of money compared to the value of a typical acquisition transaction.

E. The invitation for the public to express their opinions on M&A transactions

The Saudi Competition Law sets out provisions intended to provide the public an opportunity to express their opinions regarding an M&A transaction; in particular, any opinion

⁴²⁰ The Implementing Regulation of the Competition Law, art. 33.

⁴²¹ *Id.*

that argues that a particular transaction will affect fair competition in the marketplace.⁴²² Article 26 of the Implementing Regulation of the Competition Law states:

The Council shall receive the opinions of entities related to the economic concentration application. The council will not take into consideration any opinions that are not supported by reasons, not clarifying [sic] the anticompetitive impacts of the concentration, or not including [the] full date[,] about the entity[,] which provide[s] such opinions.⁴²³

The Council solicits public opinion by posting announcements on its website and Twitter account that describe a proposed transaction. These announcements also invite any interested and/or involved parties to submit opinions about the potential ramifications (in terms of economic concentration) of the transaction.

F. An example of an invitation for the public to express their opinions on M&A transactions

On December 7, 2014, the Competition Protection Council posted the following announcement on its website:

The Council of Competition has announced that Atta Educational Company has presented an application for the acquisition of Jarir National Schools Complex Company for Boys and Girls, New International Middle East Schools, Modern International Middle East Schools, International Middle East Schools, Sulaymaniyah Private International Schools and National Al-Fikr Schools.

In its statement published today, the Council said that Atta Educational Company is a closed joint stock company established in 1424 AH (2003 AD) in Riyadh with three branches, while the Establishments set to be acquired are just individual Establishments, except Jarir National Schools Complex Company[,] because it is a limited liability company.

Furthermore, the Council of Competition said in its statement that statistics indicate that private education in the Kingdom of Saudi Arabia saves SAR 11 billion a year out of expenditures on education, and the number of private schools amounts to more than 3,000 schools in the various stages of education across the Kingdom.

⁴²² *Id.* at art. 26.

⁴²³ *Id.*

The Council also called the public to express their viewpoints about the request of acquisition based on [the] competition system and its executive rule, in cases of economic concentration as cases of acquisition, which requires advertising for it in more than media means [sic] and to assess its effects and maintain and encourage fair competition.

The statement inquires the public [sic] to provide their opinions, suggestions and implications due to the completion of the process of economic concentration via the following link www.coc.gov.sa/yahomna.⁴²⁴

This example shows how the Competition Council announces a transaction and asks for feedback from the public, especially from related parties or parties that may be affected by the transaction. However, note that the announcement does not disclose the value of the transaction, nor does it provide many details regarding the technicalities or timeframe of the transaction.

G. The information applicants need to provide

Article 19 of the Implementing Regulation of the Competition Law states when to submit an application and what information must be included:

Any entity intending to realize the economic concentration shall submit a written application to the Council 60 days prior to the accomplishment of the concentration transaction and shall fill in a form including the following:

- 1) Names of parties related to the concentration transaction;
- 2) The description of the requested concentration and the effectiveness date;
- 3) Relevant goods and services in addition to its sale volume and percentage;
- 4) The relevant market and the volume thereof;
- 5) The main commodities dealt in by the applicant entity;
- 6) The positive impacts of the concentration;
- 7) The negative impacts of the concentration and the proposed procedures to limit such impacts;
- 8) The markets that will be affected by the concentration transaction;
- 9) The name, capacity, and official domicile of the applicant.⁴²⁵

⁴²⁴ Saudi Competition Protection Council, available at <http://www.ccp.org.sa/go/p.vbhtml?lang=en-sa&page=News&id=13&tag=News&showid=1145> (last visited November 3, 2015).

Article 20 of the Implementing Regulation of the Competition Law lists the information that must be attached to the application regarding the parties involved:

The applicant shall provide, with the application, information about each entity involved in the concentration transaction, particularly the following information:

- 1) The name, nationality, address, number of branches, commercial register number, and the licensed activity of the entity;
- 2) List of the main commodities dealt in by the entity;
- 3) List of the names of the board of directors;
- 4) The main clients and their percentage in the market;
- 5) The volume, value, and percentage of the sales in the market;
- 6) List of the competitors and their market shares;
- 7) The existing concluded agreements;
- 8) The factors that affect market entry;
- 9) The nature of distribution channels;
- 10) The factors that affect price fixing during the last five years;
- 11) The volume of the available production capacity and the percentage of its utilization;
- 12) The volume of demand on the commodity and the structure thereof;
- 13) The alternative/substitute commodity;
- 14) Types of client.⁴²⁶

H. Documents that must be attached to the Economic Concentration application

The Implementing Regulation of the Competition Law lists the documents that must be attached to the Economic Concentration application:

- 1) The Articles of Association or the bylaw[s] of the related entities;
- 2) Financial statements for the last two fiscal years of the entities involved in the transaction of Economic Concentration as well as their branches;

⁴²⁵ Implementing Regulation of the Competition Law, art. 19.

⁴²⁶ *Id.* at art. 20.

- 3) A draft contract or agreement of Economic Concentration in addition to any public or private subscription documents and the number and type of shares or assets that will be acquired;
- 4) A report on the economic dimensions of the transaction, particularly the positive or negative impacts on the market;
- 5) If a representative submits the application, he shall provide his full particulars. A copy of his power-of-attorney shall be enclosed and verified against the original [and] then signed accordingly by the competent employee.⁴²⁷

I. The outcome of the economic concentration study after the waiting period

Article 31 of the Implementing Regulation of the Competition Law explains what actions the Council may take after it has reviewed an economic concentration application:

The applicant shall be informed in writing with [sic] the decision of the Council, which shall be any of the following:

- 1) The approval on [sic] the economic concentration application, supported by reasons;
- 2) The refusal of the economic concentration application, supported by reasons;
- 3) The conditional approval on [sic] the economic concentration.⁴²⁸

Article 32 provides more details about what the Council may do if it concludes that a particular economic concentration transaction will affect freedom of competition, as stated in

Article 32 of the Implementing Regulation of the Competition Law:

If the Council concludes that the economic concentration will restrict the freedom of competition, it shall decide the following:

- 1) Illegality of the economic concentration;
- 2) Preventing any of the related parties from acquiring all or some of the entity or assets thereof;
- 3) Requesting any person to undertake procedures for resolving any entity or terminating any partnership if the Council deems that such person has a share in or is a party to the acquisition process;

⁴²⁷ *Id.* at art. 21.

⁴²⁸ *Id.* at art. 31.

4) Requesting any person mentioned in the decision, in case of joint concentration, to abide by the controls and restriction set by the Council in relation to the manner which will be followed for work flow;

5) Take the necessary precautions to terminate, prevent or mitigate the economic concentration, at the discretion of the Council.⁴²⁹

To summarize, upon receiving an economic concentration transaction application, the Council may approve the transaction, reject the transaction, or approve it with conditions. This last option (approval with conditions) was the result for the request made by Elezazya Panda, a very interesting case that is discussed in detail in the cases section of this chapter.

J. Appeals

After the Competition Council makes a decision regarding the economic concentration of a certain M&A transaction, the applicant may appeal this decision before the Board of

Grievances according to the Saudi Competition Law, which states:

Decisions of the committee may be appealed before the Board of Grievances within fifteen days as of the date of notification of the decision. In case of repealing the decision of the committee, the Board of Grievances shall review the violation and impose the relevant penalty.⁴³⁰

Therefore, a Competition Council decision is not automatically final, because its decisions are administrative and may be appealed before the administrative courts. The only instance in which an appeal is not allowed is if the Competition Law makes clear that a decision made by the Competition Council Committee will be final and cannot be appealed, as is explained in the Saudi legal system chapter under the semi courts section. The author asked a representative from the Competition Council for information about any decisions that had been appealed before the administrative court; however, the representative did not know of any such appeals and noted

⁴²⁹ *Id.* at art. 32.

⁴³⁰ Saudi Competition Law, art. 15(3).

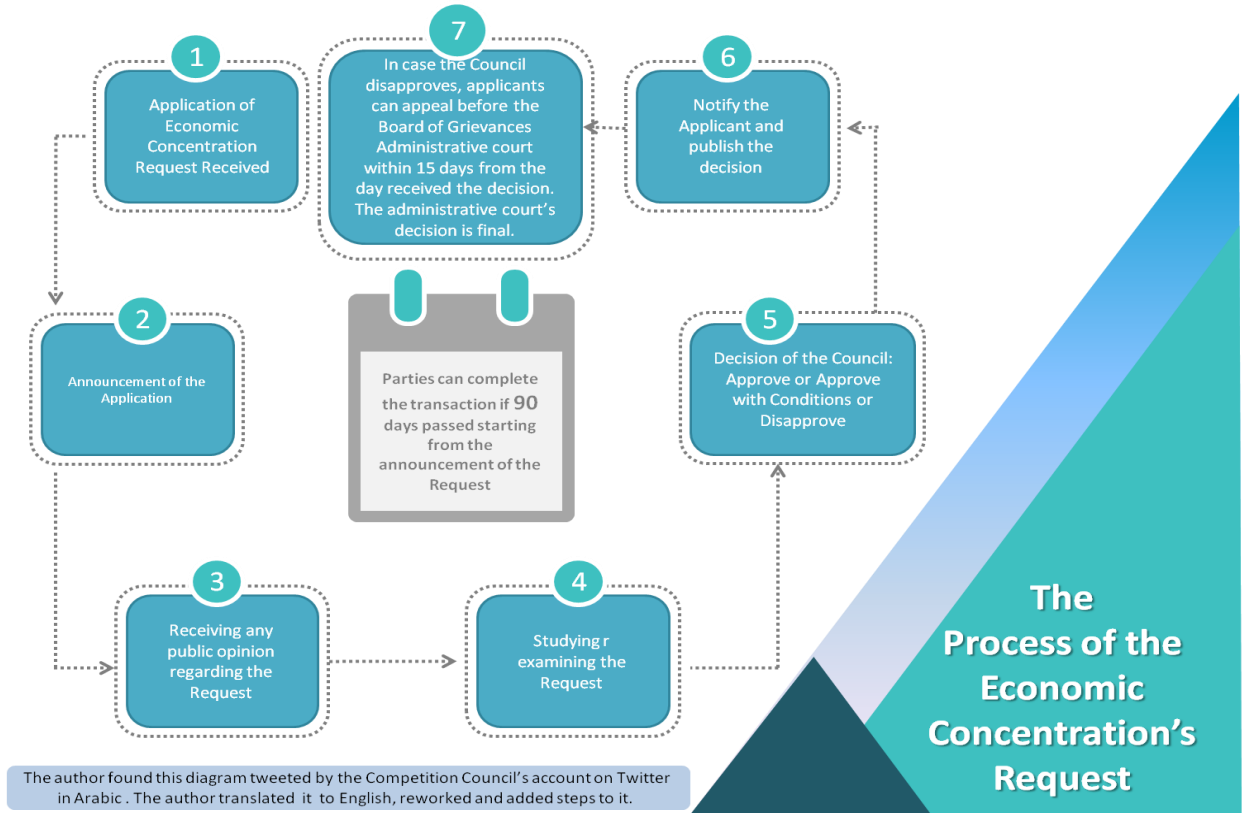
that, in fact, applicant parties generally seemed satisfied with the decisions handed down by the Council.

However, it would seem that parties should try to appeal before the administrative court if the Council refuses to approve a transaction. For one thing, getting an administrative court involved in an appeal may help to ensure that the courts are genuinely focused on any unusual circumstances surrounding a particular proposed transaction. In addition, an appeal involves a review of any previous decisions made about the transaction and may help ensure the accuracy of such previous decisions. Finally, it is the applicant party's right to ensure that the evaluation and measurement used by the Council was proper. Appeals may help to elevate decisions into cases, which eventually become available for the public to read, all of which contributes to the formulation of more stable rules regarding M&A and the Saudi Competition Law. The author discovered the diagram in Figure 2.5, which is displayed immediately below, that was tweeted by the Competition Council over Twitter⁴³¹; the author has translated the text in this diagram into English, reworked it and added certain important steps to it.

⁴³¹ Saudi Competition Council's account on Twitter (@SaudiCOC) Available on Twitter at <https://twitter.com/saudicoc/status/551754985084436481> (last visited 4 January, 2015, 10:00 a.m.).

Figure 2.5

The process of the economic concentration's request



§4.4. Assessment and Guidelines

A. The relationship between a dominating position and economic concentration

1. The issue

A contradiction exists between the Competition Law and its Implementing Regulation.

First, the Competition Law stipulates that the Competition Council has jurisdiction over approving a merger or acquisition that results in a dominant position in the market.^{432, 433}

⁴³² Saudi Competition Law, art. 9(1).

Second, the Competition Law defines dominance thusly:

A situation where a firm or a group of firms are [is] able to influence the market prevailing price through controlling a certain percentage of the total supply of a commodity or service in the industry of its business. The Regulations shall specify this percentage according to criteria, which include the market structure, the easiness of market entry by other firms, and any other criteria determined by the Council.⁴³⁴

Third, Article 6, 1 states:

Firms involved in merger operations or firms desiring to acquire assets, proprietary rights, usufructs or shares, which causes [sic] them to be in a dominating position, shall notify the Council in writing at least sixty days prior to completion of the same.⁴³⁵

Finally, Article 5 of the Competition Law makes clear that the Law only prohibits certain actions when a company enjoys a dominating position.

However, the Definitions section of the Implementing Regulation of the Competition Law describes economic concentration in this way:

[A]ny act resulting in full or partial transfer of ownership rights or usufruct of an entity's properties, rights, stocks, shares or obligations to another entity that puts an entity or a group of entities in a position of domination of an entity or a group of entities, by way of merger, takeover, acquisition, or combining two or more managements into one joint management or any other means which leads to having a market share of 40% of the total sales of a commodity in the market.⁴³⁶

⁴³³ In the Arabic version of the Saudi Competition Law, Article 9, and in this particular Article, the word "ownership" rather than "acquisition" is used. However, the English version of the Saudi Competition Law uses the word "acquisition." The exact language of Article 9(1) of the English version of the Competition Law states: "Subject to provisions of other laws, the Council shall have jurisdiction over the following tasks: 1) Approving cases of merger, acquisition, or combining two managements or more into one joint management resulting in a dominant position in the market." Ownership in Arabic could occur in many ways: inheritance, purchase, gift, donation, etc. The author believes that the word "ownership"—both for the purposes of the Saudi Competition Law, and also in the context of mergers and acquisitions, is not the proper legal terminology to use to describe acquisitions, stock purchases, or purchases of assets. The use of this word may lead to complications regarding the smooth application of the Saudi Competition Law in years to come. In fact, because "ownership" and certain other words are so broad and general, their continued usage may encourage the Council in the future to abuse the power and authority it wields over the market. The author argues that the Saudi Competition Council's purpose is to assure fair competition, ease competition, and prevent barriers to entrance from becoming part of Saudi's investment marketplace.

⁴³⁴ The Saudi Competition Law, art. 2.

⁴³⁵ *Id.* at art. 6(1).

⁴³⁶ Implementing Regulation of the Competition Law, art. 2.

Also, Articles 6 through 18 of the Implementing Regulation of the Competition Law cover issues related to a dominating position and include considerations⁴³⁷ or factors to help the Council determine if an entity is in a dominant position, or if certain actions have been taken that may constitute a violation of the Competition Law. In addition, Articles 18 to 33 of the Implementing Regulation of the Competition Law address the concept of economic concentration⁴³⁸ and the issues that such concentration can cause.

A full understanding of the Competition Law and its Implementing Regulation may cause a reader to question whether, and how, these two legal documents work together. What is the difference between the way each document defines the concepts of dominance and economic concentration? Article 6 of the Competition Law requires that parties notify the Council if they are involved in a merger or acquisition that may cause a dominating position. Article 19 of the Implementing Regulation of the Competition Law requires that any party that wants to realize economic concentration must submit an application to the Council, because mergers and acquisitions are mentioned in Article 6 of the Competition Law in the context of dominance, and are also mentioned in the Implementing Regulation of the Competition Law in the Definitions section in the context of economic concentration. Further questions may include whether it is a violation of Competition Law for an entity to be in a dominant position by means of a merger or acquisition if that dominant position does not influence prices in the marketplace. Is it a violation of the Competition Law for an entity to be in a dominant position if no action that was taken to consummate the merger/acquisition was prohibited by this law? Do the terms “economic concentration” and “dominating position” mean the same thing? Is economic concentration a step toward a dominating position?

⁴³⁷ The paper will address these considerations after clarifying the issue of the difference between dominance and economic concentration.

⁴³⁸ The paper will address these considerations after addressing the considerations of dominance.

2. Analysis

The only logical explanation and analysis of the language of this Competition Law is that economic concentration is a step toward an unwanted result: a company establishing a dominant status in the marketplace. In other words, economic concentration occurs when two or more companies combine through a merger or an acquisition. The economic concentration resulting from a merger or acquisition could lead to a dominant position if the transaction exceeds 40% of the total sales of a particular product in the marketplace. However, the Saudi Competition Law and its Implementing Regulation acknowledge that there are companies in dominant positions; however, these laws only prohibit certain actions taken by the dominant companies. The law exercises prohibitions against dominant companies only when these dominant companies take actions that restrict competition.⁴³⁹ This paper demonstrates that economic concentration is not *per se* a violation of the Competition Law, and it argues that based on the language of the Competition Law and its Implementing Regulation, occupying a dominating position without influencing prices is unlikely to be considered a violation of the Competition Law. The Implementing Regulation, which makes the language of the law broad, blurs the spirit of fair competition policy in Saudi Arabia.

⁴³⁹ Competition Law, art. 5, states that “A firm enjoying a dominant status shall be banned from any practice restricting competition, as specified by the Regulations, including:

- 1) Selling a commodity or service at a price below cost, with the intention of forcing competitors out of the market.
- 2) Imposing restrictions on the supply of a commodity or service, with the intention of creating an artificial shortage in its availability in order to raise prices.
- 3) Imposing special conditions on selling and purchasing transactions or on dealing with another firm, in a manner that puts it in a weak competitive position compared to other competing firms.
- 4) Refusing to deal with another firm without justification in order to restrict its entry into the market.” This is one of the issues in the Law. Does the Saudi policy want some companies to enjoy dominant status? If not, should not the Law prohibit the dominant status in this article? This makes the author question the meaning of dominant position in the Saudi Competition Law.”

B. The considerations and guidelines used to determine the economic concentration of a transaction and its effect

Article 27 of the Implementing Regulation of the Competition Law states that while the Council is reviewing an application request for economic concentration, it should make sure that the transaction requested will not affect competition. The Council is free to use any of the factors listed below to determine whether the transaction will affect competition:

The Council shall study the concentration application to ensure that it will not affect the competition. Such study shall be through [sic] evaluating one or more of the following factors:

- 1) The level of competition in the market;
- 2) The entry possibility of new entities to the market;
- 3) The effect of demand on the price of the commodity;
- 4) The existence of any regulatory or realistic barriers to enter the market;
- 5) The level and historical trends of the anticompetitive practices in the market;
- 6) The possibility of acquiring power in the market by the concentrating parties due to the economic concentration;
- 7) The variable characteristics of the market including the growth, innovation and creativity.
- 8) The opinions of the related entities in accordance to [sic] Article 26 hereof.⁴⁴⁰

The Implementing Regulation of the Competition Law gives the Council guidelines to use in considering the positive or negative effects of the economic concentration on competition:

The Council shall take into consideration the following upon evaluating the impacts of the economic concentration:

- 1) Maintaining and promoting the effective competition among the producers and distributors of goods and services in the market;
- 2) Enhancing the interests of the consumers with regard to quality and price;

⁴⁴⁰ Implementing Regulation of the Competition Law, art. 27.

3) Encouraging, through competition, for [sic] decreasing costs, improving new commodities, and facilitating the entry of new competitors in the market.⁴⁴¹

C. The considerations and guidelines for determining the dominating position of an entity

The Implementing Regulation of the Competition Law leaves the Council considerable latitude in terms of what to consider as it examines the position of an entity that may have a dominant position in the market:

Article (9):

The Council may, upon studying the position of any dominant entity in the market, take into consideration the availability of any or some of the following items or decide the appropriate study approach:

- 1) The relevant market of a specific commodity in a specific geographical area;
- 2) The market share of the relevant entity;
- 3) The level of actual or potential competition with regard to the number of competing persons, the volume of production and the demand on the commodity;
- 4) The obstacles that hinder, limit, or prevent the entry of new competing entities.

Article (10):

When studying the impact of a practice of a violating dominant entity on the fair competition, the Council may take into consideration any or some of the following items or decide the appropriate study approach:

- 1) The impact on competition;
- 2) Whether a practice is or [is] not consistent with the normal competitive behavior when it is possible to construe that fact based on the normal commercial concerns and interests in the situations in which the person who commits such practice is not in a position that enables it [sic] to influence the total demand or supply of the relevant goods or services or influence the prevailing price in the market;
- 3) Whether a practice is or [is] not complying with the direct protection of intellectual property rights while the usage of intellectual property rights by market players to commit the practices stipulated herein constitutes violation to the Law.⁴⁴²

⁴⁴¹ *Id.* at art. 28.

§4.5. Cases

Cases considered by the Competition Council are released as a form of administrative decision. Samples of these decisions will be provided in this Section. The purpose of presenting these decisions is to demonstrate what Competition Council decisions look like in terms of the information that the Council provides for the public.

A. The Egypt Air Company's complaint

The Competition Council issued a statement that said the following:

Egypt Air Company submitted a complaint concerning the merger of [the] ground Services Company of Saudi Arabian Airlines, the Nation[al] Ground Services Company and Attar Ground Services Company under the name of Saudi Ground Services (SGS). This new merger (company) started drafting new contracts for the services offered at higher prices.

The Council Decision:

The Council of Competition Protection issued a Decision No. (66/2011) dated on 12/7/1432, to start taking actions in investigating and collecting evidences from the related parties in this complaint concerning the practices of violating the provision of the Competition Law

The Results of the Investigation:

The General Secretariat prepared a list of [the prosecution's] pleading and referred the case to the Committee for Settlement of the violations of [the] Competition Law and [to] take the necessary action.⁴⁴³

B. The acquisition of Great Stores' Assets by Elezazya Panda

The Competition Council issued a statement that said the following:

The Purchase of Elezazya Panda of the Assets of the Great Stores in the Kingdom:

The Request:

(The request of Alezazya Panda to complete the Economic Concentration operation): The General Secretariat prepared an Economic study to see the degree of effects of the merger

⁴⁴² *Id.* at Articles 10 and 11.

⁴⁴³ *Saudi Arabia Council Protection of Competition, Annual Report 2011*, 40. There is no update for this report and no further (more recent) data about such cases.

of the Two companies in the market. The study concluded that the merger will compose (40%) of the Saudi market and the merger will constitute a dominant position situation, hence the study recommended to proceed on completing the merger in [on] condition that the new company implement a unified marketing and pricing policy throughout the Kingdom.

The Council Decision:

The Council of Competition Protection approved the merger on condition that the new company implement a unified marketing and pricing policy throughout the Kingdom, by issuing its Decision No. (38/2008) dated on 9/9/1429.⁴⁴⁴

C. The acquisition of the Saudi Gean's Assets by Elezazy Panda

The Competition Council issued a statement that said the following:

The Purchase of Elezazy Panda Company the Assets of Saudi Gean Ltd:

The Request:

Elezazy Panda Company requested to purchase the assets of Saudi Gean Ltd. and complete the Economic Concentration [application]. Both companies traded in commodity

retail trade. The General Secretarial studied the request and prepared a study based on the Rules Governing Economic Concentration. The study concluded that the new merger will compose (40%) of the Saudi market in almost all cities and provinces in the Kingdom, thus creating a dominant position situation, but irrespective of this situation, the study concluded the merger can be established according to the study results on condition that the new merger should be committed to apply a unified marketing and pricing policy⁴⁴⁵ throughout the Kingdom.

The Council Decision:

The Council issued its Decision No. (48/2009) dated on 17/10/1930H corresponding to 6/10/2009 approving the new merger on condition that the new merger should be committed to apply a unified marketing and pricing policy throughout the Kingdom.⁴⁴⁶

⁴⁴⁴ *Id.* at 42.

⁴⁴⁵ This is one of the examples of undefined words that the Competition Council uses without referring to anything that can help the reader understand the Council's decisions. For example, the Council does not provide the public with an explanation of what it means by terms such as "unified marketing" and "pricing policy."

⁴⁴⁶ *Saudi Arabia Council Protection of Competition, Annual Report 2011, supra note 443, at 43.*

1. Analysis of the Panda case

A dissertation entitled “Does the Saudi Competition Law Guarantee Protection to Fair Competition?” written by Mr. Musaed Alotaibi discusses various competition issues related to these cases. An important case is that of Panda purchasing the assets of Saudi Gean.⁴⁴⁷ Based on his research, Mr. Alotaibi concludes that even though Panda’s share in the market was 62% and the Competition Law states that this means the company has dominance, the Competition Council approved the transaction.⁴⁴⁸ Therefore, Mr. Alotaibi argues that the Competition Council erred in approving the request made by Panda.⁴⁴⁹

The author disagrees with Mr. Alotaibi’s analysis of the Competition Council’s decision in this case for several reasons. Mr. Alotaibi’s analysis is based on incomplete information. He did not have complete information about the two companies, nor did he have complete data about the economic state of the market. He stated that assessing the dominance issue is not easy and may have been negatively affected by the available information,⁴⁵⁰ which he did not have. Additionally, a representative from the Competition Council told the author that the Council had requested further information in the Panda case from other companies and other governmental agencies and ministries in order to better assess dominance or economic concentration. Therefore, the author argues that it was nearly impossible for Mr. Alotaibi to have reached a rational and reliable conclusion given the limited data to which he had access.

Finally and most importantly, the percentage (of a company’s share in the market) that the Saudi Competition Law cites is only the reportable percentage; in other words, if a transaction causes a company to achieve control of 40% or more of the market, the parties must

⁴⁴⁷ MUSAED ALOTAIBI, DOES THE SAUDI COMPETITION LAW GUARANTEE PROTECTION TO FAIR COMPETITION?, 132 (University of Central Lancashire, 2011).

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.*

⁴⁵⁰ *Id.*

notify the Competition Council and obtain its approval. Research conducted for this dissertation led the author to explain to members of the Competition Council that legal researchers, lawyers and professors have criticized the Council's decisions about certain M&A cases and have been forced to make assumptions about what certain Council decisions actually mean, because the Council does not publish thoroughly fleshed-out explanations of its decisions. Lack of information can cause legal professionals and scholars to misunderstand or be unaware of the criteria the Council is adopting for any given decision.

More examples of the Competition Council's decisions are provided below to demonstrate that the Council consistently publishes only very short descriptions, with minimal information, of its decisions.

D. The merger between Aminco and the Arabian Company for Transport and the Arabian Company for Safety and Security Services

The Competition Council issued a statement that said the following:

Merger of a Group of Security Companies under the name (Arabian company for security and safety services), (Aminco).

The Request:

Sultan Bin Mohammed Al-Azal and his partners for security guards (Aminco), submitted a request to create a merger with the Arabian Company for Transport Services and the Arabian Company for Safety and Security Services (Ltd). The General Secretariat prepared an Economic study based on the Rules Governing Economic Concentration. The results of the study revealed that the merger company will not enjoy a dominate [sic] position in the market due [to] the availability of many companies in the market practicing safety and security activities.

The Council Decision:

The Council of Competition Protection issued a Decision No. (53/2010) dated on 14/3/1431 corresponding to 28/2/2010 approving the creation of the merger to [sic] the

companies under the name of “The Arabian Company for Security and Safety Services (Aminco).”⁴⁵¹

E. The merger between AlManar and Afaq

The Competition Council issued a statement that said the following:

The Merger of AlManar Private Company and Afaq Educational Co.

The Request:

(The request of Afaq educational Co. to complete the Economic Concentration with Almanar Private Co.) The General secretarial studied the request, and the results of the study revealed that the merger operation will not result in a dominate [sic] position in the market for the new company due its small market share.

The Council Decision:

The Council of Competition Protection issued its Decision No. (54/2010) dated on 4/4/1431H corresponding to 20/3/2010, approving the completion of the Economic Concentration between the Two [sic] companies.⁴⁵²

§4.6. Interview with the Competition Council

Because M&A is a new type of financial transaction in Saudi Arabia, its implementation and applications, as well as the Competition Law, are all still evolving. The author met with some of the officers who work at the Competition Council. They welcomed the author and were willing to provide any help they could without violating the confidentiality of the companies with which they work.⁴⁵³ The author sat with some of these officers from the Competition

⁴⁵¹ *Saudi Arabia Council Protection of Competition, Annual Report 2011, supra* note 443, at 43.

⁴⁵² *Id.* at 44.

⁴⁵³ The author wishes to stress to the reader the research problems that arise in studying the topics of this dissertation; these problems arise largely because of the scope of confidentiality in Saudi Arabia concerning government activity. Officers generally fear that providing the public with any information about their business will get them in trouble, due to the lack of statutory provisions that explain the limitations about what can and cannot be disclosed. Therefore, it is not easy to get information out of officers. This makes sense in countries such as Saudi Arabia in which there are harsh penalties for officers who reveal any secret information. Such penalties can include fines of up to five million SAR, and officers can be sent to prison for two years as well, according to Article 13 of the Saudi Competition Law. The Council has not provided details or measurements that can be used to guide officers in knowing what to disclose and what not to disclose about the published decisions made by the Council. As noted, published decisions are rarely longer than one short paragraph. In the requests of Economic concentration forms, which are provided in the Appendix, there is a question that asks the applicant to state any secret information that the applicant does not want the Council to mention in its written decision announced on the website; this helps

Council and asked them questions and requested certain clarifications. One of the most important questions that the author asked concerned which model or method they thought the legislature had followed in enacting the Competition Law in 2004. They answered that they tend to see that the Saudi legislature followed or adopted the Model Law on Competition, which was created by the United Nations Conference on Trade and Development.⁴⁵⁴ The author also met directly with representatives of the Gulf Cooperation Council and is thus able to speak about certain facts learned during that conversation, even though this information has not yet become public. The Gulf Cooperation Council (GCC)⁴⁵⁵ has been openly willing to develop a unified Competition Law for the GCC⁴⁵⁶ that is similar to the law that is practiced in the European Union.

The author discussed issues regarding the unified Competition Law with the GCC, and it appears that the unified Competition Law will benefit all of the countries involved in developing it. Further, the GCC representatives indicated that they believe that a unified competition law may help attract more foreign countries and investors to invest in the Gulf region, because such a law would give them confidence that there is, in fact, a unified system in the Gulf region, and it would help them feel more comfortable with the clarity and certainty of the rules of competition. The author asked whether a unified competition law would pertain to countries outside the GCC or only to the GCC countries. The Council officers responded that any future deal that would

officers know what can be revealed, but the whole issue is still a gray area for them. This paper argues that the Council should publish its decisions with more details, in order to help guide companies that want to merge or acquire better understand how the Competition Council's system in Saudi Arabia works.

⁴⁵⁴ UNCTAD, available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/The-Model-Law-on-Competition.aspx> (last visited June 17, 2015).

⁴⁵⁵ The GCC members are The Kingdom of Saudi Arabia, The State of Kuwait, The State of Bahrain, The United Arab Emirates, The State of Qatar and The Sultanate of Oman. For further information, visit Cooperation Council for the Arab States of the Gulf, available at <http://www.gcc-sg.org/eng/indexfc7a.html?action=Sec-Show&ID=1>. (last visited June 17, 2015).

⁴⁵⁶ Cooperation Council for the Arab States of the Gulf, in the 33d session in 2012, available at <http://www.gcc-sg.org/indexa874.html?Sub=ShowOne>. Invitations to join have been extended by the GCC to Morocco and Jordan. See Amid Turmoil, *GCC Extends Invitation to Jordan and Morocco, Middle East in Focus*, commentary by the Middle East Policy Council available at <http://www.mepc.org/amid-turmoil-gcc-extends-invitation-jordan-and-morocco?print> (last visited June 17, 2015).

affect the market/s of GCC countries would be subject to the unified competition law. One of the issues delaying the drafting of the GCC Competition Law, which may continue to be an issue in the future, is that a unified court for the GCC has not yet been established. Uncertainty over where disputes will be heard and resolved may make it difficult for the writers of the draft of the new unified competition law to move ahead with completing the draft.

§4.7. Questions the author asked the Competition Council

Q1: The author asked the Council how it determines dominance or economic concentration.

A1: First, the author did not receive a clear answer about the difference between dominance and economic concentration, which forced the author's analysis in a different direction. As explained earlier, economic concentration can lead to dominance, but economic concentration is not by itself a violation of the Competition Law or its Implementing Regulation; indeed, there are official forms by which economic concentration may be requested by applicants, whose requests may be approved or refused. Second, the Council mentioned that it looks at the entire market in Saudi Arabia to determine if an entity's dominance or economic concentration will affect competition in Saudi Arabia. The Council members with whom the author spoke also stated that they only review transactions that will affect the Saudi market.

Q2: Has there ever been any obligation for any merger agreement involving a concentration of less than 40% to be submitted to the Competition Council?

A2: Some of the officers answered affirmatively, noting that they have already reviewed nine requests regarding economic concentration that involved concentrations lower than 40%. However, this surprised the author, because many mergers and acquisitions have been consummated in the past 11 months, which should mean there would have been more than just

nine requests that concerned transactions with concentrations at stake that were lower than 40%. At the same time, the author asked several lawyers the same question, and these lawyers stated that they had worked on some M&A transactions that they had not submitted to the Competition Council for review. This confirms the author's analysis and understanding of the law; namely, that not every M&A transaction must be submitted to the Competition Council. When the author noted to Council members the observation that many M&A transactions were not submitted to the Competition Council, they responded that they have been working to coordinate M&A review among different governmental bodies, such as the Ministry of Industry and Commerce, the Capital Market Authority, the Saudi Arabia Monetary Agency, the Communication and Information Technology Commission and other governmental agencies.⁴⁵⁷ The author is still

⁴⁵⁷ The author knows of several M&A transactions that were completed but not announced by the Competition Council. For instance, on April 6, 2013, Altayyar Travel Holding Group announced on its website that its board approved an acquisition transaction in which Altayyar would acquire 39% of Muthmera Real Estate Interment Company in consideration of SAR 341 million (USD 90 million), which would give Altayyar 75% of Muthmera Company and a total capital value of SAR 641 million (USD 170 million). See Altayyar Travel Group (in Arabic), available at <http://www.altayyargroup.com/ARABIC/SHAREHOLDERSRELATION/Pages/ATG-RealEstateInvestment.aspx> (last visited November 20, 2015). There has been no announcement by the Competition Council regarding the transaction, even though the consideration is not low and Altayyar's share in Muthmera is now 75% and its capital value is SAR 641 million. Altayyar Travel Group's capital reached SAR 800 million (USD 213 million) in 2009, according to Altayyar's prospectus. See Altayyar's Prospectus (in Arabic) for 2012, p. L, available at <http://www.cma.org.sa/Ar/DocLib1/Al%20Tayyar.pdf> (last visited November 20, 2015). In 2011, Altayyar Travel Group's income was SAR 4,706 million (USD 1,228 million), and its net profits were SAR 612 million (USD 163 million), see *Id.* On January 27, 2015, the Capital Market Authority approved the request of the Altayyar Travel Group Holding Company to increase its capital from SAR 1500 million to SAR 2000 million (USD 533). See http://www.cma.org.sa/en/News/Pages/CMA_N_1630.aspx. Another example involves a case in 2014 in which Philips acquired 51% of the Saudi Arabian General Lighting Company (GLC) in consideration of USD 235 million. See <http://www.reuters.com/article/2014/03/17/philips-saudi-acquisition-idUSL6N0ME35U20140317>. However, the transaction was not announced by the Competition Council. The author has discovered merger transactions between two private companies in which no request or notification was made to the Council. In another example, an Economic Concentration request was made by two merging companies and submitted to the Council, but the author questions whether the companies were legally required to submit a request or to notify the council. The Competition Council states in its announcement that "The Council also approved the request of the merger of Mask Holding Company with Asliyah Company for Investment, the Mask's activity is in participation in companies and the establishment, management and operation of agricultural, commercial, industrial and medical projects, while Asliyah Company works in the field of real estate management and development," available at <http://www.coc.gov.sa/go/p.vbhtml?lang=en-sa&page=News&id=13&tag=News&showid=1152>. However, each company invests in a different market (last visited November 20, 2015). While the Mask Company operates in the management of medical projects, and industrial, commercial and agricultural products, Asliyah Company invests in the management of real estate. How can these two companies become a relevant market especially when the law does not define it in clear way? How can two different businesses constitute economic concentration and, therefore, exceed 40% of the market?

convinced that mergers and acquisitions that do not have the potential for dominance or economic concentration of at least 40% do not fall under the Competition Law or its Implementing Regulation.

Q3: What economic methods or valuations does the Council use to apply the provisions of the Competition Law; for example, how does the Council determine economic concentration?

A3: The author did not receive a clear answer to this question. The officers stated that they make different studies based on the entire Saudi market, which requires cooperation with other governmental bodies, but they did not cite or explain the specific methods or valuations that they are using.⁴⁵⁸

Moreover, in 2014, the Competition Council referred in its publication to two merger requests that were submitted to the Council. The first request was among three construction companies, which was the second request in the construction field, and the Council did not mention the value of the transaction, even though it did state that there were 3,487 certified construction entities, and that the construction business in Saudi would reach SAR 300 billion (USD 80 billion). See, available in Arabic at <http://www.ccp.org.sa/go/uploads/Articles/53/attachments/%D8%A7%D9%84%D8%B9%D8%AF%D8%AF%20%D8%A7%D9%84%D8%AE%D8%A7%D9%85%D8%B3%20-%20%D9%85%D8%AD%D8%B1%D9%85%201436%D9%87%D9%80.pdf>. The question becomes, what is the size of those three companies combined? Will they constitute an economic concentration of 40%? Based on the number of certified construction entities and the size of the construction business in Saudi provided by the Council, the author suspects that they may have reached the statutory line. If the three companies merged did not exceed the 40% threshold of economic concentration, and they were not obliged to submit a request, why did the Council require them to do so? The Council referred in the same publication to another request for the merger between Lafander Company and Al Subhi Company, which both invest in the operation and management of medical laboratories and hospitals. Instead of stating the percentage of economic concentration that the two companies would have as a result of the merger, the Council states the annual sale of the two companies, which is SAR 15 million (USD 5 million). See the 2014 publication of the Council, available in Arabic at <http://www.ccp.org.sa/go/uploads/Articles/53/attachments/%D8%A7%D9%84%D8%B9%D8%AF%D8%AF%20%D8%A7%D9%84%D8%AE%D8%A7%D9%85%D8%B3%20-%20%D9%85%D8%AD%D8%B1%D9%85%201436%D9%87%D9%80.pdf>.

⁴⁵⁸ In 2015, February 8, The Competition Council announced that it received an economic concentration request from the Sasco company, a Saudi-listed company with capital of SAR 450 million (USD 120 million) that owns 74 gas stations throughout the Kingdom. 50% of the 74 gas stations are in the central region of the kingdom. Sasco announced it would acquire Zaiti group, a non-listed Saudi company that owns 52 gas stations throughout the Kingdom. See The Competition Council Website, available in Arabic at <http://www.coc.gov.sa/go/p.vbhtml?lang=ar-sa&page=News&id=44&tag=%D8%A7%D9%84%D8%A3%D8%AE%D8%A8%D8%A7%D8%B1&showid=1175>. It was announced that the Competition Council approved the acquisition on March 19, 2015 (see <http://www.argaam.com/article/articledetail/495059>); however, some issues need to be addressed. First, in the announcement, the Council called the transaction a “merger,” which it is not. The transaction was an acquisition. Secondly and more importantly, according to the National Committee for the gas station companies in 2014, there are 9 thousands gas stations in Saudi Arabia. See Dina Masry, *70% of petrol stations to foreigners as “subcontractors” in Saudi Arabia*, ARAB SPRING NEWS, June 16, 2014, available at <http://arabspring-news.com/70->

§4.8. Summary

The author examined the Competition Law, its Implementing Regulation and the functions of the Competition Council. The author also met with several lawyers and employees of the Competition Council (as well as with people who used to work for the Council) and held discussions with each of these groups about M&A and competition issues in Saudi Arabia. This research allows the author to clearly summarize the findings. First, the Saudi Competition Law, as stated earlier, is evolving as M&A is growing in Saudi Arabia. The procedures are improving year by year.

Second, the author could not find clear answers to certain questions about the difference between dominance and economic concentration, the former term (dominance) as used in the Competition Law and the latter term (economic concentration) as used in the Implementing Regulation. The author was told that these concepts mean the same thing. In this case, the author argues that the Implementing Regulation should use the same terminology that is used in the Competition Law to make it easier for authorities to recognize and regulate M&A transactions, as well as to make it easier for companies to take certain preliminary steps as they plan a merger or acquisition, which may save them time and effort.

Third, the author found that M&A is a relatively new concept for the Competition Council. The author argues that the Council needs to develop a more sophisticated understanding

of-petrol-stations-to-foreigners-as-subcontractors-in-saudi-arabia/. (last visited December 28, 2015). This means that the 74 gas stations owned by Sasco and the 52 owned by Zaiti are small numbers compared to the overall number of gas stations in Saudi Arabia. Third, assuming that the gas stations are concentrated in Riyadh, the capital City of Saudi Arabia, oil and gas are supported by the government, and the oil price is fixed by the government as well. Therefore, the potential for a company to gain dominance, control or monopoly in the oil and gas marketplace is low if not impossible. This paper calls for raising awareness of the concept of fair competition and monopoly. The pre-merger notification requirements and thresholds should be based on economic rationale that is germane to the Saudi market. The Saudi Competition Council could adopt a certain number as the value at which a transaction triggers notification, but it should base this number on an educated and disclosed economic premise. More important, the threshold should fit the Saudi marketplace.

that recognizes that M&A may take a variety of public and private forms. Fourth, the author was made aware, by a source that cannot be revealed, that work is being done to improve the indicators, methods, techniques and tests that can be used to determine whether a given merger or acquisition will cause dominance or economic concentration; this work may lead to the creation and implementation of regulations that consider the dominance issue from vantage points other than the simple 40% rule that is stated in the Implementing Regulation. Fifth, the Competition Council invites the public to make its opinions known, including any party who believes he/she may be affected by a proposed transaction.

§4.9. South African Competition Act⁴⁵⁹

A. The definition of merger

The South African Competition Act (SACA) defines a merger as follows: “For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.”⁴⁶⁰

SACA stipulates the meaning of control over a company as being a situation in which a company a) acquires more than 50% of the issued capital shares of another company, b) has voting power over a majority of the votes of another company, c) has the ability to veto the majority appointment of directors...g) is able to influence the company’s policy.⁴⁶¹

⁴⁵⁹ The reason that South African Competition Act is chosen as a model is that South Africa is the closest of any other country to Saudi Arabia in terms of size and GDP that also has a sufficient and clear Competition Act. Other countries are very different than Saudi Arabia in size, GDP and many other factors; therefore, they would not be practical models for Saudi to imitate. Also, the thresholds and size of transactions in the South African Competition Act and the South African Commission would fit the Saudi M&A market economically.

⁴⁶⁰ Competition Act 89 of 1998 § 12.1(a)(S.Afr).

⁴⁶¹ *Id.* at § 12.2

B. Categories of merger

Subsection 1 (a) of Section 11 of the South African Competition Act requires the Minister of Trade and Industry and the Competition Commission in consultation with each other to determine “A lower and a higher threshold of combined annual turnover or assets, or a lower and a higher threshold of combinations of turnover and assets...[and] (b) a method for the calculation of annual turnover or assets to be applied in relation to each of those thresholds.”⁴⁶² As of April 1, 2009, the lower threshold of the combined turnover/asset value is R 560 million (USD 47.23 million), and the lower threshold of the target turnover/asset value is R 80 million (USD 6.75 million).⁴⁶³ The higher threshold of the combined turnover/asset value is R 6600 million (USD 556.64 million), and the lower threshold of the target turnover/asset value is R 190 million (USD 16.02 million).⁴⁶⁴

The South African Competition Act recognizes three categories of merger: a small merger, the value of which falls below the lower thresholds set according to Subsection 1 of Section 11(a); an intermediate merger, the value of which falls between the lower and higher thresholds set according to Subsection 1(a) of Section 11; and a large merger, the value of which falls above the thresholds set according to Subsection 1(a) of Section 11.⁴⁶⁵

C. Pre-merger notification

SACA requires only intermediate and large mergers to file with the Competition Commission.⁴⁶⁶ Thus, if company A acquires 51% of company B, and the combined turnover value is greater than USD 47.23 million, and the target turnover value is greater than USD 6.75 million, then parties A and B are required to file with the Competition Commission.

⁴⁶² *Id.* at § 11.1(a)(b).

⁴⁶³ *Id.*

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.* at § 11.5.

⁴⁶⁶ *Id.* at § 13.13A.

1. Waiting period

a. Intermediate merger

For an intermediate merger, the Competition Commission must review applications within 20 business days of receipt, and it may extend this period for an additional 20 business days.⁴⁶⁷ The Competition Commission renders one of three decisions regarding the proposed merger: approval, approval with conditions or prohibition.⁴⁶⁸ If the 20 business days (or 40 days, if the Commission extends the period) pass with no decision from the Commission, the proposed merger is approved by default.⁴⁶⁹

b. Large merger

For a large merger, the Competition Commission has 40 days to render a decision, with accompanying justification, beginning from the day the parties submit the prescribed notification requirements.⁴⁷⁰ The Commission may make an extension of an additional 15 days to review the request.⁴⁷¹ After completing its review, the Commission again has three possible responses: approval of the proposed merger, approval with conditions, or prohibition; this response is forwarded to the Competition Tribunal and the Minister of Trade and Industry.⁴⁷² If the 40 business days pass and the Commission has neither made a recommendation nor applied for an extension, then the applicant parties may submit a request to the Competition Tribunal directly, asking the Tribunal to consider the proposed merger.⁴⁷³ In such a case, the Competition Tribunal is required to arrange⁴⁷⁴ a date to hear information regarding the proceedings of the merger.⁴⁷⁵

⁴⁶⁷ *Id.* at § 14.1(a).

⁴⁶⁸ *Id.* at § 14.1(a),1(b).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.* at § 14A.1(a)(b).

⁴⁷¹ *Id.* at § 14.2.

⁴⁷² *Id.* at § 14A.1(a)(b).

⁴⁷³ *Id.* at § 14.3.

⁴⁷⁴ This Subsection needs to be modified and needs to set out the number of days within which the Competition Tribunal is required to make a decision regarding the merger. It is inconsistent to state when the decision regarding

2. Filing fee

SACA imposes filing fees on both intermediate and large mergers of R 100.000 (USD 8.430) and R 350.000 (USD 29.25), respectively.⁴⁷⁶ No fee is imposed on filings for small mergers.⁴⁷⁷

3. Merger threshold calculator

The South African Competition Commission has a unique service to help companies to determine if a proposed merger is large, intermediate or small.⁴⁷⁸ The company submits information and answer questions regarding its proposed transaction, and the Commission's website will calculate the figures and provide the threshold results.⁴⁷⁹ The website states that the Competition Commission is not bound by this calculation, and that it cannot replace independent legal advice.⁴⁸⁰

D. The considerations and standards used to evaluate a merger

SACA focuses on two major drivers that need to be considered in order to efficiently review a proposed merger and ensure that the South African market remains efficient. The two considerations are whether the proposed merger will substantially prevent or lessen competition, and whether the proposed merger cannot be justified for reasons related to the protection of the

the merger must be made for the intermediate merger and not state the same information for the large merger. The law here leaves determining the time frame up to the Competition Tribunal to decide. This is not economically sufficient for merging parties that want to close their deals as soon as possible; also, it does not further the purpose of this law, which aims to make the parties aware of the time frame so that they can close their deals.

⁴⁷⁵ Competition Act 89 of 1998 § 14.3 (S.Afr).

⁴⁷⁶ Rules for Conduct of Proceedings in the Competition Commission §10, §§5(a) and (b) and Subsection 6. *See* the Competition Commission website available at <http://www.compcom.co.za/notification-fees/>. (last visited December 6, 2015).

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *Id.*

public's interests.⁴⁸¹ Thus, SACA defines the two crucial issues with which the Act is concerned and provides guidelines as to how to determine each issue.

1. Factors that may substantially lessen or prevent competition

To determine if a merger may substantially prevent or lessen competition, the South African Competition Act enumerates the factors that the Competition Commission or the Competition Tribunal must use to evaluate the strength of the relevant market and judge whether companies will operate in a competitive or cooperative manner as a result of a merger.⁴⁸² SACA stipulates the following factors:

- (a) the actual and potential level of import competition in the market;
- (b) the ease of entry into the market, including tariff[s] and regulatory barriers;
- (c) the level and trends of concentration, and history of collusion, in the market;
- (d) the degree of countervailing power in the market;
- (e) the dynamic characteristics of the market, including growth, innovation, and product differentiation;
- (f) the nature and extent of vertical integration in the market;
- (g) whether the business or part of the business of a party to the merger or proposed merger has failed or is likely to fail; and
- (h) whether the merger will result in the removal of an effective competitor.⁴⁸³

2. Factors that may affect the public interest

Regarding protection of the public interest, SACA states that the following issues should be taken into consideration to determine whether a proposed merger can be justified:

- (3) When determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on –

⁴⁸¹ Competition Act 89 of 1998 § 12A.1(a) (S.Afr).

⁴⁸² *Id.* at § 12A.2.

⁴⁸³ *Id.*

- (a) a particular industrial sector or region;
- (b) employment;
- (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and
- (d) the ability of national industries to compete in international markets.⁴⁸⁴

E. Appeal of the Competition Tribunal's decision

An appeal of the Competition Commission's decision may be made to the Competition Appeal Court within 20 business days of the day the decision was issued.⁴⁸⁵ The Competition Appeal Court may set the decision aside, amend it, or confirm it.⁴⁸⁶ If an appeal is submitted, the Competition Appeal Court is required to decide whether to set aside the Competition Commission's decision.⁴⁸⁷ If it sets the decision aside, the Appeal Court is then required to issue one of three resolution decisions: approval of the proposed merger, approval with conditions, or prohibition.⁴⁸⁸ After this step, there is no provision for any further appeal.

F. The Competition Tribunal's right to revoke its decision

The South African Competition Act gives the Competition Tribunal the power to revoke its decision to approve a transaction in certain cases:

- (1) The Competition Commission may revoke its own decision to approve or conditionally approve a small or intermediate merger if –
 - (a) the decision was based on incorrect information for which a party to the merger is responsible;
 - (b) the approval was obtained by deceit; or
 - (c) a firm concerned has breached an obligation attached to the decision.⁴⁸⁹

⁴⁸⁴ *Id.* at § 12A.3.

⁴⁸⁵ *Id.* at § 17.2.

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.* at § 13.3.

⁴⁸⁸ *Id.*

⁴⁸⁹ *Id.* at § 15.1.

G. The Acquisition of Massmart by Wal-Mart

Saudi Arabia's Competition Council may encounter situations in the future in which a Saudi Arabian company is acquired by, or merges with, a US company; therefore, it may be helpful to briefly refer to how the South African Competition Council dealt with such a case; namely, the acquisition of the South African company Massmart by the US company Wal-Mart.

In 2010, Wal-Mart, a US publicly listed company, announced that it planned to acquire 51% of Massmart, a South African publicly listed company; this action was finally approved in 2012 by the South African Competition Appeal Court.⁴⁹⁰ The Wal-Mart acquisition fell under the SA Competition Act because it was a large merger, with Wal-Mart acquiring 51% of Massmart.⁴⁹¹ The SA Competition Commission approved the acquisition in 2011; however, a recommendation was then made by the SA Competition Commission to the Competition Tribunal that Wal-Mart should be required to re-hire the 503 employees of Massmart that it had fired immediately after the acquisition was announced.⁴⁹² The SA Competition Tribunal based its analysis significantly on the grounds of public interest, stating that although the acquisition of Massmart by Wal-Mart did not raise anti-competitive concerns, it did raise public interest concerns.⁴⁹³ It further held that such concerns could be avoided or remedied by imposing conditions on the transaction, such as that the merged entity might not fire employees as a result of the transaction, and that the merged entity must create a program that ensured the development of suppliers in South Africa.⁴⁹⁴ An appeal made by the SA Ministers of Trade and Industry, Economic Development and Agriculture claimed that the Tribunal's reasoning

⁴⁹⁰ SAMUEL C. THOMPSON, JR., BUSINESS PLANNING FOR MERGERS AND ACQUISITIONS, 1131 (4th ed. 2015).

⁴⁹¹ *Id.* at 1132.

⁴⁹² *Id.*

⁴⁹³ *Id.* at 1136-37.

⁴⁹⁴ *Id.*

regarding the antitrust and public interest issues involved in this case was not successful.⁴⁹⁵ The SA Competition Appeal Court stated that it acknowledged some concerns in the areas of public interest and antitrust; however, it concluded that such concerns could not justifiably cause the merger to be prohibited, given the benefits the merger might provide.⁴⁹⁶ The Appeal Court also noted the conditions it had put into place to ensure that such concerns did not prevail.⁴⁹⁷

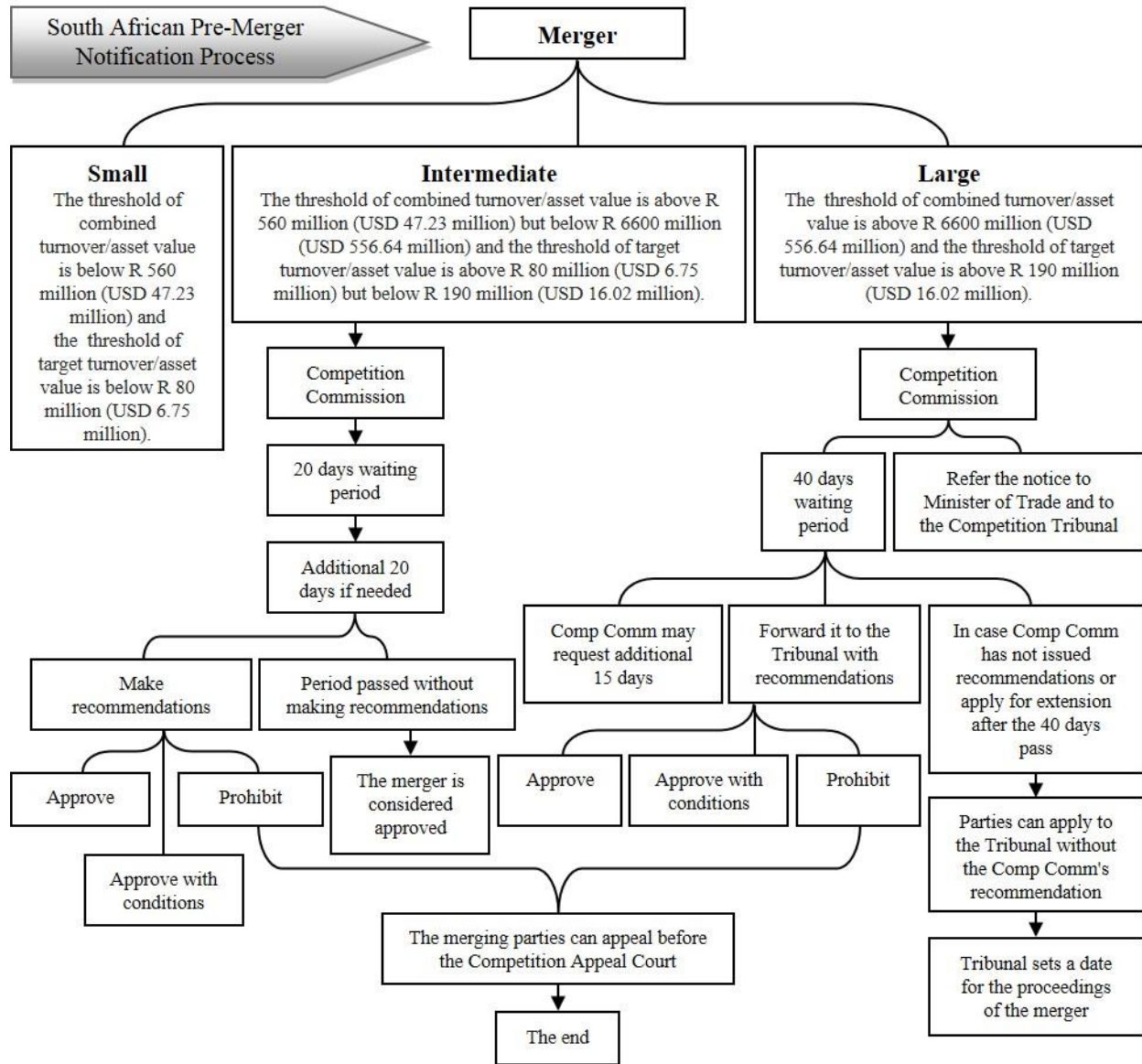
⁴⁹⁵ *Id.* at 1137.

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

Figure 5.1

South African pre-merger notification process



§4.10. Recommendations⁴⁹⁸

Several recommendations are provided here, based on the foregoing analysis of M&A and Competition Law in Saudi Arabia.

A. Pre-merger notification

- 1- The Competition Council should choose one method for the pre-merger notification. It should change the Competition Law to require either that every M&A transaction be approved by the Council before the transaction is completed, or to stipulate that the Council does not need to approve every M&A transaction. The author argues that as Saudi's Competition Law, and the practice of that Law, currently stands, the Council's approach does not comply with the Competition Law and its Implementing Regulation. For example, the Council has begun to require that every M&A transaction be filed, which is not what the Competition Law requires.
- 2- The Competition Council should make the full text of the cases it considers and the decisions it renders available to companies, lawyers, professors, economists, investors and many other parties. Doing so would raise awareness and transparency about the Council's policy, strategy and deliberations, as well as about the accuracy of its decisions. This would help companies and investors ensure that their investments comply with Saudi policy, and it would also help the Saudi government develop its policy toward competition in the marketplace and develop appropriate protection measures through a process of case study, arguments, feedback, research and appeals.

⁴⁹⁸ These recommendations were made after the analysis of the Saudi Competition Law and its Implementing Regulation, as well as an analysis of the compliance with these rules by the Competition Law. The recommendations present the issues that the law ignores, because lawmakers did not anticipate these issues or because the Law is new. The recommendations suggest ways to improve places of weakness in the law that currently render the Competition Law economically and legally insufficient, and in need of amendment.

- 3- The Competition Council should adopt a threshold system analogous to that used in the South African system, in which thresholds are set for various sizes of transactions, and transactions are reported to the Council only if they exceed a threshold. This change would require an amendment to the Competition Law to replace the 40% economic concentration doctrine with a threshold standard.
- 4- If the Competition Council adopts a threshold method, it will need to revise the threshold annually and modify it according to various factors: the size of the market, the size of the companies involved, consideration of consumer benefits, changes in pricing and certain other factors that tend to fluctuate from year to year.
- 5- The Competition Council needs to base its regulations, decisions and pre-notification requirements on rational economic reasoning that raises general awareness of the concepts of fair competition and monopoly. Simply setting a threshold for notification of an intended transaction, such as SAR 200 million (equivalent to USD 53 million), will not solve the 40% economic concentration issue. A transaction that occurs at a threshold of far less than SAR 200 million could give a company monopoly control in Saudi Arabia, especially if that company is engaged in a business sector that is struggling or has particularly high barriers to entry.⁴⁹⁹
- 6- The Competition Council should state the methods it uses to evaluate whether an M&A transaction violates the Competition Law in Saudi Arabia, and these methods should be reliable and widely accepted. The Council should publish outlines or guidelines that companies may use to evaluate their proposed transactions at the beginning of the transaction process. Most, if not all, articles (from both the academic and business

⁴⁹⁹ This recommendation is provided because members of the Council explained to the author that there has been an intention to set a threshold of SAR 200 million as the reportable threshold in addition to the 40%.

sectors) that discuss issues of competition related to M&A activity in Saudi Arabia only touch upon broad issues; this does not add value to the field. However, the problem continues to be that even experts are not able to write about the specifics of M&A activity in Saudi Arabia because they lack of information about how the Competition Council evaluates requests for M&A transactions.

- 7- When it announces a new M&A application, the Competition Council should provide information regarding the value of the transaction and the value of the companies involved, so that the public can understand the size of the proposed transaction. Having read most of the Council's announcements published over the past 14 years, the author of this dissertation finds that none of them contains information regarding the value of the transaction or of the companies that seek to merge or acquire; this information is especially difficult to discover about private companies. The Competition Council should make amendments that specify what information it will provide regarding an economic concentration request. Because the Competition Law requires a transaction to be submitted for approval when it will result in a concentration that exceeds 40% of the market, the Law should specify what method companies should use to determine if their transaction will result in such a concentration. This will make entities aware of whether they need to notify the Competition Council of an intended transaction.
- 8- The Saudi Competition Council could provide an electronic calculator similar to the service provided by the South African Competition Commission's website. Such a tool may facilitate the process of the pre-merger notification and help parties determine whether they must notify the Competition Council of their proposed transaction. The parties may need to consult with legal advisors as well, but a service such as an online

calculator could serve as a basic tool, as well as facilitate a measurement of value that is more sophisticated than the simple 40% concentration standard.

- 9- The Competition Council should clarify whether it differentiates between the notification of the M&A transaction and the request concerning economic concentration. The Competition Council should state when companies must notify the Council, when companies must submit an economic concentration request, and when companies do not need to notify the Council about a transaction.
- 10- Filing fees should be determined relative to the size of the merger, as is the case in the South African Competition Act. The Saudi Arabian Competition Council imposes a flat fee of SAR 1000 for all types of transactions. A tiered fee system would benefit the Competition Council as M&A activity in Saudi grows.
- 11- The Saudi Competition Law should guide the Council as to how economic concentration should be reviewed in different regions. The law should determine if economic concentration in Saudi Arabia should be reviewed based on the 13 administrative areas, or based on the largest cities, such as Riyadh, Jeddah, Damam, Mecca and Medina.
- 12- The Saudi Competition Law should specify whether the Council should focus only on horizontal mergers, or whether it should also review vertical mergers and conglomerates. Neither the Law nor the Council specifies the types of mergers on which the Council should focus. Vertical and conglomerate mergers generally do not affect competition as much as horizontal mergers do. Including detailed guidelines would make the Saudi Competition Law more efficient both economically and administratively and would raise the awareness of investors and corporations about the focus of Saudi economic policy.

B. The substance

- 13- Categorizing mergers into small, intermediate and large, as the South African Competition Act does, is necessary for a country like Saudi Arabia. These categories would give Saudi Arabia a better understanding of the M&A activity in its market. It would also facilitate the process of the pre-merger notification for the Competition Council and also for the parties and investors concerned. Categorization would raise awareness of the scope and mechanisms of M&A transactions in Saudi Arabia, which would benefit interested investors, economists and lawmakers.
- 14- The Saudi Competition Law should require the Competition Council to choose a clear and certain mathematical or economic method for the evaluation of pre-merger notifications and merger review, and this method should be disclosed to the public. The author refers again to the example set by the South African Competition Act, Section 11 Subsection 3 (a), which requires the Minister of Trade and Industry and the Competition Commission to publicly “[set] out the proposed threshold and method of calculation for the purpose of this section.”
- 15- The Competition Council should provide a better explanation of some of the terms used in the Implementing Regulation of the Competition Law. This Regulation defines the concept of a relevant market by using the term “relevant products.” Defining a term by using the same term in the definition is generally considered faulty logic and may result in a definition that lacks precise meaning.
- 16- The Competition Council, by means of its proper authority and the stated legislative process, should make amendments to the Competition Law and its Implementing Regulation regarding definitions and vague terminology. Certain terms are critical to the

precise and proper application of the Competition Law and its Implementing Regulation, but many of these terms, as currently used (written) in the Law and the Regulation, are unclear or contradictory. Terms such as “relevant market,” “relevant product,” “economic concentration,” “dominance” and “geographical area” should be defined using proper technical language. Definitions should refer to clear standards that companies, experts, professors and others can use to evaluate a transaction before going forward with a transaction application. Also, parties should have the right to argue and appeal when a transaction is not approved. All of these reforms may help the Board of Grievances (the designated court) assure fair competition in Saudi Arabia.

- 17- The Competition Council has translated the Arabic version of the Saudi Competition Law into English. This English version is provided only as a guideline; the Arabic version is the only formally accepted version. However, the English version should still reflect the same meaning as the Arabic version. This issue becomes even more crucial when a law or legal term is adapted (borrowed) from a law that was originally written in English, translated into Arabic, and added to the Saudi Competition Law. For example, the term “relevant market” in English is a term of art for M&A; it means a specific thing. However, this term means nothing in Arabic unless the law explains what it is and attaches a specific meaning to it in the Arabic language. This recommendation—that translations must accurately reflect the *de facto* meaning of the original language’s terms of art—should be applied whenever the Saudi Competition Law attempts to follow another country’s legal model for the purpose of drafting or amending Saudi legislation.
- 18- The author recommends that the Competition Council use consistent terminology throughout all of the Articles in the Competition Law and its Implementing Regulation.

For example, the author recommends that the word “ownership,” as used in Article 9 (1), be replaced with the word “acquisition.”

- 19- The Competition Council should define the terms it uses in its decisions, such as “unified marketing” and “pricing policy.” It should also use more precise language. For example, the word “discretion” is used in this way in Article 32(5) of the Implementing Regulation of the Competition Law: “If the Council concludes that the economic concentration will restrict the freedom of competition, it shall decide the following: 5) Take the necessary precautions to terminate, prevent or mitigate the economic concentration, at the [discretion] of the Council.” This use of the word “discretion” here is broad. Therefore, the law should explain to what extent “discretion” is given to the Council. The word “discretion” should not be left with a broad meaning.
- 20- The Competition Council should use the words “mergers” and “acquisitions” properly to reflect the exact terms of the proposed transaction. Since M&A activity has increased in Saudi, the Competition Council should make amendments to the Competition Law and its Implementing Regulation, or create an outline, to define more clearly the forms of that mergers and acquisitions may take. This would make investors and the public aware of the terms that the Council uses in its announcements or decisions.
- 21- The Competition Council should use its power as designated by the Competition Law and its Implementing Regulation. However, the author also encourages attorneys and companies to appeal Council decisions about their requests, and also to appeal any requirements made by the Council that go beyond its authority or are not supported by the Saudi Competition Law. This would help improve fair competition in the Kingdom.

- 22- The Competition Council should be a separate and independent authority that reports directly to the Ministers' Council and not to the Ministry of Commerce and Industry. Also, the Council should employ experts from different fields such as law, economics, accounting, finance and business. This would enhance fair competition and make the Competition Council more efficient, professional, independent and modern.⁵⁰⁰
- 23- The Competition Law should include rules governing independency issues. The members of the Competition Council should not be investors, or, at the least, they should not be allowed to participate in evaluating an M&A transaction in which they have an interest. Also, they should be fiscally independent. There should be mandatory disclosure requirements when any member has an interest that might affect his ability to conduct his Council duties, either generally or regarding a specific transaction that is under review. To reiterate, this recommendation becomes especially important if Council members have investments in one or more of the companies involved in an M&A transaction about which they are required to make a decision.
- 24- The Competition Council's purview should be limited to making recommendations to the Board of Grievances only; it should leave decisions regarding transactions to the courts. As an example, the author refers to the relationship between the South African Competition Commission and the South African Competition Tribunal. This will make the review of transactions more independent. Establishing an independent competition tribunal that reviews issues of competition that arise in connection with M&A transactions would accomplish this change.

⁵⁰⁰ The author shared this recommendation with certain senior scholars, such as Dr. Muhammad Alshamari, Head of the Judicial Office in the Foreign Ministry. *See* the ALRYADH NEWSPAPER, October 29, 2011 available at <http://www.alriyadh.com/679447> (last visited August 19, 2015).

- 25- Unlike the South African Competition Act, the Saudi Competition Law does not cover the Competition Council's right to revoke its own decisions, even though such a right is crucial and cannot exist without the regulatory grounds for it. Therefore, the Saudi Competition Law should include a specification giving the Council the right to revoke a decision if the Council discovers that information submitted regarding a merger was false or deceptive, or if it discovers that one or more of the parties involved did not comply with conditions attached to the decision.
- 26- The Saudi Competition Law does not provide rules or guidelines that help the Competition Council handle different types of mergers, such as horizontal, vertical and conglomerate. The Saudi Competition Law should provide principles that guide the Competition Council.
- 27- The Saudi Competition Law should have a theme and purpose that it aims to achieve. Demonstrating the purpose of the Competition Law would help the Competition Council when it reviews mergers, and it would also help judges review cases if a Council decision is appealed.
- 28- The Saudi Competition Law should state explicitly that the law does not cover mergers that involve a failing company merging with another company.
- 29- The Saudi Competition Law should state explicitly that the law does not apply to mergers between small businesses.

Chapter 5: Closely Held Corporate M&A and Basic Principles: Stock Acquisition, Assets

Acquisition and Merger⁵⁰¹

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⁵⁰¹ Relevant articles and rules cited in this chapter are provided in Appendices 5A, 5B, 5C, and 5D.

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§5.1. Scope⁵⁰²

This chapter begins by outlining the fundamentals of the New Saudi Companies Law of 2015 in Section 5.2. Section 5.3 addresses the basic rules of corporate governance, such as starting a corporation, calling for a shareholder meeting, electing directors and handling conflicts of interest. Section 5.3 also covers issues that are related and essential to M&A transactions, such as the issuance of shares by a publicly held company, private offering exceptions and insider trading. Following these introductory sections are three subsequent sections: Section 5.4 addresses the stock acquisition of a closely held corporation by discussing a crucial court case (the Safola case), as well as an acquisition deal that was canceled due to what the author argues is a legislative vacuum where M&A laws are concerned. This discussion references the US approach to M&A. Section 5.5 addresses the assets acquisition of closely held corporations; this section concludes that Saudi Arabia should amend the Saudi Competition Law 2015 in order to handle such acquisition activity in the same manner as the US does. Section 5.6 addresses the mergers of closely held corporations and discusses certain articles that Saudi M&A legislation currently does not address; the author argues that these articles are necessary for Saudi to facilitate mergers in the manner that the American system follows, and further argues that adopting such articles would help to reform the Saudi Companies Law in an economically efficient manner.

⁵⁰² The diagrams presented in this chapter are adopted with modifications from THOMPSON, JR., *supra* note 490, at 8-15.

§5.2. New Saudi Companies Law 2015

A. Introduction

On November 9, 2015, Saudi Arabia issued the new Saudi Companies Law (Companies Law 2015),⁵⁰³ 50 years after the first Saudi Companies Law (Companies Law 1965)⁵⁰⁴ was enacted. The Saudi Companies Law 2015⁵⁰⁵ improves the Companies Law 1965 and responds to various issues that occurred during the 50 years since it (the 1965 law) was passed. The Companies Law 2015 has a new character, although many articles and provisions remain unchanged since the 1965 iteration. Unfortunately, while it addresses some M&A issues, the Companies Law 2015 does not change the fundamental rules that govern M&A in Saudi Arabia.

The enactment of the new Saudi Companies Law 2015 informs the discussion of Chapter 5 of this paper. Chapter 5 provides a critical analysis of the Saudi Companies Law 2015 regarding principles relevant to M&A transactions, including a thorough comparison of Companies Law 1965 and Companies Law 2015. This may serve as a history of the legislative background of both Saudi Companies Laws, and also as an analysis of the changes (since 1965) to be found in Companies Law 2015, both in the corporate governance rules (which did change) and in the M&A rules (which remained relatively the same). Exploring the topic of M&A in Saudi Arabia in a paper of this size represents original scholarship. Because the Saudi

⁵⁰³ Ministry of Commerce and Industry, available at <https://mci.gov.sa/MediaCenter/News/Pages/09-11-15-01.aspx>. (last visited December 27, 2015).

⁵⁰⁴ Bureau of Experts at the Council of Ministers, available at <https://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=236&VersionID=48>. (last visited December 27, 2015).

⁵⁰⁵ Because the Saudi Companies Law 2015 has not been officially translated, this paper will translate the articles relevant to the topic in a way that reflects the exact meaning in Arabic. Also, since there are many articles that have not been changed from the Saudi Companies Law 1965, or have been only slightly restructured without changing the substance of the law, the translation of the Articles of the Saudi Companies Law 2015 may have similarities with the translation of the Saudi Companies Law 1965, or may have similarities with future translations of the Saudi Companies Law 2015. The translation of the language of the Saudi Companies Law 2015 addressed here reflects how the author believes the Articles should read. Any improper interpretation in the Saudi Companies Law 2015 of certain Articles or words from the Saudi Companies Law 1965 is addressed when the author finds this to be the case.

Companies Law 2015 has only just been published, few scholars have had the chance to review it; this paper provides an original and primary analysis of Companies Law 2015.

The Subsections that follow provide a brief introduction to the new approach of the Companies Law 2015 in terms enforcement, character and jurisdiction. Then, the Article/s of Companies Law 2015 that are germane to each issue will be addressed, and, when applicable, the Subsections will include a discussion of what has changed in the new Companies Law 2015 versus what has remained the same as the provisions of the old Companies Law 1965.

B. Enforcement

The Companies Law 2015 states that the Law should enter into force 150 days (approximately 5 months) after the date on which the Law was published in the official newspaper.⁵⁰⁶ The Companies Law 2015 gives companies that are already established at the time the Law comes into force one year from this time to make adjustments and reforms to bring them into compliance with the Saudi Companies Law 2015.⁵⁰⁷ The one-year period is subject to exceptions provided by the Ministry of Commerce and Industry and the Capital Market Authority.⁵⁰⁸

The Saudi Companies Law 2015 replaces Companies Law 1965 and abolishes any article in Companies Law 1965 that contradicts with Companies Law 2015.⁵⁰⁹ The language of Article 226 of Companies Law 2015 implies that any rules contained in Companies Law 1965 that do not contradict the rules specified in Companies Law 2015 may be used to help respective authorities, courts and companies interpret the substance of Companies Law 2015.

⁵⁰⁶ The Saudi Companies Law 2015 was published in the official newspaper (Um Al-Qura) in December 4, 2015, issue No. 4595, available at <http://www.uqn.gov.sa/Archive/Issue4595/News/PDFVersion/UM-ALQURA.4595.pdf> (last visited December 27, 2015).

⁵⁰⁷ *Id.* at art. 224.

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.* at art. 226.

The Saudi Companies Law 2015 gives the Ministry of Commerce and Industry and the Capital Market Authority the power to issue whatever measures are necessary to implement the Companies Law 2015 according to each entity's authority.⁵¹⁰

C. Character

The Ministry of Commerce and Industry has published a diagram illustrating the objectives and the new aspects of Companies Law 2015,⁵¹¹ which shows that the new Law has several new considerations that improve corporate governance in general, and that impact M&A in particular. For example, these new conditions provide for more limitations and supervision of a company's board of directors.

The Saudi Companies Law 2015 adds more restrictions on the salaries and compensation of members of a company's board of directors than did the Companies Law 1965.⁵¹² Both the 2015 and 1965 Laws have the same rules that govern a director's or board member's annual compensation; namely, if compensation is a percentage of a company's profits, both Laws state that this compensation shall not exceed 10%.⁵¹³ The Saudi Companies Law 2015 places further restrictions on compensation, stating that under no circumstances may any given director's annual compensation exceed SAR 500,000 (equivalent to approximately USD 133,000).⁵¹⁴ This limit is recognized to align with parameters provided by the Capital Market Authority.⁵¹⁵

The Saudi Companies Law 2015 substantially raises the penalties for violating the Law⁵¹⁶ above the levels set in Companies Law 1965.⁵¹⁷ For instance, in the 1965 Law, a director or chief

⁵¹⁰ *Id.* at art. 225.

⁵¹¹ The Ministry of Commerce and Industry, available at <https://mci.gov.sa/MediaCenter/News/Pages/09-11-15-01.aspx> (last visited December 27, 2015).

⁵¹² The Saudi Companies Law 1965, art. 74, and the Saudi Companies Law 2015, art. 76 (1) (2).

⁵¹³ *Id.*

⁵¹⁴ *Id.* at art. 76 (3).

⁵¹⁵ *Id.*

⁵¹⁶ The Saudi Companies Law 2015, ch. 11, art. 111-118.

executive intentionally providing false information regarding a shareholder meeting was subject to a minimum of three months and a maximum of one year in prison, and/or a fine of not less than SAR 5,000 (approximately USD 1,300) and not more than SAR 20,000 (approximately USD 5,300).⁵¹⁸ Under Companies Law 2015, the same act is subject to a maximum of 5 years in prison and/or a fine of SAR 5 million (approximately USD 1.3 million).⁵¹⁹

D. Jurisdiction

The Saudi Companies Law 2015 includes an article that addresses the issue of jurisdiction between the Ministry and other relevant agencies or authorities. The Companies Law 2015 states clearly that—without prejudice to the rules stipulated in Companies Law 2015, and without prejudice to what may fall under the Saudi Monetary Agency’s authority according to its laws (especially Banking Control, Cooperative Insurance Companies Control, and Finance Companies Control)—the Capital Market Authority is responsible for (1) supervising and overseeing listed companies in the Saudi Stock Market and (2) issuing rules that govern the stock market’s operations, including regulating merger transactions in which one party involved is a listed company.⁵²⁰

Article 219 of the Saudi Companies Law 2015 aims to assign supervision of listed companies to the Capital Market Authority, including the issuance of rules for mergers that involve at least one listed company. The Article also instructs insurance companies and banks to comply with additional rules specified for such entities in their respective laws. These additional rules fill in the legislative gap regarding jurisdiction that previously had been addressed in a

⁵¹⁷ The Saudi Companies Law 1965, ch. 13, art 229-231.

⁵¹⁸ *Id.* at art. 229 (6).

⁵¹⁹ The Saudi Companies Law 2015, art. 111 (a).

⁵²⁰ *Id.* at art. 219.

memorandum between the Ministry and the Capital Market Authority.⁵²¹ Until the Capital Market Authority issues rules that govern mergers involving a listed company, listed companies are governed only by the joint stock chapter of the Saudi Companies Law 2015, which comprises rules governing the merger of closely held and publicly held corporations. The acquisition of publicly held companies will be addressed in Chapter 6 of this paper.

§5.3. Basic Corporate Governance Rules: General and Regarding M&A Specifically

A. Starting the corporation: the certificate of incorporation⁵²²

The Saudi Companies Law 2015 requires the submission of the following information to register a company: 1) the company's name, purpose, headquarter and duration; 2) the name/s of the founder/s, their place/s of residence, their profession/s and their nationality/ies; 3) the class/es of shares, their value/s, their number/s and the capital paid; 4) the date and number of the approval decision from the Ministry to establish the company; 5) the date and number of the decision by the Ministry to announce the company.⁵²³

As one can see, there are some differences between these requirements and those of the Saudi Companies Law 1965, which requires a company to set out the following basic information in its Certificate of Incorporation:⁵²⁴

- 1) The company's name, object, head office, and term.
- 2) The founders' names, residence of place, occupations, and nationalities.

⁵²¹ The memorandum is translated from the Arabic and included in the Appendix of this dissertation.

⁵²² The abbreviations provided in this chapter shall mean the following: CHAC: Closely Held Acquiring Corporation; CHTC: Closely Held Target Corporation; PHAC: Publicly Held Corporation; PHTC: Publicly Held Target Corporation; AC: Acquiring Corporation; TC: Target Corporation; SHs: Shareholders.

⁵²³ The Saudi Companies Law 2015, art. 65 (1) (2).

⁵²⁴ The certificate of incorporation is the information and documents that corporations are required to submit to the Minister of Industry and Commerce in order to be registered. The bylaw is the rules and provisions that govern the corporation.

- 3) The types, value, and number of shares, as well as the amount offered for public subscription, the amount subscribed by the founders, the amount of paid-in capital, and the restrictions imposed on the circulation of shares.
- 4) Method of the division of profits and losses.
- 5) The particulars concerning contributions in kind and the rights attached thereto, and special privileges granted to the founders or others.
- 6) The date of the royal decree⁵²⁵ authorizing the incorporation of the company, and the issue number of the Official Gazette in which the royal decree was published.⁵²⁶
- 7) The date of the decision issued by the Minister of Commerce announcing the incorporation of the company, and the issue number of the Official Gazette in which the decision was published.⁵²⁷

Publicly held companies, known in Saudi Arabia as listed joint stock corporations, must file certain documents related to their incorporation.⁵²⁸ The Saudi Companies Law 2015 states that within 120 days of the date the Law was issued, the Minister of Commerce and Industry must issue sample articles of association and bylaws for every type of business organization, which shall be applicable from the date the Companies Law 2015 comes into force.⁵²⁹ This is slightly different from the Saudi Companies Law 1965, which states that a publicly held company must fill out a standard bylaws form designed by the Ministry of Commerce and Industry.⁵³⁰ The 1965 Law also stipulates that such companies shall not alter the form in any way that violates the template of the bylaws form: “The Minister of Commerce shall issue a decision

⁵²⁵ The Royal Decree is the official document signed by His Majesty as head of the Kingdom. The document reflects the will of the king agreeing with the Council of Ministers and the Shura Council, who have already met and discussed the document. However, the Royal Decree is distinguished from the Royal Order. The Royal Order is a formal written document reflecting the direct and sole will of the King, and often is issued according to a specific formula, bearing the King’s signature as head of the kingdom. As stated, the main difference is that the royal decree is the endorsement of the King’s approval in his status as the Prime Minister of the Council of Ministers after the issue is passed through the Council of Ministers. For definitions, *see* ALSHULHOOB, ABDULRAHMAN, THE CONSTITUTIONAL LAW IN SAUDI ARABIA BETWEEN ISLAMIC LAW AND COMPARATIVE LAWS, 197-98 (2d ed, Riyadh, Saudi Arabia, 2005).

⁵²⁶ The requirement of stating the date of the royal decree only applies to corporations that are required to obtain approval from the Council of Ministers, as stated in Article 52 of the Companies Law 1965.

⁵²⁷ The Saudi Companies Law 1965, art. 65.

⁵²⁸ *See* the Listing Rules, art. 2, 11.

⁵²⁹ The Saudi Companies Law 2015, art. 225 (1).

⁵³⁰ The Saudi Companies Law 1965, art. 51.

in a form for joint-stock Corporation bylaws. Such form may not be violated except for reasons satisfactory to the said minister.”⁵³¹

In an amendment that aims to reduce barriers to entry into the marketplace for entrepreneurs, the Saudi Companies Law 2015 does not require a feasibility study as a condition of registering a company. The Saudi Companies Law 1965 does requires such a study.⁵³² Specifically, the Companies Law 1965 stipulates that a company must obtain approval from the Ministry for incorporation, and notes that the Ministry will review the company’s status and financial objectives for economic feasibility:

Other corporations may be incorporated only by an authorization to be issued by the Minister of Commerce and published in the Official Gazette. The Minister of Commerce shall issue the said authorization only after reviewing a study proving the economic feasibility⁵³³ of the company’s objectives, unless the company has submitted such study to another competent government agency that has authorized the establishment of the enterprise.⁵³⁴

The Saudi Companies Law 2015 abandons another rule from the 1965 law regarding incorporation: the need for a royal decree. The Companies Law 2015 states that a joint stock company is incorporated by an issued decision that authorizes the establishment of the company, including companies that are established by the government or by any public institutional entity.⁵³⁵ The 2015 law establishes a broad condition, which states that if the business of the company requires regulatory approval or registration from the respective agency, the decision to

⁵³¹ *Id.*

⁵³² The Saudi Companies Law 1965, art. 52.

⁵³³ The author argues that the Saudi Companies Law 1965 should not have required a study of the economic feasibility of the corporations’ objectives. There is no rationale behind such a study, and therefore, the Saudi Companies Law (old or new) should not place barriers in the way of corporations. The author also argues that the economic feasibility study in particular is often based on speculation, which means that determinations of feasibility are not necessarily accurate or helpful to the Ministry in determining the readiness of the corporation for an M&A transaction.

⁵³⁴ The Saudi Companies Law 1965, art. 52.

⁵³⁵ The Saudi Companies Law 2015, art. 60 (1).

allow the establishment of the company shall not be made until the respective agency approves it or registers the company.⁵³⁶

This differs in marked ways from the Companies Law 1965, which states that some publicly held corporations needed a royal decree⁵³⁷ to incorporate:

The following joint[]stock corporations may be incorporated only by virtue of an authorization issued upon a royal decree based on the approval of the Council of Ministers and the recommendation of the Minister of Commerce, with due regard to the provisions of the Regulations:

- a) Chartered corporations.⁵³⁸
- b) Corporations managing a public utility.
- c) Corporations receiving subsidy from the government.
- d) Corporations in which the government or any other public legal person participates, except for General Organization for Social Insurance and Pension Fund.
- e) Corporations practicing banking activities.⁵³⁹

In terms of registering with a notary public, the two laws (2015 and 1965) are relatively similar. The Saudi Companies Law 2015 states that with the exception of special partnerships, the articles of association of every company must be in writing and must be notarized by the respective agency.⁵⁴⁰ The 2015 law defines the meaning of “respective agency” as being “the Ministry of Commerce and Industry unless with respect to listed companies, then it shall mean the Capital Market Authority.”⁵⁴¹ The 2015 law also states that the articles of association and any amendments to them will be void if they are not notarized.⁵⁴² Article 12 (1) of the Saudi Companies Law 2015 uses the phrase “must be notarized by the authority designated in

⁵³⁶ *Id.* at art. 60.

⁵³⁷ *See* Footnote 526.

⁵³⁸ The accurate translation of this type of corporation is the concessionary corporation, to which the Saudi government gives privileges over certain investments in the Kingdom.

⁵³⁹ The Saudi Companies Law 1965, art. 52.

⁵⁴⁰ The Saudi Companies Law 2015, art. 12 (1).

⁵⁴¹ *Id.* at art. 1.

⁵⁴² *Id.* at art. 12 (1).

notarization” instead of the term “notary public.”⁵⁴³ The Saudi Companies Law 1965 simply states that a corporation must register with a notary public before its contract may be approved by the Ministry: “[w]ith the exception of a joint venture, a company’s contract shall be recorded in writing before a notary public. Otherwise, such contract shall be null and void in relation to third parties.”^{544, 545}

If a company wants to issue shares and become publicly held, it must comply with the listing regulations governed by the Capital Market Authority, as well as by the Companies Law, which is governed by the Ministry of Commerce and Industry.^{546, 547}

B. Calling for a shareholder meeting

Regarding calling a shareholder meeting, the 2015 and 1965 laws are relatively similar. The Companies Law 2015, Article 90 (1),⁵⁴⁸ allows the board of directors, or at least 5% of shareholders, to call a meeting. This agrees with the language of Article 87 of the 1965 law, which is quoted below. However, the 2015 law adds that a general assembly meeting may be called by the Ministry of Commerce and Industry, if shareholders representing ownership of at least 2% of the company’s capital request a shareholder meeting, and in the following cases: (a) if the period specified for the general assembly meeting passed without the meeting being held according to Article 87 (within the first six months following the end of the company’s fiscal

⁵⁴³ *Id.*

⁵⁴⁴ The Saudi Companies Law 1965, art. 10.

⁵⁴⁵ That is after the article was amended in 30/7/1412H, which was in 4/2/1992AD.

⁵⁴⁶ The Saudi Companies Law 2015, art. 219.

⁵⁴⁷ As already noted earlier in the text of this chapter, the Saudi Companies Law 2015 states clearly that—without prejudice to the rules stipulated in Law 2015 and without prejudice to what may fall under the Saudi Monetary Agency’s authority according to its laws, especially the Banking Control Law, Cooperative Insurance Companies Control Law, and Finance Companies Control Law—the Capital Market Authority is responsible for (1) supervising and overseeing listing companies in the Saudi Stock Market and (2) issuing rules that govern the stock market’s operations, including regulating merger transactions in which one party involved in the merger transaction is a listed company. The Saudi Companies Law 2015, art. 219.

⁵⁴⁸ *Id.* at art. 90 (1).

year);⁵⁴⁹ (b) if the number of board members decreases below the minimum number of directors permitted (not less than 3 directors)⁵⁵⁰ by Article 69 of the 2015 Law; (c) if any violation of the law or the company's bylaws, or deficiency in the management of the company, has been found; or (d) if the board does not call for the general assembly meeting within 15 days of the date on which it was requested by an auditor or an audit committee or a group of shareholders representing at least 5% ownership of the company's capital.⁵⁵¹

As referenced above, in the Companies Law 1965, Article 87 discusses the calling of a meeting or special meeting. This Article reads as follows:

Stockholders' general or special meetings shall be convened at the summons of the board of directors in the manner prescribed in the bylaws of the company. The board of directors must call for a regular general meeting, if so requested by the auditor or by a number of stockholders representing at least 5% of the capital.

The General Department of Companies may, at the request of a number of stockholders representing at least 2% of the capital or pursuant to a decision by the Minister of Commerce, call for a general meeting if such a meeting is not called within one month from the date set therefore.⁵⁵²

C. Notice of the shareholder meeting

In terms of the meeting notice that must be provided to shareholders, the 2015 law generally retains the rules set out in the 1965 law; these are quoted below.⁵⁵³ The 2015 law does reduce the minimum number of days—from 25 down to 10—required between the date the notice is sent and the date of the meeting.⁵⁵⁴ The 2015 law also removes the following phrase that appears in the 1965 law: “if the stock of the company is registered as nominative,”⁵⁵⁵ and it gives a company the right to send a meeting notice to shareholders by registered mail instead of

⁵⁴⁹ *Id.* at art. 87.

⁵⁵⁰ *Id.* at art. 78.

⁵⁵¹ *Id.* at art. 90 (2).

⁵⁵² The Saudi Companies Law 1965, art. 87.

⁵⁵³ The Saudi Companies Law 2015, art. 92.

⁵⁵⁴ *Id.*

⁵⁵⁵ *Id.*

by making a public announcement.⁵⁵⁶ Article 88 of the 2015 law adds the requirement of sending a copy of the meeting notice to the Ministry of Commerce and Industry, as well as to the Capital Market Authority, if the company is listed on the stock market.⁵⁵⁷ By way of comparison, the following is the text of Article 88 of the Saudi Companies Law 1965 regarding meeting notices. As noted above, it states that notice of a meeting must be given at least 25 days before the scheduled date of the meeting:

Notices of general meetings shall be published in the *Official Gazette* and in a daily newspaper distributed in the locality of the head office of the company, at least 25 days prior to the date set for the meeting. Nevertheless, if all the stock of the company is registered as nominative, a notice sent by registered mails at least 25 days before the date of the meeting shall suffice. The notice shall contain an agenda of the meeting. A copy of both the notice and the agenda shall be sent to the General Department of Companies at the Ministry of Commerce within the period specified for publication.⁵⁵⁸

D. The list of shareholders

Regarding attendance at shareholder meetings, the 2015 law makes changes from the 1965 law that seem aimed at encouraging shareholders to be more active in participating in the meetings. The 2015 law abandons some of the rules of the 1965 law (noted below) regarding shareholder meetings, and gives the right to attend to every shareholder.⁵⁵⁹ Specifically, it states that each shareholder has the right to attend the meeting and declares that any article in the company's bylaws that states otherwise is invalid.⁵⁶⁰ The 1965 law requires a list to be produced of shareholders eligible to attend the meeting, and it also gives the right to attend the shareholder meeting, and to vote, to any person owning 20 or more shares of the company.⁵⁶¹ From a practical point of view, the author argues that there was no need (under the 1965 law's

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

⁵⁵⁸ The Saudi Companies Law 1965, art. 88.

⁵⁵⁹ The Saudi Companies Law 2015, art. 86 (2).

⁵⁶⁰ *Id.*

⁵⁶¹ The Saudi Companies Law 1965, art. 95.

conditions) for a list of shareholders eligible to attend meetings, since ownership of only 20 shares would qualify a shareholder to attend the meeting.

E. The right to vote by proxy

The Saudi Companies Law 2015 retains the provisions of the 1965 law concerning the right to vote by proxy or in person.⁵⁶² The 2015 law allows shareholders to appoint another person (not including a board member or any of the company's employees) to vote on his/her behalf.⁵⁶³ It also permits holding general assembly meetings using modern communications technology.⁵⁶⁴ In particular, it allows companies to use these sorts of technology to engage shareholders in discussing and voting on resolutions.⁵⁶⁵ The provisions of the 1965 law give shareholders who are eligible to attend a shareholder meeting the right to have other persons attend on their behalf, as is the case in most countries in the world. Article 83 of the 1965 law states:

The bylaws of the company shall specify the classes of stockholders entitled to attend general meetings. Nevertheless, every stockholder who holds 20 shares shall have the right to attend, even if the bylaws of the company provide otherwise. A stockholder may, in writing, give proxy to another stockholder other than a director to attend the general meeting on his behalf. The Ministry of Commerce may delegate one or more representatives to attend the general meetings as observers.⁵⁶⁶

F. The requirements for votes and quorum to approve an action at the extraordinary and general meeting assemblies

The Saudi Companies Law 2015 makes several changes in the provisions set out by the 1965 law regarding the quorum required at shareholder meetings. These changes are discussed in more detail below.

⁵⁶² The Saudi Companies Law 2015, art. 86 (2).

⁵⁶³ *Id.*

⁵⁶⁴ *Id.* at art. 86 (3).

⁵⁶⁵ *Id.*

⁵⁶⁶ The Saudi Companies Law 1965, art. 83.

1. The quorum requirements of a general assembly meeting under Saudi Companies Law 2015

The Saudi Companies Law 2015 states that the general assembly meeting shall not be valid unless shareholders representing ownership of one quarter of the company's capital attend the meeting, unless the company's bylaws require a higher percentage; however, in no case shall more than 50% ownership of the company's capital be required to be present for a meeting to be held.⁵⁶⁷ The 2015 law further states that if the requirement for a quorum of shareholders is not met in the first general assembly meeting, a second general assembly meeting may be called within 30 days of the first meeting, and the call/notice shall be issued in the manner prescribed in Article 91.^{568, 569} The Saudi Companies Law 2015 adopts a new ("new" vs. the 1965 law) mechanism for holding shareholder meetings; namely, if the first general assembly meeting is not quorate (and therefore not held), the company may hold a second general assembly meeting one hour after the prescribed time of the first meeting, provided that two conditions are met: the company's bylaws permit such a mechanism, and the notice of the original meeting clearly stated the availability of this mechanism.⁵⁷⁰ The second general assembly meeting shall be made valid by any number of shareholders present.⁵⁷¹ A resolution proposed in the general assembly meeting shall be adopted when a super majority of the shares represented in the meeting approves it, unless the company's bylaws require a higher percentage.⁵⁷²

These innovations in the 2015 law versus the 1965 law suggest that the Saudi legislature may be attempting to provide companies with a mechanism to decide issues in more efficient

⁵⁶⁷ The Saudi Companies Law 2015, art. 93 (1).

⁵⁶⁸ Article 91 of the Saudi Companies Law 2015 addresses the manner in which the call for a shareholder meeting shall be made, *see* Subsections B and C of Section 5.3.

⁵⁶⁹ *Id.* at art. 93 (2).

⁵⁷⁰ *Id.*

⁵⁷¹ *Id.*

⁵⁷² *Id.* at art. 93 (3).

ways. Likely, the Saudi legislature has noticed that companies have been negatively affected by the lengthy process they had to undergo in order to hold a first shareholder meeting. Indeed, many Saudi companies could not hold a first general assembly meeting at all if their shares were widely dispersed among shareholders, and the quorum requirement for the meeting was high. Moreover, block shareholders in many cases do not represent shares that can meet the quorum requirements of a first general assembly meeting.

2. The quorum requirements of an extraordinary general assembly meeting under Saudi Companies Law 2015

The Saudi Companies Law 2015 states that the first extraordinary general assembly meeting shall not be valid unless shareholders representing one half of the company's capital are present, unless the company's bylaws require a higher percentage; however, in no case shall a percentage of more than two-thirds be required for a meeting to be held.⁵⁷³ The 2015 law states that if a first extraordinary general assembly meeting is not held, because the quorum is not met, a second extraordinary general assembly meeting may be called in the manner prescribed in Article 91.^{574, 575} The Saudi Companies Law 2015 also permits the second extraordinary general assembly meeting to be held one hour after the time of the initial meeting (i.e., the one that was not held because it did not meet quorum requirements) passes.⁵⁷⁶ The second extraordinary general assembly meeting shall be valid if shareholders representing at least one-quarter ownership of the company's capital are present.⁵⁷⁷ If the second extraordinary general assembly meeting fails to meet the requirement of quorum, a third extraordinary general assembly meeting

⁵⁷³ *Id.* at art. 94 (1).

⁵⁷⁴ Article 91 of the Saudi Companies Law 2015 addresses the manner in which the call for a shareholder meeting shall be made, *see* Subsections B and C of Section 5.3.

⁵⁷⁵ The Saudi Companies Law 2015, art. 94 (2).

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

may be called in the manner prescribed in Article 91.⁵⁷⁸ The third extraordinary general assembly meeting shall be valid with whatever number of shares is present upon approval of the respective authority.⁵⁷⁹ A resolution in an extraordinary general assembly meeting shall be adopted if approved by two-thirds of the shares represented in the meeting, unless the resolution concerns the increase or decrease of capital, the extension of the company's duration, the dissolution of the company before the time prescribed in the company's bylaws or a merger with another company.⁵⁸⁰ In those cases, the meeting resolution is adopted if approved by three-fourths of the shares represented in the meeting.⁵⁸¹

Now let us contrast how the 2015 law treats meeting quorums with the approach of the Saudi Companies Law 1965. The 1965 law recognizes two types of shareholder meetings: (1) regular general meeting and (2) extraordinary general meeting.⁵⁸² The 1965 law assigns certain obligations to each kind of meeting, which are regulated by certain Articles.⁵⁸³ Both meeting types require the presence of a quorum of 50% ownership of the company's capital, unless the company's bylaws contain a provision requiring a higher percentage.⁵⁸⁴ Both types of meeting require a majority vote of the shares represented to pass an action, unless the company's bylaws contain a provision requiring a higher percentage.⁵⁸⁵ However, for the extraordinary general meeting, if the action concerns a merger, an increase in capital or a dissolution, then it must be approved by three-fourths of the shares represented at the meeting, according to Article 91:

The regular general meeting shall be valid only if attended by stockholders representing at least one half of the company's capital, unless the bylaws of the company provide for a higher proportion. If this quorum has not been obtained at a first meeting, a notice shall

⁵⁷⁸ *Id.* at art. 94 (3).

⁵⁷⁹ *Id.*

⁵⁸⁰ *Id.* at art. 94 (4).

⁵⁸¹ *Id.*

⁵⁸² The Saudi Companies Law 1965, art. 91; 92.

⁵⁸³ The Saudi Companies Law 1965, art. 84; 85.

⁵⁸⁴ The Saudi Companies Law 1965, art. 91.

⁵⁸⁵ *Id.*

be sent for a second meeting to be held within 30 days of the previous meeting. This notice shall be published in the manner prescribed in Article (88). The second meeting shall be considered valid, regardless of the number of shares represented thereat. Resolutions of the regular general meeting shall be adopted by absolute majority vote of the shares represented thereat, unless the bylaws of the company provide for a higher proportion.⁵⁸⁶

Article (92) continues:

An extraordinary general meeting shall be valid only if attended by stockholders representing at least one half of the company's capital, unless the company's bylaws provide for a higher proportion. If this quorum has not been obtained at the first meeting, a notice shall be sent for a second meeting in the manner prescribed in Article (91). The second meeting shall be valid if attended by a number of stockholders representing at least one quarter of the company's capital. Resolutions of an extraordinary general meeting shall be adopted by a two thirds majority vote of the shares represented thereat. But if a resolution pertains to an increase or a decrease in capital, or to extension of the term of the company, or to dissolution of the company prior to expiry of the term specified in its bylaws or to merger of the company into another company or firm, it shall be valid only if adopted by a three-fourths majority vote of the shares represented at the meeting. The board of directors must publish, in accordance with the provisions of Article (65), the resolutions adopted by an extraordinary general meeting if these provide for amendment of the company's bylaws.⁵⁸⁷

G. Election of directors

Article 68⁵⁸⁸ of the Saudi Companies Law 2015 contains rules regarding voting for directors, and it does not change the language of the 1965 law, which addresses this topic in Article 66.⁵⁸⁹ According to the 1965 law (Article 66), the regular general meeting may choose a minimum of three directors, and directors will have a tenure as specified in the company's bylaws, but tenure shall not last longer than three years:

A corporation shall be administered by a board of directors whose number shall be specified by the bylaws of the company, provided that it is not less than three directors. The regular general meeting shall appoint the directors for the term specified in the company bylaws, which shall not exceed three years. The Council of Ministers may determine the number of the boards of directors on which a director may serve. Directors, however, shall always be eligible for re-appointment, unless the company bylaws provide

⁵⁸⁶ *Id.*

⁵⁸⁷ *Id.* at art. 92.

⁵⁸⁸ The Saudi Companies Law 2015, art. 68.

⁵⁸⁹ The Saudi Companies Law 1965, art. 66.

otherwise. The company bylaws shall specify the manner of retirement of directors; but the regular general meeting may, at any time, remove all or some of the directors even if the company's bylaws provide otherwise, without prejudice to the right of a removed director to hold the company liable if the removal is made without acceptable justification or at an improper time. A director may resign, provided that such resignation is made at a proper time; otherwise, he shall be responsible to the company for damages.⁵⁹⁰

H. The filling of directors' vacancies

The Saudi Companies Law 2015 makes some changes to Article 67 of the 1965 law, which deals with filling a vacant director's seat. The 2015 law requires that listed companies notify the Ministry of Commerce and Industry and the Capital Market Authority within 5 business days of a director's seat becoming vacant.⁵⁹¹ When a board of directors fills a vacancy, the board must present the successor director or directors in the first general assembly meeting following the filling of the vacancy.⁵⁹² If the board of directors meeting cannot be held because the number of directors does not meet the requirements according to the law or the company's bylaws, then the remaining directors shall call for a general assembly meeting within 60 days to appoint the required number of directors.⁵⁹³ In the Saudi Companies Law 1965, the board of directors may fill a vacant director seat, and the next regular general meeting must approve the choice, unless the company's bylaws state otherwise.⁵⁹⁴ However, if the number of directors falls below the required number, the board of directors must call a regular general meeting to fill the vacancies, according to Article 67:

Unless the company bylaws provide otherwise, if the position of a director becomes vacant, the board of directors may appoint a temporary director to fill the vacancy, provided that such appointment shall be laid before the first regular general meeting. The new director shall complete the unexpired term of his predecessor. If the number of directors falls below the minimum number prescribed in this Law or in the company's

⁵⁹⁰ *Id.*

⁵⁹¹ The Saudi Companies Law 2015, art. 70 (1).

⁵⁹² *Id.*

⁵⁹³ *Id.* at art. 70 (2).

⁵⁹⁴ The Saudi Companies Law 1965, art. 67.

bylaws, the regular general meeting must be convened as soon as possible to appoint the required number of directors.⁵⁹⁵

I. Fiduciary duty of the Board of Directors

The Saudi Companies Law 2015 addresses the duty of a company's board of directors in a broad way,⁵⁹⁶ stating that taking into account the authority of the general assembly, the board of directors has the broadest power to manage the company in order to accomplish the company's objectives, except in the case that such power is excluded by the Law or by the company's bylaws, or in the case that such power falls under the authority of the general assembly.⁵⁹⁷ The Saudi Companies Law 2015 establishes a general rule that covers the duty of care and states that the board's members are jointly liable to compensate the company, shareholders, and third parties for any damages that may result from mismanagement or violation of the law or of the company's bylaws.⁵⁹⁸

The Saudi Companies Law 2015 covers the duty of loyalty in broad language, stating that it is prohibited for a board member to use any information obtained as a board member for his or her own personal interest or for the interests of relatives or other persons, and that if a board member should do so, he or she should be terminated and asked for compensation.⁵⁹⁹ This rule represents an attempt to make the joint stock provisions in the Saudi Companies Law match the relevant rules in the Capital Market Authority's regulations; one example is the regulation pertaining to insider trading, which is briefly addressed in this chapter in the insider trading Subsection. The Saudi Companies Law 2015 added an insider information rule to Article 72 of the Saudi Companies Law 1965 that states: "Directors may not disclose to the stockholders or to

⁵⁹⁵ *Id.*

⁵⁹⁶ See the discussion of the Saudi Companies Law 1965 on the issue of care and loyalty, MESHAL FARAJ, TOWARD NEW CORPORATE GOVERNANCE STANDARDS IN THE KINGDOM OF SAUDI ARABIA: LESSONS FROM DELAWARE, 47 (SABIC Chair for IFMS, 2016).

⁵⁹⁷ The Saudi Companies Law 2015, art. 75.

⁵⁹⁸ *Id.* at art. 78 (1).

⁵⁹⁹ *Id.* at art. 74. See also MESHAL FARAJ, *supra* note 596, at 47.

third parties outside a general meeting, such secrets of the company because they are liable for its administration; otherwise, they must be removed and held liable for damages.”⁶⁰⁰ The Saudi Companies Law 2015 also covers conflicts of interest, as will be discussed in the following subsection.⁶⁰¹

The Corporate Governance Regulation,⁶⁰² which was issued by the Capital Market Authority, only covers listed companies.⁶⁰³ This Regulation provides general guidance for listed companies,⁶⁰⁴ except in cases in which a mandatory article is specified, which contains language specific to the duty of care and duty of loyalty of a board member.⁶⁰⁵

The Corporate Governance Regulation clearly states that the fiduciary duty of members of the board of directors includes the duty of due diligence and good faith, and it reads as follows:

- (a) Without prejudice to the competences of the General Assembly, the company’s Board of Directors shall assume all the necessary powers for the company’s management. The ultimate responsibility for the company rests with the Board even if it sets up committees or delegates some of its powers to a third party. The Board of Directors shall avoid issuing general or indefinite power of attorney.
- (b) The responsibilities of the Board of Directors must be clearly stated in the company’s Articles of Association.
- (c) The Board of Directors must carry out its duties in a responsible manner, in good faith and with due diligence. Its decisions should be based on sufficient information from the executive management, or from any other reliable source.⁶⁰⁶

The clear language of these rules in the Corporate Governance Regulation regarding fiduciary duty should be mandatory for listed companies and should be adopted in the Saudi

⁶⁰⁰ Saudi Companies Law 1965, art. 72. *See also* Alsulimi, Abdullah bin Adnan, the *New in the Saudi Companies Law*, an unpublished paper obtained by the author via email.

⁶⁰¹ *Id.*

⁶⁰² Issued by the Board of Capital Market Authority Pursuant to Resolution No. 1/212/2006, which was amended by Resolution number 1-10-2010, dated 30/3/1431H, corresponding to 16/3/2010G.

⁶⁰³ *See* The Corporate Governance Regulation, art. 1(a).

⁶⁰⁴ The Corporate Governance Regulation, art. 1(b).

⁶⁰⁵ *Id.* at art. 11. *See also* MESHAL FARAJ, *supra* note 596, at 47-8.

⁶⁰⁶ The Corporate Governance Regulation, art. 11 (a) (b) (c).

Companies Law 2015, so that the Law can cover closely held joint stock companies; this would help the Saudi courts review relevant cases, as well as develop a practical and clear understanding of the fiduciary duty of a board of directors.⁶⁰⁷

J. Conflicts of interest

This section compares the 2015 law with the 1965 law with respect to conflicts of interest and addresses changes made to the 2015 law. This section also addresses how conflict of interest transactions would be treated under Delaware law in the United States, and concludes with a summary and recommendations as to how the rules governing conflicts of interest might be improved in the new Saudi Companies Law 2015.

1. In general

The Saudi Companies Law 2015 addresses conflicts of interests in Article 71. The 2015 law amends the conflict of interest rules set out in the 1965 law by adding the stipulation that an interested director may not participate in a meeting of board directors and shareholders in which a transaction that may involve a conflict of interest for that director will be discussed or voted upon.⁶⁰⁸ The Saudi Companies Law 2015 also adds that if the interested director fails to disclose such an interest, as prescribed in Article 71 (1), the company or any related party may file a suit before the respective court to declare the contract void.⁶⁰⁹ This plaintiff may be awarded compensation for any lost profit that may have resulted from the director's undisclosed interest.⁶¹⁰

While the 2015 law expands upon the rules that are present in the 1965 law aimed at solving conflict of interest problems, the author argues that still more changes are required. First,

⁶⁰⁷ For more discussion about the Saudi judicial approach to the duty of care and loyalty, *see* MESHAL FARAJ, 47-70.

⁶⁰⁸ The Saudi Companies Law 2015, art. 71 (1).

⁶⁰⁹ *Id.* at (2).

⁶¹⁰ *Id.*

while the Saudi Companies Law 1965 uses the word “personal” to describe an interest that must be disclosed⁶¹¹ (the 1965 text will be cited and discussed below), the Saudi Companies Law 2015 deletes the word “personal” and instead uses the more broad phrase “direct or indirect interest.”⁶¹² However, the 2015 law does not specify that the only kind of interest that falls under this rule is a financial interest; Delaware law, which will be addressed later, does make this specification. This is an important distinction for Saudi businesses for reasons unique to the Kingdom. Specifically, Saudi Arabia contains many tribes, creating an environment of many social networks that are interwoven and complicated. The broadness of the phrase regarding “interest” in the 2015 law could open the door to lawsuits brought for various reasons, including interests and disputes that are not simply financial, but are also social and political. Also, the 2015 law does not address whether interested directors may be present at directors meetings in order to satisfy the quorum requirement. For instance, if a board of directors comprises three directors and one is an interested director, this director must be counted for the meeting to reach the quorum requirement prescribed in Article 68 of the 2015 law.

The language describing “interest” was a problem under the 1965 law as well. Article 69 of the 1965 law regulates conflict of interest issues, but it states only that any board member who has personal interests in a transaction must disclose these interests, and that the transaction must be approved by the ordinary general assembly.⁶¹³ The broadness of this language led to a certain well-known conflict of interest claim (discussed in detail below) that was raised over a controversial stock acquisition transaction. This is the text of Article 69:

A director may not have any interest whether directly or indirectly, in the transactions or contracts made for the account of the company, except with an authorization from the regular general meeting, to be renewed annually. Transactions made by way of public

⁶¹¹ The Saudi Companies Law 1965, art. 69.

⁶¹² The Saudi Companies Law 2015, art. 71.

⁶¹³ The Saudi Companies Law 1965, art. 69.

bidding shall, however, be excluded from this restraint if the director has submitted the best offer.

The director must inform the board of directors of any personal interest he may have in the transactions or contracts made for the account of the company. Such declaration must be recorded in the minutes of the board meeting, and the interested director shall not participate in voting on the resolution to be adopted in this respect.

The chairman of the board of directors shall inform the regular general meeting when it convenes of the transactions and contracts in which any director has a personal interest. Such communication shall be accompanied by a special report from the auditor.⁶¹⁴

2. Saudi Chemical transaction

The Saudi Chemical transaction is an example of an acquisition transaction that was not completed as result of a conflict of interest. The broad language of Article 69 of the Saudi Companies Law 1965, which regulates conflicts of interests, exacerbated the controversy surrounding the issues. On July 2, 2008, Saudi Chemical, a Saudi publicly traded company with initial capital of SAR 632,400,000 million (equivalent to USD 168 million),⁶¹⁵ made an announcement that one of its subsidiaries,⁶¹⁶ Saudi International Trading Company (SITCO Pharma), which at the time was a 99% owned subsidiary, planned to acquire the 50% stake owned by Almuarid Company of the Aldawa Company for SAR 235 million (equivalent to USD 62 million) in cash.⁶¹⁷ One of Saudi Chemical's board members had an interest⁶¹⁸ in the transaction. Therefore, the shareholders filed a complaint with the Ministry of Industry and Commerce⁶¹⁹ to force the board to put the transaction up for a vote in the ordinary general

⁶¹⁴ *Id.*

⁶¹⁵ Saudi Chemical has large stakes in the following subsidiaries: Saudi International Trading Company (SITCO Pharma) 99%, Suez International Nitrates Company (Sinco) 100%, Chemical Company for Commercial Investment Ltd 100%, AJA Pharma Company Ltd 100% and Saudi Chemical Co. Ltd 100%. More information available at <http://www.tadawul.com.sa> (last visited July 15, 2015).

⁶¹⁶ The Saudi Companies Law 1965 does not mention the subsidiaries.

⁶¹⁷ Saudi Chemical's announcements to the *Tadawul*, available at <http://www.tadawul.com.sa> (last visited July 15, 2015).

⁶¹⁸ The Companies Law does not define "interest."

⁶¹⁹ Claims against a violation of the Saudi Companies Law should be filed before the Court, not the Ministry.

assembly meeting, in accordance with the provisions of Article 69.⁶²⁰ The Ministry required that Saudi Chemical include this transaction in the minutes on which attendees of the ordinary general assembly meeting would vote.⁶²¹ According to someone briefed on the issue, the board of directors believed that since the director with an interest in the acquisition was not planning to attend the ordinary general assembly meeting, he would not participate in approving the transaction, and therefore the board did not need to include the transaction in the minutes or put it up for a vote. However, the shareholders insisted on exercising their rights as prescribed in Article 69 of the Companies Law 1965. Eventually, in December 2008, the shareholders voted against the acquisition in the Ordinary General Assembly.^{622, 623}

Under the Saudi Companies Law 2015, the court, rather than the Ministry of Commerce and Industry, would have reviewed the case. The company would have known that the interested

⁶²⁰ Aloyad Khalid, *The Ministry Required the Saudi Chemical to Include the Transaction in the OGA*, RYADH NEWSPAPER (May 22, 2009), available at <http://www.alriyadh.com/431414> (last visited July 15, 2015).

⁶²¹ *Id.*

⁶²² See ALEQTISADIAH NEWSPAPER, (July 2, 2009), available at http://www.aleqt.com/2009/07/02/article_247035.html (last visited July 15, 2015).

⁶²³ The Corporate Governance Regulation, which applies only to listed corporations, covers conflict of interest issues with respect to a company's Directors. However, the Regulation does not provide clear and complete treatment of conflict issues, because the Regulation is meant for guidance and its guidelines are not mandatory. Also, it does not differ from Article 69 of the Saudi Companies Law, which provides no details that might help prevent confusion or disputes that may arise about conflict issues as a result of the lack of specifications about how to deal with such issues. Article 18 of the Corporate Governance Regulation provides the following:

(a) A Board member shall not, without a prior authorization from the General Assembly, to be renewed each year, have any interest (whether directly or indirectly) in the company's business and contracts. The activities to be performed through general bidding shall constitute an exception where a Board member is the best bidder. A Board member shall notify the Board of Directors of any personal interest he/ she may have in the business and contracts that are completed for the company's account. Such notification shall be entered in the minutes of the meeting. A Board member who is an interested party shall not be entitled to vote on the resolution to be adopted in this regard neither in the General Assembly nor in the Board of Directors. The Chairman of the Board of Directors shall notify the General Assembly, when convened, of the activities and contracts in respect of which a Board member may have a personal interest and shall attach to such notification a special report prepared by the company's auditor.

(b) A Board member shall not, without a prior authorization of the General Assembly, to be renewed annually, participate in any activity, which may likely compete with the activities of the company, or trade in any branch of the activities carried out by the company.

(c) The company shall not grant cash loan[s] whatsoever to any of its Board members or render guarantee[s] in respect of any loan entered into by a Board member with third parties, excluding banks and other fiduciary companies.

director was not allowed to participate in the shareholder meeting at which the transaction would be discussed. Therefore, the company likely would not have made the argument that because the interested director would not attend the meeting, the transaction did not require a shareholder vote.

The Saudi Companies Law 2015 should include more details regarding the conflict of interest issue. It should specify the types of conflict of interest that will prevent an interested director from voting on a proposed transaction. The Saudi Companies Law 2015 should specify rules regarding the presence of interested directors at certain relevant shareholder meetings.

3. Treatment of the Saudi Chemical transaction under Delaware law

This section discusses how a transaction such as the Saudi Chemical transaction would have been handled under Delaware law. The author argues that the transaction would have not have been controversial had Saudi Law adopted the provisions of Delaware's Section 144 regarding the treatment of conflicts of interest.⁶²⁴ This section will provide a recommendation, which, if adopted, may enhance the Saudi Companies Law 2015, reduce issues regarding conflicts of interest and provide protection for both corporations and shareholders.

Delaware law does not render a transaction or contract void or voidable solely because it involves a director with a financial interest in the transaction or contract.⁶²⁵ Delaware law also does not render a transaction or contract void solely because the interested director is present or participating in the board's meeting.⁶²⁶ Instead, Delaware law states that the transaction or contract is not void or voidable as long as one of these conditions is met:

⁶²⁴ For more discussion about the application of Rule 144, *see* Blake Rohrbacher, John Mark Zeberkiewicz, and Thomas A. Uebler, *Finding Safe Harbor: Clarifying the Limited Application of Section 144*, 719-748, DELAWARE JOURNAL OF CORPORATE LAW, Volume 33, Number 3, (2008), available at <http://lawlib.wlu.edu/CLJC/index.aspx?mainid=222&issuedate=2008-12-08>. (last visited February 21, 2016).

⁶²⁵ DEL. CODE. ANN. tit. 8, §144 (2016).

⁶²⁶ *Id.*

(a) No contract or transaction between a corporation and 1 or more of its directors or officers, or between a corporation and any other corporation, partnership, association, or other organization in which 1 or more of its directors or officers, are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the board or committee which authorizes the contract or transaction, or solely because any such director's or officer's votes are counted for such purpose, if:

(1) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the board of directors or the committee, and the board or committee in good faith authorizes the contract or transaction by the affirmative votes of a majority of the disinterested directors, even though the disinterested directors be less than a quorum; or

(2) The material facts as to the director's or officer's relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or

(3) The contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the board of directors, a committee or the stockholders.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the board of directors or of a committee which authorizes the contract or transaction.⁶²⁷

Compliance with Section 144 restores protection under the business judgment rule for the interested transaction, and prevents such a transaction from undergoing an invalidity or violability review by the court simply because there is an interested director.⁶²⁸ However, complying with Section 144 does not provide protection from a court review for equitable standards (a fairness review) for breach of fiduciary duty.⁶²⁹ The application of Section 144 determines whether the interested transaction will be reviewed by the court under the breach of duty review (if the transaction complies with Section 144), or if the interested transaction will be reviewed by the court under both breach of duty and violability reviews.⁶³⁰

⁶²⁷ *Id.*

⁶²⁸ Rohrbacher, *supra* note 624, at 718-19, 734, 742 and 747-48.

⁶²⁹ *Id.*

⁶³⁰ *Id.* at 747-48.

Section 144 of Delaware law provides more details than Article 69 of the Saudi Companies Law. It first states clearly that the interest that triggers the rule is financial interest. Secondly and more importantly, Rule 144 of Delaware law provides that the existence of a financial interest, or the presence or participation of the interested director in the meeting that authorizes the transaction, does not *per se* make the transaction void or voidable, so long as the financial interest is disclosed and approved by a majority of disinterested directors or shareholders. According to the plain language of Rule 144 of Delaware law, the Saudi Chemical transaction would have been approved, had it received a majority of the votes of the disinterested directors or shareholders.

4. Recommendations

The Ministry of Commerce and Industry issued an order in the Saudi Chemical case stating that the transaction required shareholder authorization at the general meeting; the transaction did not ultimately receive this approval. However, the transaction should not have been sent to the Ministry of Commerce and Industry, because Article 69 of the Saudi Companies Law 1965 states that the vote of shareholders is required in case of a conflict of interest. Contentious debate and disagreement arose in this case over how an interested acquisition transaction should be handled; this debate was caused in large part by the (overly) broad language of the Saudi Companies Law 1965 regarding conflicts of interest. The board of directors argued that because the interested director would not attend the board meeting, the board of directors should not have needed to obtain shareholder approval of the transaction. The adoption of a rule similar to Rule 144 of Delaware law would clearly define how such an issue should be handled, and had Saudi had such a rule at the time of this case, the controversy may have been prevented. Indeed, a rule such as Rule 144 could help guide other corporations in their

future transactions in Saudi Arabia. Also, the Saudi Companies Law 2015 does not address the issue of whether interested directors may be counted for the purpose of a board quorum, and it should do so. The Saudi Companies Law 2015 should also specify that “interest” means specifically financial interest. Therefore, the word “financial” should be inserted before the word “interest,” and the Law should state that the presence or participation of the interested director in the meeting that authorizes the transaction does not *per se* make the transaction void or voidable, so long as the financial interest is disclosed and approved by a majority of disinterested directors or shareholders.

K. Requirements for publicly held corporations regarding issuing shares for the purpose of M&A

This section only applies when the transaction in question involves stock acquired through share issuance from a publicly held acquiring company (PHAC) to a closely held target corporation (CHTC). If cash rather than stock is involved, the PHAC is not covered by this section.

1. The Listing Rules and private placement

The PHAC is subject to the Listing Rules when a PHAC needs to raise the company’s capital in order to issue shares for the CHTC, and it is subject to the private placement exemption under the Offers of Securities Regulations when the PHAC wants to offer limited shares to the CHTC.⁶³¹ Chapter 6 discusses situations in which a publicly held corporation is acquired.

2. The Listing Rules

The Listing Rules state the requirement for stock acquisition by a PHAC as the following:

⁶³¹ See The Listing Rules, Chapter 5 and Offers of Securities Regulations, art. 3.

Where the purpose of a capital increase is to acquire a company or purchase or an asset, the following additional requirements must be complied with as applicable:

- 1) the issuer must submit to the Authority a report prepared by the issuer's financial advisor comprising the issuer's valuation and a valuation of the target company to be acquired or the asset to be purchased;
- 2) the issuer must submit to the Authority a financial due diligence report and a legal due diligence report issued by the legal advisor for the target company to be acquired or assets to be purchased; and
- 3) the prospectus shall include: (a) the general structure of the transaction; (b) the rationale behind the acquisition or purchase; (c) an outline of the business of the target company to be acquired and market details of its relevant industry and trends; (d) a management discussion and analysis section on the target company to be acquired or the target asset to be purchased; (e) annual audited financial statements for the past three years (if any) preceding the date of the application for the target company to be acquired; (f) disclosure of any related parties; (g) pro forma financial statements reflecting the financial position of the issuer following the acquisition or the purchase; (h) any change in the issuer or the target company to be acquired as a result of the transaction (including changes to the board or senior executives); (i) the risk factors related to the acquisition transaction or to the asset to be purchased; (j) the valuation of the company to be acquired or the asset to be purchased; (k) the time period of the acquisition process; and (l) the issuer's share price performance.⁶³²

As in the case involving the CHAC, in order to increase its capital, the PHAC must obtain the approval of three-fourths of the shares represented in an extraordinary shareholders meeting, as prescribed in the Saudi Companies Law 2015.⁶³³ In this regard, the 2015 law retains the provisions of the 1965 law.⁶³⁴

3. Private offering exception

A PHAC also may fall under the private placement exemption, which is governed by the Offers of Securities Regulations. The private placement is defined as one of the following:

- 1) The securities are issued by the government of the Kingdom, or a supranational authority recognised by the Authority;
- 2) The offer is restricted to sophisticated investors; or

⁶³² Listing Rules, art. 32.

⁶³³ The Saudi Companies Law 2015, art. 95 (4).

⁶³⁴ The Saudi Companies Law 1965, art. 92.

3) The offer is a limited offer.

(b) The Authority may, in circumstances other than those described in paragraph (a) of this Article and upon application of a person seeking to make an offer of securities, determine that such an offer shall be treated as a private placement subject to compliance with such limitations as the Authority may impose.⁶³⁵

The limited offer is defined in the Offers of Securities Regulations as an offer that is directed to no more than 60 offerees in which:

the minimum amount payable per offeree is not less than one million Saudi Riyals or an equivalent amount. The minimum amount payable per offeree may be less than one million Saudi Riyals or an equivalent amount where the total value for the securities being offered does not exceed Saudi Riyals five million or an equivalent amount.⁶³⁶

L. Insider trading

Because the PHAC might issue shares as part of a merger or acquisition, or the proposed transaction might be between two listed corporations, this Subsection addresses the insider trading rule that applies to securities traded on the Saudi Stock Exchange (*Tadawul*). The Subsection also discusses a case in which an insider trading violation related to an acquisition transaction occurred.

Capital Market Law prohibits trading in securities by an insider trader or by any person who obtains insider information related to the securities being traded:

a. Any person who obtains, through family, business or contractual relationship, inside[r] information (hereinafter an “insider”) is prohibited from directly or indirectly trading in the Security related to such information, or to disclose such information to another person with the expectation that such person will trade in such Security.

Insider information means information obtained by the insider and which is not available to the general public, has not been disclosed, and such information is of the type that a normal person would realize that in view of the nature and content of this information, its release and availability would have a material effect on the price or value of a Security related to such information, and the insider knows that such information is not generally available and that, if it were available, it would have a material effect on the price or value of such Security.

⁶³⁵ Offers of Securities Regulations, art. 9.

⁶³⁶ *Id.* at art. 11 (a) (1) (b).

b. No person may purchase or sell a Security based on information obtained from an insider while knowing that such person, by disclosing such insider information related to the Security, has violated paragraph (a) of this Article.

c. The Authority has the power to establish the rules for specifying and defining the terms provided for under paragraphs (a) and (b) of this Article, and such acts or practices which the Authority deems appropriate to exempt them from their application, as may be required for the safety of the market and the protection of investors.⁶³⁷

The Market Conduct Regulation also prohibits situations in which any party uses insider information related to securities.⁶³⁸ To ensure that the prohibition covers any usage of insider information to trade securities, the Market Conduct Regulation specifies the different usages of insider information that violate Article 50 of the Capital Market Law, as well as the Market Conduct Regulation:

Prohibition of Disclosure of Inside Information (a) An insider is prohibited from disclosing any inside information to any other person when he knows or should have known that it is possible that such other person may trade in the security related to the inside information. (b) A person who is not [an] insider is prohibited from disclosing to any other person any inside information obtained from an insider, when he knows or should have known that it is possible that such other person to whom the disclosure has been made may trade in the security related to the inside information. Article 6: Prohibition of Insider Trading (a) An insider is prohibited from engaging in insider trading. (b) A person who is not [an] insider is prohibited from engaging in insider trading if he obtains the inside information from another person and he knows or should have known, that the information is inside information.⁶³⁹

1. The definition of insider traders and insider trading

The Market Conduct Regulation defines the concept of insider trading—by a member of the board of directors, an executive officer, or an employee with the issuer who is privy to inside information—as a person who obtains inside information through a family relationship or through a person related in any way to the person obtaining the inside information, or as a person who obtains inside information through a work relationship.⁶⁴⁰

⁶³⁷ Capital Market Law, art. 50.

⁶³⁸ The situations are stated in the Market Conduct Regulation, Articles 5 and 6.

⁶³⁹ The Market Conduct Regulation, art. 5; 6.

⁶⁴⁰ *Id.* at art. 4s (b) 1, 2 and 3.

2. The elements of insider information

The Market Conduct Regulation stipulates three elements that constitute insider information, the use of which to trade securities violates the Capital Market Law according to Article 50.⁶⁴¹ The three elements are: (1) the information is related to securities, (2) the information is not available to the public and (3) the reasonable person would think making such information public would substantially affect the price and value of the security.⁶⁴²

3. An M&A insider trading case⁶⁴³

The Capital Market Authority (CMA) filed a suit before the Appeal Committee for the Resolution of Securities Conflicts against a company, which the author will denote as company A. The suit was filed against company A's chairman of the board and his brother for trading in securities using inside information about a potential acquisition.

The chairman's brother bought 264,502 shares of company A based on inside information that was not disclosed to the public; he learned this information from his brother, who was the chairman of the company's board. The information was that company A was negotiating a deal to acquire another company, and the chairman knew that the deal was about to be closed, because he was assigned by the company to sign the deal. His brother also committed an insider trading violation when he used this information as a reason to trade in the securities of the company. The Capital Market Authority accused the chairman of trading in the company's securities as well, because the chairman bought 28,700 shares.

⁶⁴¹ The Market Conduct Regulation, art. 4 (c) 1, 2 and 3.

⁶⁴² *Id.*

⁶⁴³ 134/س09/2009 for 1430H in 28/03/2009, available at <http://www.crsd.org.sa/En/Appeals/year%201430/penal/148-30E.pdf>. (last visited June 22, 2015).

The Appeal Committee confirmed that because the actions taken by the defendants violated Article 50 (a) and (b) of the Capital Market Law, the suit fell under the Appeal Committee's jurisdiction according to the Capital Market Law.⁶⁴⁴

In this case, the Appeal Committee stated that the Capital Market Law provides a two-pronged test to determine if defendants are liable for insider trading actions. Articles 50 (a) and (b) state:

a. Any person who obtains, through family, business or contractual relationship, inside information (hereinafter an "insider") is prohibited from directly or indirectly trading in the Security related to such information, or to disclose such information to another person with the expectation that such person will trade in such Security. Insider information means information obtained by the insider and which is not available to the general public, has not been disclosed, and such information is of the type that a normal person would realize that in view of the nature and content of this information, its release and availability would have a material effect on the price or value of a Security related to such information, and the insider knows that such information is not generally available and that, if it were available, it would have a material effect on the price or value of such Security.

b. No person may purchase or sell a Security based on information obtained from an insider while knowing that such person, by disclosing such insider information related to the Security, has violated paragraph (a) of this Article.⁶⁴⁵

Even though the Capital Market Authority contended that the two-pronged test was met, the Appeal Committee was not convinced that the evidence provided by the CMA was enough to hold the chairman's brother liable for trading in securities based on inside information. The Appeal Committee stated that among other events, the increase in the value of the company's shares by 5.66%, and then by 9.59%, and then by another 7.47%, attracted the attention of many investors to the company, and caused news and rumors to spread to the general public about the pending acquisition. The Appeals Committee found that the evidence provided by the CMA that the chairman disclosed inside information to his brother was not definite or convincing.

⁶⁴⁴ Capital Market Law, art. 25 (a).

⁶⁴⁵ *Id.* at Articles 50 (a) and (b).

However, the CMA's evidence did prove that the chairman made stock purchases before announcing the deal to the public. Especially important was the fact that the chairman was assigned by the company to sign the deal, which gave him access to information about the transaction that the public did not have.

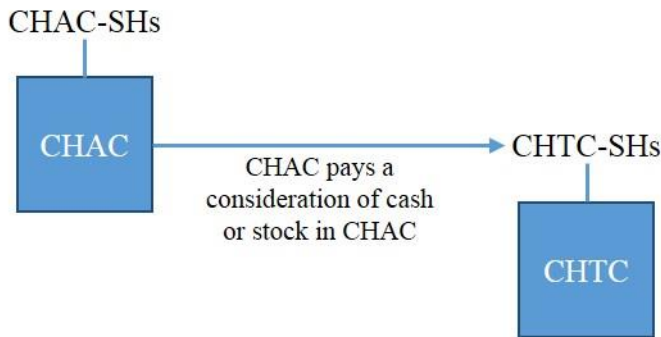
§5.4. Stock Acquisition of a Closely Held Target Corporation

A. Introduction

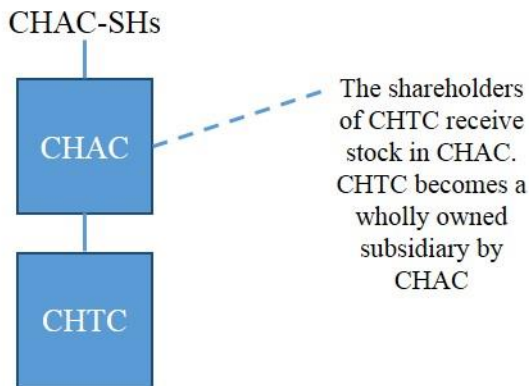
This Section will discuss the stock acquisition of a closely held corporation through a stock purchase agreement. A typical stock acquisition is structured as presented in Figure 5.2, which is displayed immediately below.

Figure 5.2

Stock exchange acquisition⁶⁴⁶



After the stock exchange acquisition is complete



B. Stock acquisition of a closely held corporation through a stock purchase agreement

If a CHAC plans to acquire shares of a CHTC, the applicable rules will depend on the CHTC's type of corporation—limited liability or closely held joint stock company. The reason to distinguish between the two types of companies is that while the Saudi Companies Law 2015 contains some rules that apply to acquisitions of limited liability companies, it does not contain any rules that govern the acquisition of a closely held joint stock company. Therefore, the court

⁶⁴⁶ THOMPSON, JR., *supra* note 490, at 8.

will apply the general principles of Islamic law to an acquisition case involving a closely held joint stock company. The court's disposition of previous acquisition cases that it has handled suggests that it is willing to prevent a stock exchange agreement unless each shareholder consents to sell his or her shares in the closely held joint stock company.⁶⁴⁷

If the CHTC is a limited liability company, the stock acquisition offer is subject to the right of first refusal, which means that the shares that the CHAC wants to acquire must first be offered to other shareholders of the CHTC.⁶⁴⁸ The following is the relevant language from the Saudi Companies Law 1965, which is maintained unchanged in Article 161 of the 2015 law:⁶⁴⁹

A partner⁶⁵⁰ may waive his portion to one of the partners or others in accordance with the terms of the company's contract[;] however if he wants to waive his portion to others with a compensation, he shall notify the other partners through the director of the company with the terms of the waiver. In this case, each partner may ask for [a] refund [of] the money of the portion with its true value.⁶⁵¹ If thirty days passed from the date of notification without any of the partners using his right of restitution[,]⁶⁵² the owner of the portion has the right to dispose [of] it, taking into account the provisions of the second paragraph of Article (157).⁶⁵³ If more than one of the partners used the right of restitution and the waiver was related to a group of portions, these portions shall be divided between [sic] those who asked for restitution by the portion of each of them in the capital. If the waiver was related to one portion, it shall be given to the partners who have asked for restitution, taking into account the provisions of the second paragraph of Article (158). If the waiver of the portion was without compensation, then the asking partner shall pay the value according to the latest inventory conducted by the company. The right of restitution provided for in this article on [sic] shall not be applied to the transfer of ownership of the portions by inheritance or a will.⁶⁵⁴

⁶⁴⁷ Such was the case in the Safola transaction, which is discussed in Subsection C of this section.

⁶⁴⁸ The Saudi Companies Law 2015, art. 161.

⁶⁴⁹ The Saudi Companies Law 2015, art. 161.

⁶⁵⁰ The word "partner" is not correctly translated, because partners and partnership have different provisions and applications.

⁶⁵¹ "True value" is a vague term, which should refer to a financial term.

⁶⁵² "Right of restitution" means the right of first refusal.

⁶⁵³ This means that if 30 days pass, and the other partners have not invoked their right of first refusal nor did they buy the shares, the buying partner may sell his shares to a third party.

⁶⁵⁴ The Saudi Companies Law 1965, art. 165.

C. The Safola case

1. Introduction

The following case is a quintessential example of an M&A transaction in Saudi Arabia. It involves a court ruling to resolve a situation in which the acquiring company tries to acquire 100% of a company; the majority of the shareholders agreed to sell their shares, but there was a minority of shareholders who did not. The ruling handed down in this case will affect all M&A transactions in Saudi Arabia in the foreseeable future, especially cases in which a specific rule governing a stock acquisition purchase is missing. Because there are no rules governing stock purchases, the court tries to fill in by enforcing the Islamic rule that no person shall be forced to sell his or her shares without consent.

2. The case

The 2006 *Alshehri v. Safola* case⁶⁵⁵ involved Alsharq for Plastic Industries, Co., a limited liability company owned by a father and seven sons. The ownership was divided thusly: the father owned 93% of the company and each of the seven sons owned 1%. The Safola company offered to purchase 100% of the Alsharq Company. The father and six of the sons agreed to sell their shares to Safola for cash. The seventh son (the Plaintiff, Waleed), with his 1% ownership, opposed the sale of the shares. The Plaintiff requested in court to use his right of first refusal to purchase his brothers shares, which collectively totaled 6%, but he did not object to his father selling his 93% share of the Alsharq Company to Safola.

Waleed Alshehri with his 1% ownership in Alsharq for Plastic Industries Co. filed a suit before the court against Safola (the Defendant) challenging the sale of shares by six of the shareholders, who collectively owned 6% of Alsharq; namely, his brothers. Again, he did not object to his father, who owned 93% of Alsharq, selling his shares. The Plaintiff's suit alleged:

⁶⁵⁵ Board of Grievances, 5th Commercial Circuit, Case NO: 38/D/TG/5.

1) the Plaintiff was not informed of the sale of shares to Safola Co.; 2) the rest of the shareholders did not have a valid power of attorney to sell the Plaintiff's shares without his consent; and 3) the Plaintiff had "*Alshufah's* right," which means the right of first refusal. Safola announced that it had acquired all of the Alsharq company from the Alshehri family by paying SAR 175 million for the 1,233,500 shares owned by the Alshehri family: 93% owned by the father Ali, and 7% owned by the seven sons, including the Plaintiff.

The court stated its opinion according to Article 165 of the Companies Law and Article 8 of the Articles of Incorporation of the Alsharq Company. Each partner has the right of first refusal when the other partners want to sell their shares to a third party. In addition, the court noted that according to Islamic principles, the plaintiff had the *Alshufah* right, which gave him as a partner the right to buy out the other partners that wanted to sell to a third party.

The Court opined that the other brothers (shareholders) and the father did not notify the Plaintiff that they were selling their shares, and therefore prevented the Plaintiff from exercising his right. The Defendant, Safola, claimed that in fact the father, who owned 93% of the shares, had a power of attorney to act on behalf of the Plaintiff. However, the Plaintiff proved to the court that he had not known about the acquisitions until he saw them reported in the news, whereupon he filed a complaint with the notary public at the Ministry of Commerce and Industry stating that he disapproved of the transaction, because he did not know about it. Further, he asked for an injunction to stop the transaction from moving forward until the matter was reviewed and decided upon by the court.

The Defendant argued that according to the Islamic principles of the *Alshufah* right, a partner cannot accept some shares and refuse others; i.e., Waleed could not purchase 6% of the shares (as he proposed to do) and not the other 93%. Such an action would make the value of the

remaining shares less valuable, which is prohibited by Islamic Law; the Prophet Muhammad said: “There should be neither harming [*darar*] nor reciprocating harm [*diraar*],” and Islamic law says: “Harm should be removed” and “Harm shall be removed as possible [sic] as it could be.” The Defendant (Safola) stated that the Plaintiff’s request to purchase only his brothers’ shares—6% of the Alsharq shares—and not the father’s 93%, would affect the company by dividing it. The court agreed with the Plaintiff, stating that the shares were divided into equal shares, which could not harm the company. The court explained that the Plaintiff had the right to choose how many shares he wished to buy, and it noted that the Plaintiff did not choose to buy a small percentage from each partner. Instead, the Plaintiff chose to buy the entirety of each of his brothers’ shares, but none of his father’s shares, which the court deemed acceptable. The court also stated that the Plaintiff, still a shareholder in the Alsharq company, owned 1% of the capital of the company, against which the Defendant did not argue, which also meant that the Defendant implicitly agreed with the court that the Plaintiff was still a shareholder in the Alsharq company.

The court also referred to the concept of “*Alfadulee*” in Islamic jurisprudence, which means that when someone sells an item that he does not own, the sale is pending until the real owner approves or voids it. In this case, since none of the partners had a valid power of attorney, and they sold the Plaintiff’s shares without his consent, the sale of the Plaintiff’s shares was not valid unless the Plaintiff approved it.

Therefore, the court concluded that according to Article 165 of the Companies Law 1965 and Article 8 of the Articles of Incorporation of the Alsharq Company, and also according to Islamic principles, the other shareholders, including the father, did not have the right to sell the Plaintiff’s shares to the Defendant, Safola. The court also held that the Plaintiff had the right to

buy his brothers' shares. The Plaintiff had to pay Safola SAR 10,500,000 for his brothers' 6% share.

3. The issue

By its ruling on this case, the court created a ruling that built a principle⁶⁵⁶ that no shareholder can be forced to sell his or her shares for any reason. This case applies to the sale of shares that requires each shareholder to agree to sell in order for the sale to be valid. Otherwise, the sale is void and will be nullified by the court. This rule also will apply in cases when stock is exchanged via a stock exchange acquisition; i.e., when shareholders of a target acquisition will receive stock in the acquiring company. Such an arrangement could become quite complicated if minority shareholders oppose the acquisition action. For instance, when the listed Saudi company⁶⁵⁷ HADCO was acquired by a company called Almarai,⁶⁵⁸ the acquired company called for a vote after the Capital Market Authority mandated that the acquired company had to obtain the approval of 50% of its shareholders for the transaction.⁶⁵⁹ Even though the acquired company (HADCO) approved the transaction, the vote was not 100% in favor.⁶⁶⁰ The minority could have objected to the transaction, because the law does not address the issue of the percentage of approving votes necessary to implement a total stock acquisition transaction. The Capital Market Authority's requirement that HADCO obtain its shareholders' approval seems to have had no legal ground. If the acquired company is not dissolved and does not disappear, the transaction is

⁶⁵⁶ This principle applies to any transaction and to any type of company, which means that it does not matter if the company is private or listed.

⁶⁵⁷ Because the law is silent about stock acquisitions, if the law is not changed, the court likely will tend not to enforce rules about stock exchanges, because a stock exchange is categorized as a sale, which requires the consent of each shareholder to exchange his or her share for shares in the acquiring company.

⁶⁵⁸ See the article entitled *Souhail Karam, Saudi Almarai, Hadco agree on takeover terms*, July 1, 2009, ARABIAN BUSINESS NEWSPAPER, available at <http://www.arabianbusiness.com/saudi-almarai-hadco-agree-on-takeover-terms-16457.html>. (last visited November 13, 2015).

⁶⁵⁹ See the article *CMA approves Almarai's \$253.2m bid for Hadco*, ARAB NEWS, September 13, 2009, available at <http://www.arabnews.com/node/327977>. (last visited November 13, 2015).

⁶⁶⁰ *Id.*

a stock acquisition, which places it under the Companies Law and the M&A transaction rules, neither of which gives the board of directors or the majority of shareholders the right to approve the total acquisition of a company without the consent of each shareholder. Even though the Safola case involved a limited liability company, it makes clear that the absence of a rule allowing acquisitions to be approved by majority rule opens the door for the court to intervene and apply the selling with consent rule in cases involving closely held corporations.

Finally, the ruling by the court in the Safola case creates a barrier favoring the minority over the company's interests by giving the minority the opportunity to block the stock acquisition of a CHTC.

If the CHTC is a joint stock company, the general rules governing joint stock companies in the Saudi Companies Law 2015 will apply. In the absence of specific rules governing stock acquisitions for a joint stock company, other than what is specified for limited liability companies in the Companies Law 2015, the acquisition of a closely held joint stock company falls under the ruling of the court, which requires the consent of every shareholder for an acquisition to occur.

When a company wants to acquire all of the CHTC's shares, the CHTC faces the rule that "no one is forced to sell his shares," as specified in the Safola case. This ruling highlights the absence of an Article giving the board of directors the power to approve the sale of all of the company's stock, regardless of who owns the shares. The failure to address stock acquisitions in cases involving a CHTC has created a legislative gap that discourages companies from moving forward with acquisitions of CHTCs. Also, the absence of a "squeeze out" rule means that the Saudi Companies Law 2015 fails to address how a company may acquire all of a CHTC, which makes it difficult for a company to acquire 100% of the stocks of PHTCs and CHTCs. Moreover,

while several companies would like to include in their bylaws and shareholder agreements clauses such as “tag along” and drag along” rights—which the author briefly addresses later in this chapter—it is uncertain whether these types of agreements will be enforceable. The Saudi Companies Law 2015 needs to be changed to permit buyout agreements.

D. A deal canceled due to a legislative gap in the approval of a stock acquisition (the Sahara-Sipchem Deal)

This section analyzes a stock acquisition deal that failed and was canceled, because there was no regulatory framework for a direct stock acquisition approved by a majority of shareholders. The section also provides suggestions for how these types of transactions could be structured in the future.

1. Sahara-Sipchem deal

Sahara Petrochemicals is a publicly traded Saudi company established and listed on the *Tadawul* in 2004 with a capital value of SAR 4,387,950,000 billion (USD 1.167 billion).⁶⁶¹ Sipchem is also a publicly traded Saudi petrochemical company established in 1999 as closely held company and listed on the *Tadawul* in 2006 with a capital value of SAR 3,666,666,660 billion (USD 977 million).⁶⁶² Sipchem has nine subsidiaries in the Kingdom, located in Jubail and Khobar.⁶⁶³

On June 4, 2013, Sahara announced it had signed a memorandum of understanding with Sipchem for Sipchem to acquire all of Sahara.⁶⁶⁴ The text of the announcement is presented

⁶⁶¹ See Sahara’s file on the *Tadawul* website, available at <http://www.tadawul.com.sa> (last visited December 11, 2015).

⁶⁶² See Sipchem’s file on the *Tadawul* website, available at <http://www.tadawul.com.sa> (last visited December 11, 2015).

⁶⁶³ *Id.*

⁶⁶⁴ See Sahara’s website, available at <http://www.saharapcc.com/en/newsdetails.aspx?pageid=31&newsid=917> (last visited December 11, 2015).

below to facilitate discussion of some of the issues and criticism of the issues involved in these types of transactions.

Sahara's announcement reads as follows:

Sahara Petrochemical Co. announces the signing of a memorandum of understanding with Saudi International Petrochemical Company for [sic] begin confirmatory due diligence and continue the non-binding negotiations relating to the detailed terms of a proposed business merger between the two companies based on the principles of a merger of equals (the Proposed Merger^{665, 666}) as following:

1. Signed the Memorandum on Wednesday 04-12-2013
2. Related parties: Sahara Petrochemicals Company and Saudi International Petrochemical Company
3. The signing of the MoU comes as a result of the preliminary conclusions of the studies and negotiations in relation to the Proposed Merger which indicate that, subject to agreeing [to] certain key terms, the Proposed Merger will be a positive transformational step in the business of the Company. The Proposed Merger is expected to enhance the Company's leading position in the local and international petrochemical industry and the combined business is expected to result in significant synergies related to operational efficiencies and the combined company would become a stronger platform for further growth in the long-term.

The MoU has been signed by Eng. Esam Fouad Himdy, CEO and Managing Director of the Company, on behalf of the Company, and Eng. Ahmad Al-Abdulaziz Al Ohali, CEO and Managing Director of Sipchem, on behalf of Sipchem, in the city of Riyadh.

In this regard, Eng. Himdy and Eng. Al-Ohali have jointly commented as follows: If completed, we hope that the Proposed Merger will benefit our shareholders and our employees. Indeed, the expectation is that the Proposed Merger will be positively transformational and potentially have significant benefits for both companies. The terms

⁶⁶⁵ One of the main issues in this transaction is the transaction's label. Sahara calls it "merger" while in fact it is an acquisition; note especially that Sahara announced at the same time that Sipchem and Sahara wanted both companies to stay as they were, and also that Sahara would become a subsidiary of Sipchem. This gives an indicator of certain issues, such as how the M&A concept is perceived in Saudi Arabia and how M&A is new to Saudi Arabia. Such unfamiliarity with M&A concepts can cause companies to label their transactions differently, due to the absence of legislation that clearly defines crucial transactions such as M&A. The Ministry of Industry and Commerce and the Capital Market Authority also have the burden of making sure that announcements precisely describe the structure of proposed transactions. This issue becomes especially important when companies use different labels to describe certain deals, either to drive up the price of shares or to mislead shareholders.

⁶⁶⁶ One of the conclusions that can be drawn from the way the deal was structured and labeled as it was announced is that had the deal been a merger, it would only have needed the approval of two-thirds of the shares represented in the General Assembly Meeting. The absence of legislative framework under the Saudi Companies Law 2015 could encourage companies to give deals labels that do not reflect the true nature of the transaction, taking advantage of the authorities' weak understanding of the new concepts of M&A. The issue of understanding M&A in Saudi Arabia is driven by the vague definitions of M&A concepts throughout legal texts in the Saudi laws.

of the Proposed Merger will be underpinned by a shared commitment to achieve a fair result and create value for each company's shareholders based on the principles of a merger of equals. This is an important precedent in the petrochemical sector in the Kingdom of Saudi Arabia, which will, God-willing, result in a larger, more capable, and more competitive company that can increase investments in new projects in the Kingdom and globally, and will provide exciting growth opportunities for management and employees, adding value to the shareholders of both companies.

Both companies have agreed that, in the event the Proposed Merger occurs, it will be implemented by way of an exchange of shares where, after the Proposed Merger is completed, the Company will become a subsidiary of Sipchem.⁶⁶⁷ Under the terms of the Proposed Merger, Sipchem will issue 0.685 new shares for every one issued share in the Company. Accordingly, based on the agreed exchange ratio, if the Proposed Merger is completed, Sipchem will issue 300,574,575 new shares to the Company's shareholders in exchange for all issued shares in the Company.

The MoU does not constitute an offer by Sipchem to the Company's shareholders or to its board of directors, nor does it constitute an announcement of a firm intention to make an offer. Under the MoU, the Company and Sipchem have agreed to continue to co-operate with each other to complete the financial, technical, commercial, market and legal due diligence, agree [to] an integration plan, and [oversee] the governance and strategy of the combined group as well as the preparation of the definitive documentation required to implement the Proposed Merger. Should the companies agree to proceed with the Proposed Merger, they intend to enter into a definitive legally binding merger agreement that, amongst other things, will specify the terms of Sipchem's potential offer addressed to the Company's shareholders and its board of directors (the Merger Agreement). Both companies will continue to conduct business as usual and both companies' shares will continue to trade as usual until completion of the Proposed Merger.

Currently, both companies intend to finish their evaluation of the Proposed Merger with the intention of being in a position to sign the Merger Agreement in the first half of 2014. The MoU will expire on the earlier of the date on which the Merger Agreement is signed by the companies or by notice for [sic] termination of the studies from either company to the other.

The entry into the MoU does not mean that the Proposed Merger will be agreed between the two companies, that an offer will be eventually made in relation to the Proposed Merger, or that the terms or timing of any potential offer have been confirmed. If the terms of the Proposed Merger are agreed, it is expected that it will be subject to various conditions and approvals including, without limitation, the approval of the Capital Market Authority, the approval at the general assembly of each company, and the approval of the competent Saudi Arabian regulatory authorities.

⁶⁶⁷ This is more proof that the transaction in fact was an acquisition and not a merger, as it was labeled in the announcements. It is obvious that Sahara wanted to be acquired 100% rather than to merge into Sipchem.

In respect of the Proposed Merger, the Company has appointed Morgan Stanley Saudi Arabia as its financial advisor, Al-Jadaan & Partners Law Firm as its Saudi legal advisor, Clifford Chance LLP as its international legal advisor, and IHS Inc. as its technical and market consultant. Sipchem has appointed HSBC Saudi Arabia Limited as its financial advisor, Zeyad S. Khoshaim Law Firm as its Saudi legal advisor, Allen & Overy LLP as its international legal advisor, Jacobs Consulting as its technical consultant, and Nexant as its market consultant.⁶⁶⁸

On June 8, 2014 Sahara announced that even though Sahara and Sipchem had advanced in their negotiations and reached a good understanding regarding the deal, they decided to postpone the deal due to difficulties encountered in consummating the transaction in the manner that the two companies wished; these difficulties arose because they could not find a proper regulatory framework to govern the deal:

Although both companies are still convinced that the Proposed Merger is in the interest of their shareholders, the companies reached a conclusion that it is difficult to implement this merger under the current regulatory framework using a structure acceptable to both companies where both companies will continue to exist⁶⁶⁹ whilst achieving operational integration.⁶⁷⁰

2. The regulatory framework issue

Because Sipchem wanted to acquire 100% of Sahara, and there were no rules governing total acquisition transactions, the rule that did apply came from the Companies Law 1965 according to the Safola case, which held that no shareholder may be forced to sell his share without his consent. That meant that in order for Sipchem to acquire all of Sahara, it needed the approval of all of Sahara's shareholders. This rule caused difficulties for both companies. In contrast, if the transaction had been structured as a merger, Sahara could have completed the deal by obtaining the approval of a majority of its shareholders (two-thirds of the shares represented

⁶⁶⁸ See Sahara's website, available at <http://www.saharapcc.com/en/newsdetails.aspx?pageid=31&newsid=917> (last visited December 11, 2015).

⁶⁶⁹ Another proof that the transaction is an acquisition.

⁶⁷⁰ See Sahara's website, available at <http://www.saharapcc.com/en/newsdetails.aspx?pageid=31&newsid=978> (last visited December 11, 2015).

in the meeting) as prescribed in Articles 85 and 92 of the Saudi Companies Law 1965. Article 94 (4) of the Saudi Companies Law 2015 retains the same language as the 1965 law.⁶⁷¹

3. Solution

To solve this issue, the Saudi legislature needs to issue rules that allow total acquisitions to occur with the approval of a majority of shareholders. If the Saudi Companies Law 1965 had specified how many shares were needed to approve an acquisition, the acquisition of Sahara by Sipchem would have been consummated.

Another way to achieve the same result as a stock acquisition would have been for Sipchem to have formed a subsidiary, and for this subsidiary to have merged with Sahara. The result would have been that Sahara would have become a subsidiary wholly owned by Sipchem. This is an example of a reverse subsidiary merger⁶⁷², which will be discussed in the following Section of this Chapter that discusses the US. The Saudi Companies Law 2015 does not address this scenario, which means that the Saudi Companies Law 2015 does not prohibit this type of action. However, the mechanism of a “reverse subsidiary merger” has never been used in Saudi Arabia, which raises speculation about whether the Ministry of Commerce and Industry may raise objections to this type of structure.

The drag along clause provides another practical way to solve the problem of the lack of any provision in the law that forces minority shareholders to sell their shares when the majority of shareholders want to sell their shares.⁶⁷³ A drag along clause typically is a clause that can be included in a shareholder agreement; it requires minority shareholders to sell their shares to a

⁶⁷¹ The Saudi Companies Law 2015, art. 94 (4).

⁶⁷² See THOMPSON, JR., *supra* note 490, at 11, 40.

⁶⁷³ Ma Isabel Sáez Lacave, Nuria Bermejo Guitierrez, *Specific Investments, Opportunism and Corporate Contracts: A Theory of Tag-along and Drag-along Clauses*, 424-25, EUROPEAN BUSINESS ORGANIZATION LAW REVIEW 11.3 (Sep 2010), available at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7923089>. (last visited February 28, 2016).

third party when the majority of the shareholders want to sell their shares to that third party.⁶⁷⁴ Therefore, the majority has the power to “drag” minority shareholders along with a sale and force them to sell all of their shares to the buyer.⁶⁷⁵ Neither the Saudi Companies Law 2015 nor the Saudi Companies Law 1965 prohibits such restrictions or clauses. A Saudi lawyer, who spoke with the author but preferred to remain anonymous, informed the author that Saudi law firms will include a drag along clause when drafting shareholder agreements if the shareholders ask them to; however, he also noted that law firms cannot guarantee whether the court will enforce such clauses.⁶⁷⁶

E. Is the stock acquisition provision against Islamic Law?

1. Introduction

This section argues that adopting provisions that permit stock acquisitions, such as share exchange provisions based on a majority vote, does not violate Islamic rules. Further, the author argues that once natural or institutional parties become shareholders in a corporation, they inherently and implicitly agree to comply with the Companies Law 2015 and with the corporation’s bylaws. This assertion rebuts the position that, out of concern for cohesion, shareholders must not be forced to sell their shares. The author argues that there is no issue of cohesion in the case of acquisitions, given that parties become shareholders of their own free will and in doing so, they freely submit to all conditions and rules stipulated in the Companies Law 2015 and in the corporation’s bylaws.

⁶⁷⁴ *Id.*

⁶⁷⁵ *Id.*

⁶⁷⁶ Anonymous attorney in Saudi with whom the author met in 2015.

2. The argument

Even though the court invokes the Islamic rule that no shareholder may be forced to sell his shares without consent, an argument can be made within Islamic jurisprudence that allows the application of majority vote rule.⁶⁷⁷ While sales under Islamic rules must be based on consent and must not transgress the will of the shareholders, the argument could be made that when a party becomes a shareholder in a company, he implicitly gives this consent and agrees to comply with the Companies Law 2015.⁶⁷⁸ The Saudi Companies Law 1965 contains such a rule (details of which are below) and Article 105 of the 2015 law retains the same rule and wording. The Saudi Companies Law 1965 states that when any party owns shares in a corporation, he implicitly agrees to the provisions prescribed in the Companies Law 1965 and also agrees to the corporation's bylaws:

Subscription in or ownership of stock shall imply that the stockholder accepts the company's bylaws and shall abide by the resolutions adopted by stockholders' meetings in conformity with the provisions of this Law and the company's bylaws, whether in his presence or absence, and whether he has voted for or against them.^{679, 680}

This argument—that entering into a shareholding contract means that the parties involved willingly agree to comply with its conditions and rules, including the majority vote rule—is commonly invoked and discussed within Islamic jurisprudence.

A well-established tenet of Islamic jurisprudence states that the default rule in cases of transactions is that “the original status of dealings and transactions are [sic] *permi*[tted].”⁶⁸¹ The rule summarizes all verses from the *Qur'an* and the *Sunnah* or *Hadith* that assert that

⁶⁷⁷ AHMED ALRAIZIN, CORPORATE GOVERNANCE OF JOINT STOCK CORPORATION[S] (A STUDY UNDER THE ISLAMIC JURISPRUDENCE), HOKAMAT ALSHARKAT ALMUSAHYMAH (DERASAH FIGHYAH), 43-5 (Sabic Chair for Islamic Securities Studies, Muhammad bin Saud University Project No. 23-01, Saudi Arabia, Riyadh, 2012).

⁶⁷⁸ *Id.*

⁶⁷⁹ The Saudi Companies Law, art. 96.

⁶⁸⁰ See also ALRAIZIN, *supra* note 677, at 41.

⁶⁸¹ KHALID ALMOSLIH, *Commercial marketing incentives and its applications under Islamic Jurisprudence*, 16 (Dar ibn ALjawzi, Saudi Arabia, Riyadh, 2005).

transactions are based in agreements such as: “O ye who believe! fulfill (all) obligations,”^{682, 683}

as well as from the *Hadith* where the Prophet Muhammad said: “Muslims are bound by their conditions, except a condition that forbids what is permissible or permits what is forbidden.”⁶⁸⁴

Here is a synthesis of the previous authoritative resources from the *Qur'an* and *Sunnah* or *Hadith*: there is no direct prohibition in the *Qur'an* or the *Hadith* against approving actions such as stock or assets acquisitions via the mechanism of a majority vote; therefore, it is permissible for the government to issue and adopt rules that permit approving stock acquisitions, assets acquisitions and mergers based on majority votes. Natural or institutional parties that become shareholders in a corporation agree to be bound by the Saudi Companies Law 2015 and by the corporation's bylaws. There is no coercion or duress imposed on the shareholders to become part of the corporation.

⁶⁸² Al-Mâ'idah, Verse 1, Ali, Abdullah Yusuf (2014-03-21), The Holy Qur'an (English Translation) with Commentary, (Kindle Locations 4501-02), Kindle Edition.

⁶⁸³ The commentary and explanation of the meaning of the word “obligations” in Qur'an is:

This line has been justly admired for its terseness and comprehensiveness. Obligations: 'uqud: the Arabic word implies so many things that a whole chapter of Commentary can be written on it. First, there are the divine obligations that arise from our spiritual nature and our relation to God. He created us and implanted in us the faculty of knowledge and foresight; besides the intuition and reason which He gave us, He made Nature responsive to our needs, and His Signs in Nature are so many lessons to us in our own inner life; He further sent Messengers and Teachers, for the guidance of our conduct in individual, social, and public life. All these gifts create corresponding obligations which we must fulfil [1], (Cf. 30: 30). But in our own human and material life we undertake mutual obligations express and implied. We make a promise; we enter into a commercial or social contract; we enter into a contract of marriage: we must faithfully fulfill all obligations in all these relationships, (Cf. 7: 172 and 16: 91).

Ali, Abdullah Yusuf (2014-03-21), The Holy Qur'an (English Translation) with Commentary, (Kindle Locations 4848-51), Kindle Edition.

⁶⁸⁴ HUSSEIN RASSOOL, ISLAMIC COUNSELLING: AN INTRODUCTION TO THEORY AND PRACTICE, 169 (New York, Routledge Taylor and Francis Group, 2015). The Hadith was narrated by Abo Dawood, *Imam Ahemd* and *Aldargagotmi Hadeeth* number 1023. See also Abdulhaman Alsakawye “*almagasid alhasanah fee bayan katheer min alhadeeth almushataherah beyn alsnah*,” Dar Alkitab Alarabi publication, 607. For additional readings in English on general principles of contract under Islamic Law, see Noor Mohammed, *Principles of Islamic Contract Law*, 115-130, JOURNAL OF LAW AND RELIGION, Vol. 6, No. 1 (1988); Hussein Hassan, *Contracts in Islamic Law: The Principles of Commutative Justice and Liberality Journal of Islamic Studies* (2002), 257-97; and Abdul Jalil, Muhammad Khalilur Rahman, *Islamic Law of Contract is Getting Momentum*, 175-92, INTERNATIONAL JOURNAL OF BUSINESS AND SOCIAL SCIENCE, Vol. 1 No. 2, November (2010), available at http://ijbssnet.com/journals/Vol._1_No._2_November_2010/14.pdf. (last visited December 16, 2015).

The previous argument is presented to counter a potential objection to allowing stock acquisitions based on majority votes; to reiterate, this objection is based on the premise that such provisions would be in conflict with the Islamic rule that no one may be forced to sell.

Therefore, the CHTC should be able to sell all of its shares with the approval of a majority of its shareholders. To provide a mechanism for acquiring all of a company's stock, the following Subsection presents the American model of dealing with stock acquisitions, which may serve as an example after which the Saudi Companies Law 2015 could be modeled. This Subsection provides examples of common forms of structuring transactions that may result in stock acquisition.

In the case of a stock acquisition, the Saudi Companies Law 2015 gives the board of directors of the acquiring company broad power to achieve the company's purpose, unless a specific provision in the Law or in the company's bylaws provides otherwise.⁶⁸⁵ As noted, this includes the acquisition of stock. Under the 1965 law, the acquiring company also does not require the approval of its shareholders to take the action of acquiring.⁶⁸⁶ Rather, this action falls under the authority of the board of directors.⁶⁸⁷ In a broad rule for a joint stock company, the Companies Law 1965 states that:

With due regard to the prerogatives of the general meeting, the board of directors shall enjoy full powers in the administration of the company. It shall be entitled, within the scope of its competence, to delegate one or more of its members or others to perform an act or certain acts. Nevertheless, the board of directors may not contract loans for terms exceeding 3 years, or sell or mortgage the real property or the place of business of the company, or release the debtors of the company from their liabilities, unless so authorized in the bylaws of the company and subject to the terms set forth therein. If the company's bylaws do not contain any provisions in this regard, the board may perform

⁶⁸⁵ The Saudi Companies Law 2015, art. 75.

⁶⁸⁶ The Saudi Companies Law 1965, art. 73.

⁶⁸⁷ *Id.*

the above acts with an authorization from the regular general meeting, unless such acts fall by virtue of their nature within the scope of the company's objects.⁶⁸⁸

The closely held acquiring joint stock company is not required to obtain the approval of shareholders unless the acquiring company must increase its capital in order to acquire the closely held company.⁶⁸⁹ Three-fourths of the shares present in the extraordinary general assembly are required to increase the capital of the company, as specified in the Saudi Companies Law 1965:

But if a resolution pertains to an increase or a decrease in capital, or to extension of the term of the company, or to dissolution of the company prior to expiry of the term specified in its bylaws or to merger of the company into another company or firm, it shall be valid only if adopted by a three-fourths majority vote of the shares represented at the meeting.⁶⁹⁰

Both the 2015 and 1965 Saudi Companies Laws give broad authority to the board of directors of acquiring companies and do not require that an acquiring company obtain shareholder approval to issue significant numbers of shares. The Saudi Companies Law 2015 should amend its law to add a rule requiring the acquiring corporation to obtain the majority of its shareholders' votes to issue a significant number shares; the NYSE rule that shareholders must approve a certain stock issuance (as will be discussed in the US section) may serve as an example.

F. Closely held stock acquisitions in the US

The United States' Model Business Corporation Act (MBCA),⁶⁹¹ Section 11.03, provides what is known as the "compulsory share exchange" provision.⁶⁹² The MBCA states:

⁶⁸⁸ *Id.*

⁶⁸⁹ The Saudi Companies Law 1965, art. 92.

⁶⁹⁰ *Id.*

⁶⁹¹ AMERICAN BAR ASSOCIATION, MODEL BUSINESS CORPORATION ACT, (4th ed. 2011).

⁶⁹² THOMPSON, JR, *supra* note 490, at 29, 40-1 and 49. Delaware law does not have the compulsory share exchange provision; see Mary Siegel, *An Appraisal of the Model Business Corporation Act's Appraisal Rights Provisions*, 231-52, 74 LAW AND CONTEMPORARY PROBLEMS, note: 17 (Winter 2011), available at <http://scholarship.law.duke.edu/lcp/vol74/iss1/19>. (last visited November 14, 2015).

(a) Through a share exchange:

(1) a domestic corporation may acquire all of the shares of one or more classes or series of shares of another domestic or foreign corporation, or all of the interests of one or more classes or series of interests of a domestic or foreign other entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange, or

(2) all of the shares of one or more classes or series of shares of a domestic corporation may be acquired by another domestic or foreign corporation or other entity, in exchange for shares or other securities, interests, obligations, rights to acquire shares or other securities, cash, other property, or any combination of the foregoing, pursuant to a plan of share exchange.⁶⁹³

When a CHAC is going to acquire a CHTC, the board of directors of the CHTC is required to adopt a plan for the stock exchange and submit it to shareholders for their approval at a quorate meeting at which at least a majority of shareholders entitled to vote is present.⁶⁹⁴ The board of directors is required to make a recommendation about the plan to the shareholders, except in a case involving a conflict of interest; in such a case, the board of directors must notify the shareholders that they are unable to make a recommendation because of the conflict of interest.⁶⁹⁵ The plan is considered approved by the shareholders when the majority of shareholders vote in favor of the plan.⁶⁹⁶

The CHAC is not required to obtain shareholder approval of stock exchange plans as long as it is the acquiring company, according to MBCA §11.04(g), unless there is an issuance of shares by the acquiring company in excess of 20%, according to MBCA §6.21(f) (1) (ii).

The shareholders of a CHTC have the right to dissent and to have their shares appraised according to MBCA §13.02(a) (2).

⁶⁹³ MODEL BUS. CORP. ACT §11.03(a) (2011).

⁶⁹⁴ MODEL BUS. CORP. ACT §11.04(b) (2011).

⁶⁹⁵ *Id.*

⁶⁹⁶ *Id.* at §11.04(e).

When a PHAC is going to acquire a CHTC and the consideration is stock, the New York Stock Exchange requires the shareholders' approval in the following cases:

(c) Shareholder approval is required prior to the issuance of common stock, or of securities convertible into or exercisable for common stock, in any transaction or series of related transactions if:

(1) the common stock has, or will have upon issuance, voting power equal to or in excess of 20 percent of the voting power outstanding before the issuance of such stock or of securities convertible into or exercisable for common stock; or

(2) the number of shares of common stock to be issued is, or will be upon issuance, equal to or in excess of 20 percent of the number of shares of common stock outstanding before the issuance of the common stock or of securities convertible into or exercisable for common stock.⁶⁹⁷

While Delaware law does not have a stock exchange provision like the MBCA's, it does provide for stock acquisition purchases to be achieved through a reverse subsidiary merger,⁶⁹⁸ which will be discussed in the section of this paper that addresses the merger of a closely held target corporation into a closely held acquiring corporation.

G. Recommendations

- 1- The Saudi Companies Law 2015 should provide mechanisms that facilitate stock acquisitions that are economically efficient and attractive. If the acquiring corporation is not able to acquire 100% of a target corporation, the stock acquisition may become less desirable, as was the case in the Sahara-Sipchem deal.
- 2- The Saudi Companies Law 2015 should provide a mechanism for stock exchange among closely held corporations via stock purchase agreements that requires only the majority (not 100%) of the acquired corporation's shareholders to approve.

⁶⁹⁷ New York Stock Exchange Listed Company Manual §312.03; THOMPSON, JR., *supra* note 490, at 36.

⁶⁹⁸ THOMPSON, JR., *supra* note 490, at 11, 40; AMERICAN BAR ASSOCIATION, MBCA (OFFICIAL TEXT WITH OFFICIAL COMMENT AND STATUTORY CROSS-REFERENCES), 11-09, 11-10 (United States, 2011).

- 3- The Saudi Companies Law should make it lawful and enforceable for companies to include in their bylaws a mechanism for selling shares and ownerships interests; for example, instruments such as buy/sell orders, and put/call options. These agreements help companies respond to various financial changes that may occur. The Saudi Companies Law 2015 does not recognize agreements that may be taken to facilitate share exchanges or the disposal of minority or ownership interests, nor does it distinguish between minority and majority.
- 4- Regarding the acquiring company, the Saudi Companies Law 2015 should model the NYSE rules and not require shareholder approval of a transaction unless a significant issuance of shares, such as 20% or more, is involved. This would give the acquiring companies the latitude to guide their organizations according to efficient business strategies. Again, an exception here would be a case in which a significant issuance of stock is involved.
- 5- The Saudi Companies Law 2015 should adopt a dissenting right in case of a stock exchange plan. It should also stipulate a right for those who dissent to have their shares appraised, so that they may obtain fair value for their shares.
- 6- The rule that the court currently may invoke to prohibit squeezing out the minority shares, which it applies according to the Islamic rule that no shareholder may be forced to sell his shares, should not be applicable. The solution to this issue would be to amend the Saudi Companies Law 2015 so that it adopts the right to force the minority shares to be sold when the majority shares vote in favor of a stock acquisition. The proposed amendment would enhance the attractiveness and competitiveness of companies and help to regulate efficient combinations between corporations.

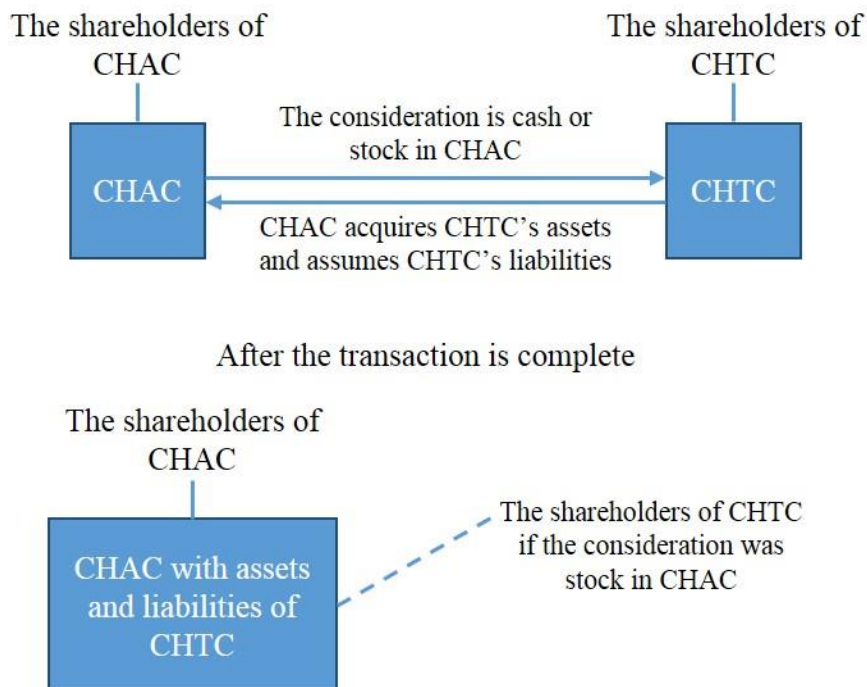
- 7- The Saudi Companies Law 2015 should incorporate a rule requiring an acquiring corporation to obtain the majority of its shareholders' votes before issuing a significant number of shares.
- 8- The drag along clause provides a practical solution for the lack of a provision in the law that forces minority members to sell their shares when the majority of shareholders wants to sell their shares. A drag along clause is typically included in shareholder agreements. Because it is uncertain whether the courts will enforce such clauses, the Saudi Companies Law 2015 should explicitly state that such clauses and restrictions are permissible.

§5.5. Assets Acquisition of a Closely Held Corporation

This section addresses the assets acquisition of a closely held corporation according to the 2015 and 1965 Saudi Companies Laws. The section also presents assets acquisition treatment under the MBCA, which may serve to guide the Saudi legislature to take the same approach as the MBCA in order to enhance the efficiency of the Saudi Companies Law 2015. Assets acquisition is generally structured as presented in Figure 5.3, which is displayed immediately below.

Figure 5.3

Assets acquisition⁶⁹⁹



A. Assets acquisition in Saudi Arabia

Regarding a company's sale or the acquisition of assets and certain other financial matters, the Saudi Companies Law 2015 makes a number of changes to the language of the 1965 law. For example, the 1965 law states that "the board of directors may not contract loans for terms exceeding 3 years, or sell or mortgage the real property or the place of business of the company, or release the debtors of the company from their liabilities, unless so authorized in the bylaws of the company and subject to the terms set forth therein."⁷⁰⁰ The 2015 law changes this language materially, stating that a board of directors may make long-term loans of any duration; sell or mortgage the company's assets; sell or mortgage the company's commercial store; and

⁶⁹⁹ THOMPSON, JR., *supra* note 490, at 9.

⁷⁰⁰ The Saudi Companies Law 1965, art. 73.

release the company's debtors from their liabilities to the company unless the law, the company's bylaws or the general assembly meeting limits the board's authority in such regard.⁷⁰¹

Consider another example of differences between the 2015 and 1965 laws. The Saudi Companies Law 1965 vests the management of a corporation with the board of directors; the board must secure shareholder approval in the ordinary general assembly in the case of an assets acquisition transaction involving real estate, unless such a transaction is authorized by the corporation's bylaws or occurs within the course of conducting ordinary business.⁷⁰² The Saudi Companies Law 2015 replaces the 1965 law's phrase: "sell or mortgage the real property ... of the company"⁷⁰³ with the simple phrase: "company's assets."⁷⁰⁴ Indeed, the 2015 law essentially reverses the 1965 law in this regard; the 2015 law states that a board of directors may sell the "company's assets" unless the law or the company's bylaws or the general assembly meeting provide limitations to the board's authority in such regard.⁷⁰⁵ In practice, this means that the Saudi Companies Law 2015 makes it a default condition that a board of directors' has the right to sell a company's assets. The 2015 law does not require the board of directors to secure a majority shareholder vote in order to sell some or substantially all of the company's assets; the MBCA model does require such a vote, which will be addressed in the following section.

Granting the board of directors the right to sell the corporation's assets is consistent neither with the Islamic rule requiring each shareholder's consent to sell nor with the Saudi Companies Law 2015. The Saudi Companies Law 2015 requires shareholders to vote on any major changes in the corporation, but it does not require their votes to sell assets. However, it is possible to dispose of major portions of a corporation via the sale of company assets. Therefore,

⁷⁰¹ The Saudi Companies Law 2015, art. 75 (2).

⁷⁰² The Saudi Companies Law 1965, art. 73.

⁷⁰³ *Id.*

⁷⁰⁴ The Saudi Companies Law 2015, art. 75 (2).

⁷⁰⁵ *Id.*

the Saudi Companies Law 2015 should adopt a provision that requires a majority shareholder vote to approve the sale of assets. The following section will describe how the American model deals with the sale of assets; this model may provide a guide for the Saudi legislature to follow in making improvements to the Saudi Companies Law 2015 that will protect shareholder rights and limit the excessive powers of the board of directors. Both of these improvements may help to enhance corporate governance in Saudi Arabia regarding M&A activities.

B. Assets acquisition of closely held corporations in the US

While the Saudi Companies Law 2015 does not include rules about assets acquisition, the Model Business Corporate Act (MBCA) does encompass provisions that govern the disposition of the assets of corporations.⁷⁰⁶ The MBCA specifies in which cases it does and does not require the approval of shareholders to consummate an assets acquisition transaction.⁷⁰⁷ The author argues that Saudi Arabia should regulate assets acquisitions in the same way that the American MBCA does; this would require amending the Saudi Companies Law 2015. Adding assets acquisition provisions to the Saudi Companies Law would provide a mechanism for assets acquisition that allows corporations to structure acquisitions according to their interests and financial goals, while at the same time protecting shareholders whose shares or ownership interests are targeted for acquisition.

C. The required shareholder approval

The MBCA includes a provision that regulates the assets acquisition of a CHTC, which requires the approval of shareholders in specific cases, such as when the acquiring company is

⁷⁰⁶ MODEL BUS. CORP. ACT §12 (2011).

⁷⁰⁷ *Id.*

going to acquire all or substantially all of the target's assets.⁷⁰⁸ The MBCA provides a statutory test that triggers the mandatory approval of the shareholders:

(a) A sale, lease, exchange, or other disposition of assets, other than a disposition described in section 12.01, requires approval of the corporation's shareholders if the disposition would leave the corporation without a significant continuing business activity. If a corporation retains a business activity that represented at least 25% of total assets at the end of the most recently completed fiscal year, and 25% of either income from continuing operations before taxes or revenues from continuing operations for that fiscal year, in each case of the corporation and its subsidiaries on a consolidated basis, the corporation will conclusively be deemed to have retained a significant continuing business activity.⁷⁰⁹

According to the provisions of the MBCA, a board of directors is required first to adopt an assets plan and submit it with a recommendation to the shareholders for approval, unless a conflict of interest exists, in which case the board of directors must notify shareholders that it cannot make a recommendation due to the conflict.⁷¹⁰ Otherwise, if at least 25% of the acquired corporation's business activity will remain and continue, then the board of directors may manage the assets acquisition and need only adopt a resolution in order to complete the transaction.⁷¹¹ When the assets plan requires approval, it is considered approved when a quorum has been achieved and the majority of shareholders entitled to vote (unless the company's Articles of Incorporation require more than a simple majority) are in favor of the assets acquisition plan.⁷¹²

The MBCA provides appraisal rights for any dissenters, as stated in Section 13.02 (a) (3). However, Section 12.02 (g) of the MBCA excludes an assets acquisition plan from Section 12.02 when the corporation will be dissolved after the transaction. In other words, while the appraisal right is provided only for a disposition of assets that is structured according to Section 12.02, the MBCA does not provide appraisal rights for a transaction in which the disposition of assets

⁷⁰⁸ MODEL BUS. CORP. ACT §12.02 (a) (2011).

⁷⁰⁹ *Id.*

⁷¹⁰ MODEL BUS. CORP. ACT §12.02 (b) (2011).

⁷¹¹ MODEL BUS. CORP. ACT §12.01 (2011).

⁷¹² MODEL BUS. CORP. ACT §12.02 (g) (2011).

eventually dissolves the corporation; that scenario is governed by MBCA Chapter 14,⁷¹³ which gives shareholders the right to approve the transaction⁷¹⁴ but eliminates the appraisal right when the assets acquisition is part of “the course of dissolution.”⁷¹⁵

D. The judicial interpretation of the sale of “all or substantially all assets”

The MBCA uses the term “disposition of assets” in discussing assets acquisition, and stipulates a test to determine when shareholders have the right to vote on an assets acquisition plan; however, Delaware law speaks of acquiring “all or substantially all” of the acquired assets.⁷¹⁶ The court has interpreted the meaning of “all or substantially all” assets via two approaches: the quantitative approach in *Gimbel v. The Signal Companies, Inc.*⁷¹⁷ and the qualitative approach in *Katz v. Bregman*.⁷¹⁸

In *Gimbel v. The Signal Companies, Inc.*, the court admits that the statutory language that describes the cases in which shareholders have the right to vote on the sale of substantially all assets does not provide a mathematical measurement.⁷¹⁹ It agrees that such a measurement may be taken by examining the quantitative effects on the corporation or its purpose; this measurement may eventually determine if substantially all of the assets were sold.⁷²⁰

The court bases its interpretation of “the sale of substantially all the assets” on the rationale that not every unusual action requires shareholder approval; rather, this approval is required only when an action would affect the purpose or existence of the corporation:

But any "ordinary and regular course of the business" test in this context obviously is not intended to limit the directors to customary daily business activities. Indeed, a question

⁷¹³ *Id.*

⁷¹⁴ MODEL BUS. CORP. ACT §14.02 (a) and (b) (2011).

⁷¹⁵ MODEL BUS. CORP. ACT §13.02 (a) and §12.02 (g) (2011).

⁷¹⁶ DEL. CODE. ANN. tit. 8, §271(a) (2016).

⁷¹⁷ *Gimbel v. Signal Companies*, 316 A.2d 599, 603 (Del. Ch. 1974).

⁷¹⁸ *Katz v. Bregman*, 431 A.2d 1274 (Del. Ch. 1981); THOMPSON, JR, *supra* note 490, at 61-3.

⁷¹⁹ *Gimbel*, 316 A.2d 599 at 605.

⁷²⁰ *Id.*

concerning the statute would not arise unless the transaction was somewhat out of the ordinary. While it is true that a transaction in the ordinary course of business does not require shareholder approval, the converse is not true. Every transaction out of normal routine does not necessarily require shareholder approval. The unusual nature of the transaction must strike at the heart of the corporate existence and purpose. As it is written at 6A Fletcher, Cyclopaedia Corporations (Perm. Ed. 1968 Rev.) § 2949.2, p. 648:

The purpose of the consent statutes is to protect the shareholders from fundamental change, or more specifically to protect the shareholder from the destruction of the means to accomplish the purposes or objects for which the corporation was incorporated and actually performs.

It is in this sense that the "unusual transaction" judgment is to be made and the statute's applicability determined. If the sale is of assets quantitatively vital to the operation of the corporation and is out of the ordinary and substantially affects the existence and purpose of the corporation, then it is beyond the power of the Board of Directors.⁷²¹

In *Katz v. Bregman*, the court employed the qualitative factor to measure whether the sale of the acquired corporation constituted a sale of substantially all of the target's assets.⁷²² The court in this case stated that the consummation of the assets acquisition transaction would cause the transfer of the business line of the acquired corporation:

Furthermore, the proposal, after the sale of National, to embark on the manufacture of plastic drums represents a radical departure from Plant's historically successful line of business, namely steel drums. I therefore conclude that the proposed sale of Plant's Canadian operations, which constitute over 51% of Plant's total assets and in which are generated approximately 45% of Plant's 1980 net sales, would, if consummated, constitute a sale of substantially all of Plant's assets. By way of contrast, the proposed sale of Signal Oil in *Gimbel v. Signal Companies, Inc.*, supra, represented only about 26% of the total assets of Signal Companies, Inc. And while Signal Oil represented 41% of Signal Companies, Inc. total net worth, it generated only about 15% of Signal Companies, Inc. revenue and earnings.

I conclude that because the proposed sale of Plant National (Quebec) Ltd. would, if consummated, constitute a sale of substantially all of the assets of Plant Industries, Inc., as presently constituted, that an injunction should issue preventing the consummation of such sale at least until it has been approved by a majority of the outstanding stockholders of Plant Industries, Inc., entitled to vote at a meeting duly called on at least twenty days' notice. Compare *Robinson v. Pittsburg Oil Refining Company, Del. Ch.*, 126 A. 46 (1933).⁷²³

⁷²¹ *Id.* at 606.

⁷²² *Id.* at 606.

⁷²³ *Katz*, 431 A.2d 1274 at 1276.

The case of *Hollinger, Inc. v. Hollinger International, Inc.*⁷²⁴ is presented in the context of whether the court applies the quantitative or qualitative approach when it measures the sale of substantially all of a subsidiary's assets.⁷²⁵ The court applied both quantitative and qualitative approaches to the *Hollinger* case, and it emphasized that most corporations hold and operate businesses or assets through wholly held subsidiaries.⁷²⁶ This renders unacceptable the argument that Delaware 271 should only be triggered when the subsidiary has no control over its business.⁷²⁷ A portion of the court's opinion in this case is cited in this paper to provide additional insight into the type of value the court focuses on when it applies quantitative and/or qualitative approaches to measure an assets sale. The court bases its assessment of the value of the assets in question on the economic merit, value and importance both of the remaining assets and of the assets sold.⁷²⁸ The court does not measure the prestigious value of the assets or judge whether the sale of assets is perceived as a major transaction.⁷²⁹ In the context of the *Hollinger* case, the court summarized its interpretation of Section 271 of Delaware law as follows:

Put simply, after the Telegraph Group is sold, International will retain considerable assets that are capable of generating substantial free cash flow. Section 271 does not require a vote when a major asset or trophy is sold; it requires a vote only when the assets to be sold, when considered quantitatively and qualitatively, amount to "substantially all" of the corporation's assets.⁷³⁰

E. Recommendations

- 1- The Saudi Companies Law 2015 should adopt a provision that gives shareholders the right to vote on the acquisition of all or substantially all of the corporation's assets.

⁷²⁴ *Hollinger, Inc. v. Hollinger International, Inc.*, 858 A.2d 342, (Del. Ch. 2004).

⁷²⁵ See THOMPSON, JR., *supra* note 490, at 64.

⁷²⁶ *Hollinger*, 858 A.2d 342 at 348.

⁷²⁷ *Id.*

⁷²⁸ *Id.*

⁷²⁹ *Id.*

⁷³⁰ *Id.*

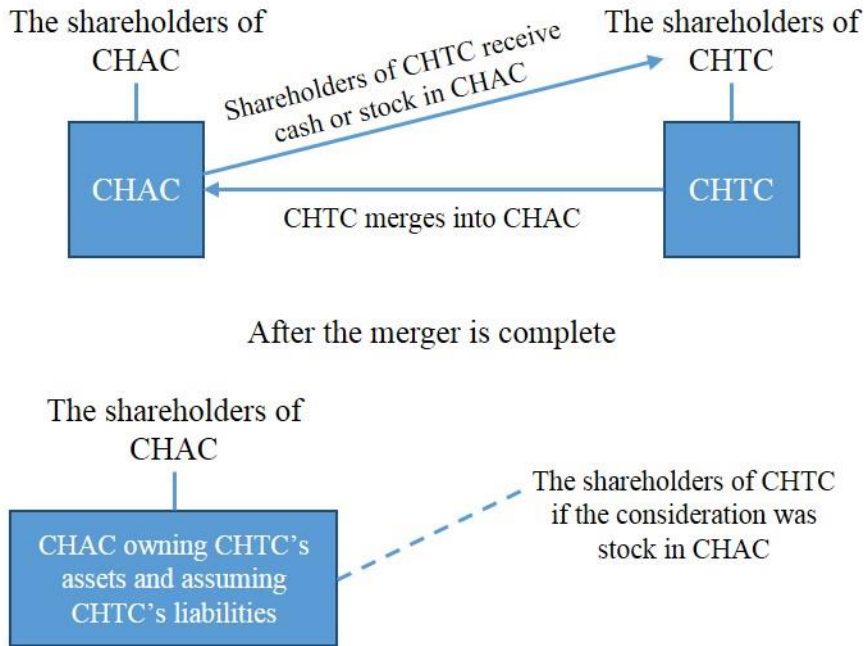
- 2- The Saudi Companies Law 2015 should give those who dissent an acquisition of assets the right to appraise their shares and obtain the fair value of their shares, except if the corporation is going to be dissolved as result of the assets acquisition plan.
- 3- The Saudi Companies Law 2015 should provide a proper test to determine when a disposition of assets requires the approval of the shareholders of the target company.

§5.6. Merger of Closely Held Corporation into Acquiring Corporation

This section addresses the merger of a closely held corporation into an acquiring corporation. The section will also suggest provisions that should be incorporated into the Saudi Companies Law 2015 to deal with such things as appraisal rights and mergers between a parent and its subsidiary; the author argues that Saudi law should reference the American approach in dealing with such issues. A merger of a closely held corporation into an acquiring corporation is typically structured as presented in Figure 5.4, which is displayed immediately below.

Figure 5.4

Direct Merger⁷³¹



A. Introduction

The Saudi Companies Law 2015 covers mergers in four Articles: 190, 191, 192 and 193. The Saudi Companies Law 1965 covers merger issues in three Articles: 213, 214 and 115. This section will examine the rules regarding the merger of a closely held corporation into an acquiring corporation. The section will analyze these rules, discuss their flaws, and finally, in Subsection N of Section 5.6, recommend the incorporation of certain rules into the Saudi Companies Law 2015. If a closely held corporation were to merge into an acquiring corporation, both companies would be obligated conform with the three Articles covering mergers in the Saudi Companies Law 1965, or with the four Articles covering mergers in the Saudi Companies Law 2015.

⁷³¹ THOMPSON, JR., *supra* note 490, at 10.

B. Definition and method of merger in the Saudi Companies Law

Article 191 of the Saudi Companies Law 2015⁷³² retains the stipulations of the 1965 law regarding the forms that a merger transaction may take. The 1965 law states the following: “[t]he integration is conducted by the annexation of one or more Companies to another existing company or by combining two or more Companies in a new company under foundation.”⁷³³ Thus, the two forms that the 1965 law recognizes are incorporation and consolidation.

C. Requirements to approve a merger transaction

Regulations involving the approval of a merger in the Saudi Companies Law 2015 are similar in most respects to those of the 1965 law. For example, the Saudi Companies Law 2015 stipulates that a merger shall be adopted by each constituent to the merger according to the manner prescribed for amending the company’s articles of incorporation or bylaws.⁷³⁴ Amending the company’s articles of incorporation or bylaws falls under the extraordinary general assembly’s authority, as addressed in Article 88 of the 2015 law. On these topics, the 1965 law stipulates similarly, stating that in order for a merger resolution to be adopted, the merged company and merging company must comply with the same rules and procedures prescribed for amending a company’s certificate of incorporation or bylaws.⁷³⁵ The Saudi Companies Law 1965 assigns the extraordinary general assembly the duty of voting to amend the company’s bylaws.⁷³⁶ It also states that shareholder approval is required for a merger and for issuing new shares; such a vote should take place in the extraordinary general meeting, according to Article 92 of the 1965 law:

⁷³² The Saudi Companies Law 2015, art. 191.

⁷³³ The Saudi Companies Law 1965, art. 214.

⁷³⁴ The Saudi Companies Law 2015, art. 191 (3).

⁷³⁵ The Saudi Companies Law 1965, art. 214.

⁷³⁶ *Id.* at art. 85.

Resolutions of an extraordinary general meeting shall be adopted by a two thirds majority vote of the shares represented thereat. But if a resolution pertains to an increase or a decrease in capital, or to extension of the term of the company, or to dissolution of the company prior to expiry of the term specified in its bylaws or to merger of the company into another company or firm, it shall be valid only if adopted by a three-fourths majority vote of the shares represented at the meeting.⁷³⁷

Regarding extraordinary general assembly meetings, the Saudi Companies Law 2015 states that the first extraordinary general assembly meeting called shall not be valid unless shareholders representing one half of the company's capital are present (unless the company's bylaws require a higher percentage, but in no case shall more than two-thirds be required for the meeting to commence).⁷³⁸ The 2015 law also states that if the first extraordinary general assembly meeting is not held because the quorum is not met, a second extraordinary general assembly meeting may be called in the same manner as prescribed in Article 91.^{739, 740} The second extraordinary general assembly meeting may be held one hour after the time that the meeting that was not held (because a quorum had not been achieved) passes.⁷⁴¹ This second extraordinary general assembly meeting shall be valid if shareholders representing at least one quarter of the company's capital are present.⁷⁴² If the second extraordinary general assembly meeting fails to meet the quorum requirement, a third extraordinary general assembly meeting may be called in the same manner prescribed as in Article 91.⁷⁴³ The third extraordinary general assembly meeting shall be valid with whatever number of shares is present after the approval of the respective authority.⁷⁴⁴

⁷³⁷ *Id.* at art. 92.

⁷³⁸ The Saudi Companies Law 2015, art. 94 (1).

⁷³⁹ Article 91 of the Saudi Companies Law 2015 addresses the manner in which the call for a shareholder meeting shall occur; *see* Subsections B and C of Section 5.3.

⁷⁴⁰ The Saudi Companies Law 2015, art. 94 (2).

⁷⁴¹ *Id.*

⁷⁴² *Id.*

⁷⁴³ *Id.* at art. 94 (3).

⁷⁴⁴ *Id.*

According to the 2015 law, a merger transaction resolution in the extraordinary general assembly meeting shall be adopted if two-thirds of the shares represented in the meeting approve, unless the resolution concerns the increase or decrease of capital; or the extension of the company's duration; or the dissolution of the company before the time prescribed in the company's bylaws; or a merger with another company.⁷⁴⁵ In any of those cases, the resolution is adopted if three-fourths of the shares represented in the meeting approve the resolution.⁷⁴⁶

The Saudi Companies Law 2015 adds a rule that the 1965 law did not include about voting rights on issues concerning mergers; the 2015 law states that a shareholder who owns shares in both the acquired and acquiring companies may vote in only one company.⁷⁴⁷

1. Legislative conflicts

Although the Companies Law 2015 does not substantially modify the rules that govern mergers between companies in Saudi Arabia, it does contain a sentence that creates confusion in a very important aspect of the merger concept. Article 192 states that all of the liabilities and rights of the merged company transfer to the merging company, or to the new company that emerges from the merger, after the merger process is completed, and the new company has been registered in accordance with the law.⁷⁴⁸ The Companies Law 2015 then stipulates that the merging or emerging company is deemed the successor of the merged company to the extent that the assets will devolve to it unless the merger agreement states otherwise.⁷⁴⁹ Thus, Article 192 of the Companies Law 2015 contains sentences that contradict each other. Article 192 first states that all liabilities and rights transfer to the merging company, which is the case in any merger, because one company is disappearing. However, the second part of Article 192 states that the

⁷⁴⁵ *Id.* at art. 94 (4).

⁷⁴⁶ *Id.*

⁷⁴⁷ *Id.* at art. 191 (4).

⁷⁴⁸ *Id.* at art. 192.

⁷⁴⁹ *Id.*

merging or emerging company (the acquiring company) is the successor to the merged company (the company that has been acquired) to the extent that the acquiring company receives the assets of the acquired company, unless the merger agreement states otherwise.

This second part of Article 192 means that there may be cases in which the acquiring company does **not** assume all of the liabilities of the acquired company. This contradicts the first part of Article 192, as well as the very concept of merger. It also could create a situation in which the merging company may argue that it is not obligated to assume all of the liabilities of the merged company unless the merger agreement specifically requires it to do so. The last part of Article 192 suggests that the Saudi legislature confused the treatment of assets in a merger transaction with the sale of assets in which a company can select certain liabilities. Had the Saudi legislature stated only that not all liabilities are assumed unless specified in the merger agreement, it would have been clear that the Saudi legislature wanted to take an approach to merger practices that was different from that taken by other countries. However, as noted, the Saudi legislature also stated that all of the liabilities and rights of the merged company transfer to the merging or emerging company. That means that companies must state that all of the acquired company's liabilities and rights were transferred to the survivor or new company in order to ensure that no dispute arises as result of Article 192. The Companies Law 2015 should amend the second part of Article 192 and delete the sentence that declares that the survivor company is the successor of the acquired company to the extent that it receives the acquired company's assets unless the merger agreement states otherwise. This sentence directly contradicts the first part of Article 192, and it also contradicts the standard concept of merger that all of the rights and liabilities of the merged company transfer to the surviving or merging company.

D. Mergers between corporations with different forms (such as LLC with JSC)

The Saudi Companies Law 2015 retains the rule found in the 1965 law that allows a merger between different types of companies; this rule provides that, with consideration of the respective laws, a company may merge with another company of its type or of another type even during the dissolution period.⁷⁵⁰ The relevant Article from the 1965 law is Article 213, which states that it is legal for any company to merge into any other type of company, excepting insurance companies: “It is permissible for the company, even if it is in the phase of liquidation, to integrate into another company of its kind or of another kind, but the cooperative company shall not be integrated into a company of another kind.”⁷⁵¹

E. The issue

The Saudi Companies Law 2015 does not provide the appraisal right, which is necessary. Also, the Saudi Companies Law 2015 does not provide the right for the parent corporation to merge with its 90% wholly owned subsidiary without the approval of the shareholders, even though the outcome of such a case is automatic.

F. Merger of closely held corporations into acquiring corporations in the US

The MBCA provides rules and procedures for a case in which a closely held corporation will merge into an acquiring corporation; these rules do not differ from the rules prescribed for a stock exchange plan in terms of the requirements for a quorum and for shareholder approval.

The MBCA covers mergers between corporations in Section 11.02, where it states that:

- (a) One or more domestic business corporations may merge with one or more domestic or foreign business corporations or eligible entities pursuant to a plan of merger, or two or more foreign business corporations or domestic or foreign eligible entities may merge into a new domestic business corporation to be created in the merger in the manner provided in this chapter.

⁷⁵⁰ *Id.* at art. 190.

⁷⁵¹ The Saudi Companies Law 1965, art. 213.

(b) A foreign business corporation, or a foreign eligible entity, may be a party to a merger with a domestic business corporation, or may be created by the terms of the plan of merger, only if the merger is permitted by the foreign business corporation or eligible entity.⁷⁵²

G. The action required by the board of directors and shareholders

For a closely held corporation to merge into a closely held acquiring corporation, the board of directors of the CHTC must adopt a merger plan and submit it to shareholders for their approval.⁷⁵³ The board of directors is required to make a recommendation on the merger plan to the shareholders, except when there is a conflict of interest, in which case the board of directors must notify shareholders that they are unable to make a recommendation because of the conflict.⁷⁵⁴ Shareholders may approve the merger plan with a majority vote in favor.⁷⁵⁵ The approval of a merger by the shareholders of the surviving corporation is not required.⁷⁵⁶ Also, if the merger involves a subsidiary merging into the parent, the approval of the shareholders of the subsidiary is not required,⁷⁵⁷ as will be discussed in the following Subsection.

H. Mergers between a parent corporation and its subsidiary

The MBCA states that if a parent corporation owns 90% of its subsidiary, and the parent wants to merge with its subsidiary, the merger may be consummated without the approval of the subsidiary's board of directors or shareholders:

(a) A domestic parent corporation that owns shares of a domestic or foreign subsidiary corporation that carry at least 90% of the voting power of each class and series of the outstanding shares of the subsidiary that have voting power may merge the subsidiary into itself or into another such subsidiary, or merge itself into the subsidiary, without the approval of the board of directors or shareholders of the subsidiary, unless the articles of incorporation of any of the corporations otherwise provide, and unless, in the

⁷⁵² MODEL BUS. CORP. ACT §11.02 (a), (b) (2011).

⁷⁵³ MODEL BUS. CORP. ACT §11.04 (b) (2011).

⁷⁵⁴ *Id.*

⁷⁵⁵ MODEL BUS. CORP. ACT §11.04 (e) (2011).

⁷⁵⁶ MODEL BUS. CORP. ACT §11.04 (g) (1) (2011).

⁷⁵⁷ MODEL BUS. CORP. ACT §11.05 (a) (2011).

case of a foreign subsidiary, approval by the subsidiary's board of directors or shareholders is required by the laws under which the subsidiary is organized.⁷⁵⁸

I. Appraisal rights

The MBCA provides appraisal rights for the shareholders of the merged corporation,⁷⁵⁹ unless the merged corporation is a 90% held subsidiary merging with the parent entity, as stipulated in MBCA Section 11.5(a).

J. Delaware law

Under Delaware law, Section 251 defines merger and consolidation as follows:

(a) Any 2 or more corporations existing under the laws of this State may merge into a single corporation, which may be any 1 of the constituent corporations or may consolidate into a new corporation formed by the consolidation, pursuant to an agreement of merger or consolidation, as the case may be, complying and approved in accordance with this section.⁷⁶⁰

Under Delaware law, a resolution must be adopted by the boards of directors of both the merging corporation and the surviving corporation, because each party is a constituent in the transaction.⁷⁶¹ Delaware law also requires the approval of shareholders for the merger to go forward; this means that the majority of the owners of any outstanding stock of the merging corporation and the surviving corporation must approve the merger.⁷⁶²

⁷⁵⁸ *Id.*

⁷⁵⁹ MODEL BUS. CORP. ACT §13.03 (a) (1) (2011).

⁷⁶⁰ DEL. CODE. ANN. tit. 8, §251 (a) (2016).

⁷⁶¹ *Id.* at §251 (b).

⁷⁶² *Id.* at §251 (c).

K. The merger between parent and subsidiary

Delaware law provides a mechanism by which a parent entity that owns 90% of a subsidiary may merge with its subsidiary without the approval of the subsidiary's shareholders.⁷⁶³

L. Appraisal rights

Delaware law provides appraisal rights in Section 262 for dissenters who did not vote in favor of the merger:

(a) Any stockholder of a corporation of this State who holds shares of stock on the date of the making of a demand pursuant to subsection (d) of this section with respect to such shares, who continuously holds such shares through the effective date of the merger or consolidation, who has otherwise complied with subsection (d) of this section and who has neither voted in favor of the merger or consolidation nor consented thereto in writing pursuant to § 228 of this title shall be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock under the circumstances described in subsections (b) and (c) of this section.⁷⁶⁴

Delaware law also provides appraisal rights in the case of a parent merging with its 90% owned subsidiary.⁷⁶⁵

M. Reverse subsidiary merger

The reverse subsidiary merger is structured such that a closely held parent corporation forms a subsidiary and the subsidiary merges into the closely held target corporation.⁷⁶⁶ This structure can achieve the same result that a stock exchange acquisition can achieve.⁷⁶⁷ In the reverse subsidiary merger, under Delaware law, a resolution of the boards of directors of both the subsidiary and the target shall be adopted.⁷⁶⁸ The approval of the shareholders of both subsidiary

⁷⁶³ *Id.* at §253 (c).

⁷⁶⁴ *Id.* at §262 (a).

⁷⁶⁵ *Id.* at §262 (b) (3).

⁷⁶⁶ THOMPSON, JR., *supra* note 490, at 74; MODEL BUSINESS CORPORATION ACT OFFICIAL TEXT WITH OFFICIAL COMMENT AND STATUTORY CROSS-REFERENCES, 11-09, 11-10.

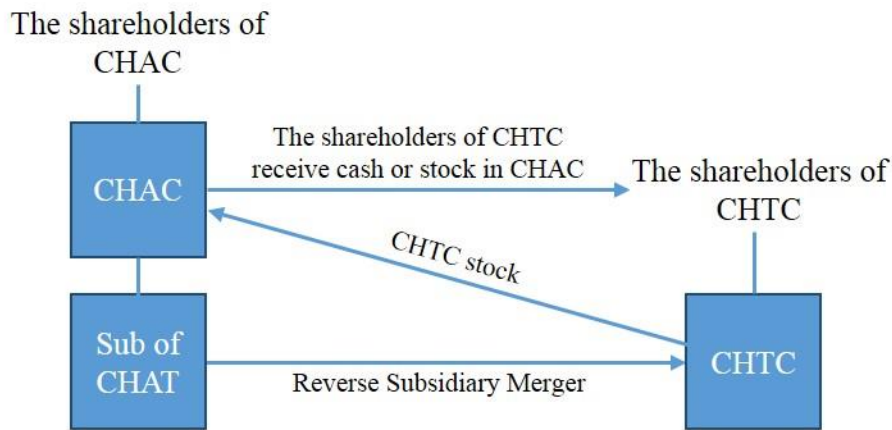
⁷⁶⁷ *Id.* at 40.

⁷⁶⁸ DEL. CODE. ANN. tit. 8, §253 (b) (2016).

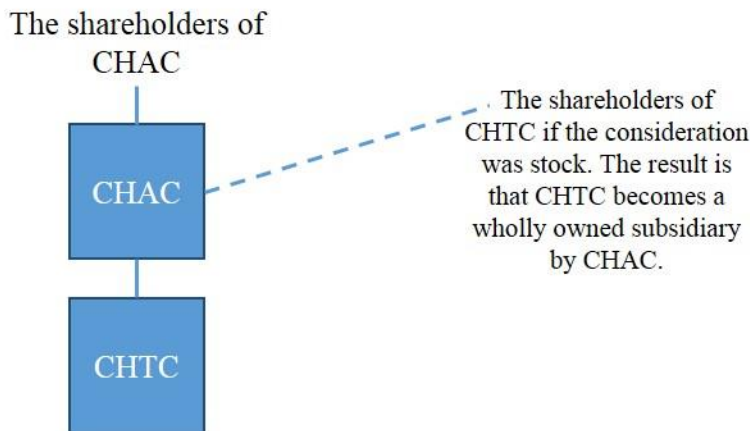
and target is required.⁷⁶⁹ Delaware law provides appraisal rights for dissenters in both the closely held target corporation and the subsidiary.⁷⁷⁰ A reverse subsidiary merger is structured as presented in Figure 5.5.

Figure 5.5

Reverse subsidiary merger⁷⁷¹



After the transaction is complete



⁷⁶⁹ DEL. CODE. ANN. tit. 8, §253 (c) (2016).

⁷⁷⁰ *Id.* at §262 (b).

⁷⁷¹ THOMPSON, JR., *supra* note 490, at 10.

N. Recommendations

- 1- The Saudi Companies Law 2015 does not provide the appraisal right, which it should include. The appraisal right would play a crucial role in ensuring a balance among majority and minority shareholders, and it would provide a relatively equitable mechanism by which dissenters could exit the corporation and be fairly compensated for their shares. The appraisal right would be the most suitable remedy for minority shareholders who vote against a merger, according to (for example) the following rationale:

At common law it was in the power of any single stockholder to prevent a merger. When the idea became generally accepted that, in the interest of adjusting corporate mechanism to the requirements of business and commercial growth, mergers should be permitted in spite of opposition of minorities, statutes were enacted in state after state which took from the individual stockholder the right theretofore existing to defeat the welding of his corporation with another. In compensation for the lost right, a provision was written into the modern statutes giving the dissenting stockholder the option completely to retire from the enterprise and receive the value of his stock in money.⁷⁷²

- 2- The Saudi Companies Law does not give a parent entity the right to merge with its 90% owned subsidiary without the approval of shareholders, even though the conclusion of such a merger is automatic. The adoption of a rule that permits a parent corporation to merge with its 90%-owned subsidiary without shareholder approval would facilitate efficient transactions. Requiring the approval of shareholders in cases in which a parent corporation wishes to merge with a 90%-owned subsidiary has no basis in corporate

⁷⁷² Julián J. Garza Castañeda, Appraisal Rights: “*The Fair*” Valuation of Shares In Case of Dissent, available at <http://biblio.juridicas.unam.mx/revista/DerechoComparado/numero/96/art/art4.htm#N1> (last visited December 7, 2015). See also Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker* (1962), Faculty Scholarship Series, Paper 4744, available at http://digitalcommons.law.yale.edu/fss_papers/4744. (last visited December 7, 2015). For additional elaborations, see EDWARD P. WELCH, ROBERT S. SAUNDERS, ALLISON L. LAND, JENNIFER C. VOSS, AND ANDREW J. TURE, FOLK ON THE DELAWARE GENERAL CORPORATION LAW: FUNDAMENTALS, GCL-855 (New York, Wolters Kluwer, 2014); *Appraisal of Shares of Dissenting Stockholders in Consolidation-American General Corporation v. Camp, et al.*, 1 Md. L. Rev. 338 (1937), available at <http://digitalcommons.law.umaryland.edu/mlr/vol1/iss4/6> (last visited December 7, 2015).; and Jeffrey G. MacIntosh, *The Shareholders' Appraisal Right in Canada: A Critical Reappraisal*, OSGOODE HALL LAW JOURNAL 24.2 (1986), 201-98, available at <http://digitalcommons.osgoode.yorku.ca/ohlj/vol24/iss2/1> (last visited December 11, 2015).

governance. The Saudi Companies Law 2015 should adopt rules that can fill the legislative gaps that have been ignored thus far owing to the fact that issues such as (for example) mergers between a parent corporation and a 90%-owned subsidiary were not in play when the Law was enacted.

Chapter 6: Tender Offer of Stock of a Publicly Held Corporation (Public Takeover)⁷⁷³

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⁷⁷³ Relevant articles and rules cited in this chapter are provided in Appendices 6A, 6B, and 6C.

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§6.1. Scope

This Chapter is an assessment and critique of Saudi Arabia's M&A Regulation, which applies to the takeover of publicly held corporations. The Chapter identifies provisions that may help improve the economic and legal efficiency of Saudi M&A activity. The European Commission's Directive on Takeover bids is referenced throughout the chapter as a comparison and guide. This Chapter concludes with recommendations that may improve the efficiency of the Saudi M&A Regulation and facilitate the takeover mechanism.

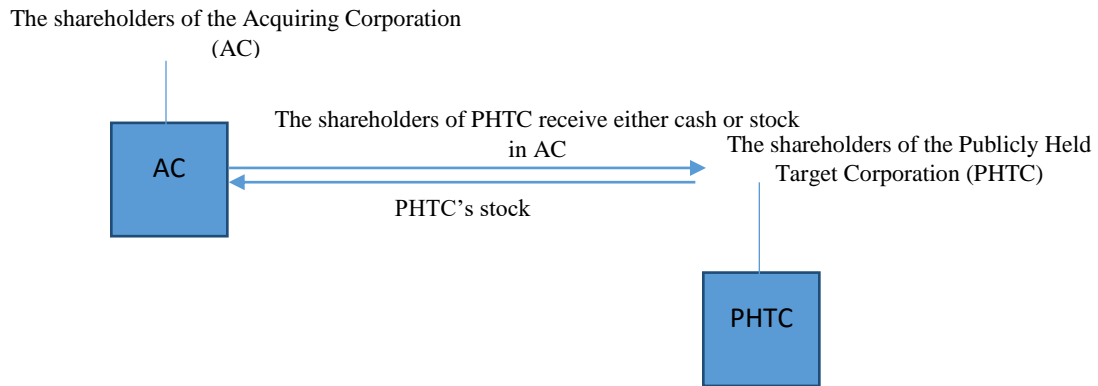
The Chapter begins by (1) introducing the Saudi Capital Market Authority and its role, which is to regulate tender offers under the Saudi M&A Regulation; and (2) the European Commission's (EC) Directive on Takeover Bids. The author explains why he chose the EC Directive as a model in Section 6.2, and addresses the applicability of the Saudi M&A Regulation in Section 6.3. Every Section of the Chapter thereafter includes some level of comparison between the Saudi M&A Regulation and the EC Directive; if the EC Directive does not cover a specific section, a brief reference to the UK Takeover Code and its relevant rules is made. Rules governing the announcement of a takeover bid are addressed in Section 6.4, the prohibition of dealing rule in Section 6.5, and the mandatory offer rule in Section 6.6. Section 6.6 also discusses the question of which ownership threshold—30% or 50%—is more efficient as the trigger of the mandatory offer, and Section 6.7 discusses the types and prices of mandatory offers. Section 6.8 lays out the disclosures of information for the mandatory offer. Section 6.9 explains the obligation of the board of directors of the offeree company to provide an opinion regarding the offer, and Section 6.10 discusses the independence of the board of directors of the offeree company. Section 6.11 addresses provisions necessary to establish the credibility of the offeror to complete the offer, and Section 6.12 details the offer period and the right of

shareholders to withdraw their acceptance. Section 6.13 addresses the breakup and reverse breakup fee provisions; Section 6.14 treats the competition provision; Section 6.15 focuses on the hostile takeover and restrictions on the defensive measures rules; Section 6.16 details the required disclosures of ownership acquired during the offer and Section 6.17 notes the required disclosures of ownership acquired before the offer. Section 6.18 addresses the EC Directive's treatment of squeeze out and sell out rules. Section 6.19 provides a summary of the author's recommendations, and a diagram that provides a visual representation of the structure of a tender offer of a publicly held corporation.

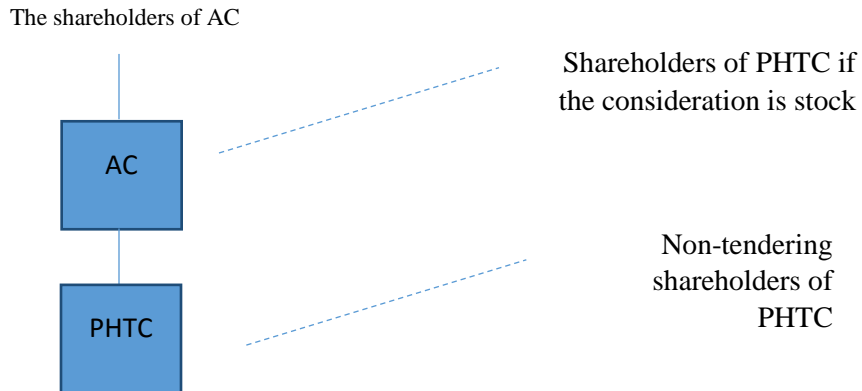
Figure 6.1, which is displayed immediately below, illustrates the structure of a tender offer. The Acquiring Corporation (AC) makes an offer to the shareholders to tender their shares. If the offer is stock or includes stock, the tendering shareholders will receive stock in the AC.

Figure 6.1

Tender offer⁷⁷⁴



After the offer is complete



§6.2. Introduction

A. A brief introduction to the Saudi Capital Market Authority

The enacting of the Saudi Capital Market Law 2004 officially established the Saudi Capital Market Authority (the Authority).⁷⁷⁵ The Authority has supervisory power over the Saudi

⁷⁷⁴ THOMPSON, JR., *supra* note 490, at 15.

Stock Exchange (*Tadawul*) and listed companies in Saudi Arabia.⁷⁷⁶ The Authority has also the power to issue rules that regulate the Saudi stock market in accordance with the Capital Market Law,⁷⁷⁷ as well as judicial power to hear, review and adjudicate disputes and claims that arise out of the Capital Market Law or its regulations.⁷⁷⁸ Indeed, the author considers the Capital Market Authority one of the most advanced and sophisticated authorities in Saudi Arabia as compared to other Saudi agencies and authorities. The author makes this observation after carefully examining its role, the Law that governs it and the regulations it has implemented. The role of the Authority and its function are addressed in greater detail in Chapter 2's introduction to the Saudi legal system.

B. Tender offer under the Saudi Capital Market Authority Regulation

In 2007, the Saudi Capital Market Authority enacted an M&A Regulation (the Regulation),^{779, 780} which regulates takeover bids of publicly held corporations; this section analyzes these rules. This section also refers to the European Commission's Directive on takeover bids in order to show that the Authority's Regulation contains many provisions that are similar to those of the EC Directive. If the EC Directive does not cover an issue that is discussed in this chapter, the author may refer to the City Code on Takeovers and Mergers (the Code).

⁷⁷⁵ The Saudi Capital Market Authority's official website, available at <http://www.cma.org.sa/En/AboutCMA/Pages/default.aspx> (last visited December 17, 2015).

⁷⁷⁶ *Id.* See also The Capital Market Law, art. 5.

⁷⁷⁷ *Id.*

⁷⁷⁸ The Capital Market Law, art. 25.

⁷⁷⁹ The M&A Regulation does not address mergers at all. Therefore, the title of the Regulation should be changed to "Takeover Regulation."

⁷⁸⁰ The Saudi Capital Market Authority's official website, available at <http://www.cma.org.sa/En/Documents/MERGER%20REGULATION-26-8-009.pdf> (last visited December 17, 2015).

Hereinafter, the author will refer to the Code as the UK takeover code; the Code was amended in 2011 and again in 2013.⁷⁸¹

In the recommendations section of this chapter, and referring to the EC Directive as a guide, the author suggests certain measure that the Authority should adopt in order to enhance Saudi's tender offer rules and improve the application of the M&A Regulation in Saudi Arabia.

C. Tender offer under the EC Directive 2004/25/EC⁷⁸²

The EC Directive was adopted on April 21st 2004.⁷⁸³ It lays out the fundamental legal principles that EC member states must adopt when issuing their laws, and it mandated that member states incorporate and implement the Directive by 2006.⁷⁸⁴ The rules in Saudi's Regulation are mostly in accord with the principles of the EC Directive. For example, Saudi's Regulation agrees with the Directive on takeover bids; indeed, an analysis of the Regulation reveals that it was inspired and guided by the Directive. Thus, the author refers to the principles of the Directive to make recommendations about rules the Saudi Regulation should adopt, especially regarding concepts such as the squeeze out and the sell out.

D. The rationale behind comparing the Saudi M&A Regulation with the European Commission's Directive on takeover bids

The author's decision to compare the provisions of the Saudi M&A Regulation against those of the EC Directive regarding takeovers results from the observation that the Regulation agrees with the principles of the Directive on takeovers. Therefore, the Directive provides the

⁷⁸¹ See The Takeover Code, (11th ed. May 20, 2013, 3) available at <http://www.thetakeoverpanel.org.uk/wp-content/uploads/2008/11/code.pdf> (last visited March 4, 2016).

⁷⁸² Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids. 2004 O.J. (L 142) (EC). Also See The European Union's website (EUROPA), available at <http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:32004L0025> (last visited March 4, 2016).

⁷⁸³ See *Id.*

⁷⁸⁴ See *Id.*

most logical and efficient model to use to inform recommendations of amendments to the Saudi M&A Regulation. Ensuring that the Regulation functions at the same level as the EC Directive will help make Saudi Arabia a more attractive environment, and provide a familiar legal environment, for corporations incorporated in one of the European state members. This may provide incentives for European corporations to invest money in the Saudi Capital Market, especially now that foreign investment in the Saudi stock market is permitted.

§6.3. When Does The Saudi M&A Regulation Apply?

The Saudi M&A Regulation applies only in cases in which a controlling stake in the target has been acquired; however, the stipulation that the stake must be *controlling* for the Regulation to apply is not explicitly spelled out.⁷⁸⁵ The Saudi Capital Market Authority's Regulations and Rules includes a Glossary of defined terms that defines "acquisition" as follows: "[t]akeover: the acquisition of control of a company listed on the Exchange."⁷⁸⁶ The Glossary defines "control" as "the ability to influence the actions or decisions of another person through, whether directly or indirectly, alone or with a relative or affiliate (a) holding 30% or more of the voting rights in a company, or (b) having the right to appoint 30% or more of the members of the governing body; 'controller' shall be construed accordingly."⁷⁸⁷ Therefore, the Saudi M&A Regulation will only apply to a stock purchase of 30% and more of a company's shares; in other words, if a company acquires 29% of a listed company, this acquisition need not comply with the Regulation.

⁷⁸⁵ See Mergers and Acquisitions Regulation, Article 2 and The Glossary of Defined Terms used in the Regulations and Rules of the Capital Market Authority, 3.

⁷⁸⁶ See The Glossary of Defined Terms used in the Regulations and Rules of the Capital Market Authority, 3.

⁷⁸⁷ *Id.* at 8.

§6.4. The Announcement of the Offer

A. The announcement of an offer under the Saudi M&A Regulation

1. The public announcement

Article 6 (b) of the Saudi M&A Regulation requires that a proposed acquisition must be announced to the public in the following cases and manner:

(b): A public announcement is required:

- 1) When a company is considering a potential takeover and an approach to a potential offeree company has been made and the parties have reached an understanding (including the relevant conditions) that an offer will be made;
- 2) When a firm intention to make an offer (the making of which is not, or has ceased to be, subject to any pre-condition) is notified to the board of the offeree company from a serious source, irrespective of the attitude of the board to the offer;
- 3) Immediately upon an acquisition of shares by that person which gives rise to an obligation to make an offer under Article 12 or a permission to make an offer under Article 13. The announcement should not be delayed while full information is being obtained; additional information can be the subject of a later supplementary announcement;
- 4) When, following a bid approach, a company's shares are the subject of rumour and speculation or where there is a price movement of 20% or more above the lowest 12 Capital Market Authority share price since the time of the approach or a price movement of 10% or more in a single day;
- 5) When, before a bid approach has been made, the offeree company is the subject of rumour and speculation or where there is a price movement of 10% or more in a single day and there are reasonable grounds for concluding that it is the potential offeror's actions[,] which have led to the situation;
- 6) When negotiations or discussions are about to be extended to include more than a very restricted number of people (outside those who need to know in the companies concerned and their immediate advisers); or
- 7) When a purchaser is being sought for a holding, or aggregate holdings, of shares listed on the Exchange carrying 30% or more of the voting rights of a company or when the board of a listed company is seeking one or more potential offerors; and i. The company is the subject of rumour and speculation or there is a price movement of 20% or more above the lowest share price since the time of the approach or a price movement of 10% or more in a single day; or

ii. The number of potential purchasers or offerors approached is about to be increased to include more than a very restricted number of people.⁷⁸⁸

2. Who is responsible for announcing the offer?

The Saudi M&A Regulation states that before preliminary negotiations are held, the offeror bears the responsibility for announcing the offer.⁷⁸⁹ After the preliminary negotiations, the offeree bears the responsibility for announcing the offer, as stipulated in Article 6 (c):

c) Responsibilities of Offeror and the Offeree Company, 1) Before the board of the offeree company is approached, the responsibility for making an announcement lies only with the offeror. The offeror should, therefore, keep a close watch on the offeree company's share price for any signs of movement. The offeror is also responsible for making an announcement once an Article 13 obligation has been incurred or Article 12 applies to it. 2) Following an approach to the board of the offeree company which may or may not lead to an offer, the primary responsibility for making an announcement will normally rest with the board of the offeree company which must, therefore, keep a close watch on its share price for any untoward movement of 20% or more above the lowest share price since the time of the approach or a price movement of 10% or more in a single day. Where the offer is to be recommended and an application to the Authority to grant a temporary suspension of trading in accordance with the Listing Rules is submitted and the Authority has granted such suspension, a possible alternative to an immediate announcement may be to obtain a suspension to be followed shortly by an announcement. 3) A potential offeror must not attempt to prevent the board of an offeree company from making an announcement or requesting the Authority to grant a temporary suspension of trading, in accordance with the Listing Rules. 4) The responsibility to make an announcement under Article 6 (b)(1) is a joint responsibility of the potential offeror and offeree company.⁷⁹⁰

3. The responsibility of both companies to make an announcement

When the offeree and the offeror companies have reached an understanding that an offer will be made, both companies are required to make an announcement according to Article 6:

The responsibility to make an announcement under Article 6 (b)(1) is a joint responsibility of the potential offeror and offeree company.” Referring to “1) When a company is considering a potential takeover and an approach to a potential offeree company has been made and the parties have reached an understanding (including the relevant conditions) that an offer will be made.”⁷⁹¹

⁷⁸⁸ Mergers and Acquisitions Regulation, art. 6 (b).

⁷⁸⁹ *Id.* at art. 6 (c).

⁷⁹⁰ *Id.*

⁷⁹¹ *Id.* at art. 6 (c) (4).

4. Announcement made before receiving notification from the acquiring company of its intention to make an offer

Except for the cases described in Articles 12 and 13, the target company must announce a potential acquisition if it is in talks with an offeror company about an acquisition, even before it has received notification from the offeror of the intention to make an offer.⁷⁹² However, the target company need not disclose name of the acquiring company, as stated in Article 6:

(e) The Announcement of a Possible Offer, 1) Except in the case of a mandatory offer under Article 12 or a permissive offer under Article 13, before a firm intention to make an offer has been notified, a brief announcement by the offeree company that talks are taking place or that a potential offeror is considering making an offer (without disclosing the name of the potential offeror) must be made.⁷⁹³

B. The announcement of the bid under the EC Directive

The EC Directive's approach to takeover bids demonstrates that its principles aim to protect minority shareholders when a control of the corporation is acquired.⁷⁹⁴ The Directive requires EC member states to take the necessary steps to ensure the protection of the minority shareholders:

Member States should take the necessary steps to protect the holders of securities, in particular those with minority holdings, when control of their companies has been acquired. The Member States should ensure such protection by obliging the person who has acquired control of a company to make an offer to all the holders of that company's securities for all of their holdings at an equitable price in accordance with a common definition. Member States should be free to establish further instruments for the protection of the interests of the holders of securities, such as the obligation to make a partial bid where the offeror does not acquire control of the company or the obligation to announce a bid at the same time as control of the company is acquired.⁷⁹⁵

The Directive states that announcing a bid as soon as possible lowers the chance of insider trading.⁷⁹⁶ Reducing the risk of insider trading during a takeover bid is one of the

⁷⁹² *Id.* at art. 6 (e).

⁷⁹³ *Id.* at art. 6 (e).

⁷⁹⁴ Council Directive on takeover bids, recital 9, 2004 O.J. (L 142) (EC).

⁷⁹⁵ *Id.*

⁷⁹⁶ *Id.* at (12).

primary goals of takeover rules; ensuring transparency in the market helps to provide equal investment opportunities for all shareholders.

C. Observations

The Saudi M&A Regulation and EC Directive contain similar principles regarding the announcement of the bid, to which the author does not recommend amendments.

§6.5. “Prohibited Dealings by Persons Other Than the Offeror”⁷⁹⁷

A. Under the Saudi M&A Regulation

The Saudi M&A Regulation prohibits any person in the target company from dealing in securities with any other party except the offeror from the time of the offeror’s first approach until the acquisition announcement has been made or the offer has been retracted:

1) No dealings of any kind in securities or shareholding control of securities of the offeree company by any person, not being the offeror, who is privy to confidential price-sensitive information concerning an offer or contemplated offer may take place between the time when there is reason to suppose that an approach or an offer is contemplated and the announcement of the approach or offer or of the termination of the discussions. This prohibition includes dealings in securities of the offeror unless the offer is sufficiently small in the context of the business of the offeror that the fact of the proposed offer, if it were made public, would not have a significant impact on the market price of the securities of the offeror.

2) No person who is privy to confidential price-sensitive information concerning an offer or contemplated offer may make any recommendation to any other person as to dealing in the relevant securities.⁷⁹⁸

The Regulation also prohibits the offeror from selling any security of the target’s company:

“[r]estriction on dealings by the offeror and concert parties [d]uring an offer period, the offeror and persons acting in concert with it must not sell any securities in the offeree company except

⁷⁹⁷ Mergers and Acquisitions Regulation, art. 8 (a).

⁷⁹⁸ *Id.*

with the prior consent of the Authority. Sales below the value of the offer will not be permitted.”⁷⁹⁹ This restriction likely exists to prevent any extreme changes in the value of the securities of the target company.

B. Under the UK Takeover Code

The UK Takeover Code contains a similar rule that prohibits dealings within certain specified timeframes by persons other than the offeror.⁸⁰⁰ The rule reads as follows:

(a) No dealings of any kind in securities of the offeree company by any person, not being the offeror, who is privy to confidential price sensitive information concerning an offer or contemplated offer may take place between the time when there is reason to suppose that an approach or an offer is contemplated and the announcement of the approach or offer or of the termination of the discussions. (b) No person who is privy to such information may make any recommendation to any other person as to dealing in the relevant securities.⁸⁰¹

C. Observations

The Saudi M&A Regulation and the UK Takeover Code contain the same rule that prohibits dealings within certain specified timeframes by persons other than the offeror. The author does not recommend changes in this regard.

§6.6. Mandatory Offer

A. The trigger of a mandatory offer under the Saudi M&A Regulation

1. The mandatory offer rule

Saudi’s Capital Market Authority aims to make the Saudi stock market fair and to ensure that shareholders are protected. Therefore, it includes a provision that a party that acquires 50% or more of a target company may be subject to a mandatory offer that would require that party to make an offer to buy the rest of the target company’s shares:

⁷⁹⁹ *Id.* at (b).

⁸⁰⁰ The Takeover Code, 2013, Rule 4.1(a)(b) (U.K.).

⁸⁰¹ *Id.*

(a) Where a person or a group of persons acting in concert increase ownership of shares in a given company through a restricted purchase of shares or a restricted offer for shares so that such person or those with whom such person is acting in concert become the owner of 50% or more of a given class of voting shares listed on the Exchange, the Board shall have the right to exercise its power in accordance with Article 54 of the Capital Market Law to order such person to offer to purchase the shares of the same class it does not own on the terms set out in this Article 12 and in accordance with the other relevant provisions of these Regulations.⁸⁰²

Note that this mandatory bid rule states that once a party acquires 50% of a target corporation, the Capital Market Authority has the right to require the acquirer to make a mandatory offer. The author argues that the Authority should not hold this discretionary power. The intent of a mandatory bid rule is to establish a policy that when a party acquires 50% of a target corporation, the mandatory offer shall be triggered and extended to the rest of the shareholders.⁸⁰³ Giving the Authority discretion over whether to trigger the mandatory bid rule does not promote the stability and equality that the mandatory offer is designed to achieve.

2. The acquisition of the Saudi Research and Marketing Group

The following case study of the acquisition of the Saudi Research and Marketing Group should highlight the reasons why the author proposes an amendment to Regulation Article 12 (a) regarding the mandatory offer. The proposed change is that the mandatory offer should be triggered immediately once the threshold of 50% ownership of the target company is reached. The mandatory bid rule should trigger automatically, rather than by the request of the Authority.

The Saudi Research and Marketing Group (SRMG) is a Saudi publicly held corporation listed on the Saudi stock exchange (*Tadawul*) with capital of SAR 800 million (USD 213 million).⁸⁰⁴ SRMG was established in 2000 as limited liability company and converted into a

⁸⁰² Mergers and Acquisitions Regulation, art. 12 (a).

⁸⁰³ CHRISTOPHE CLERC, FABRICE DEMARIGNY, DIEGO VALIANTE, MIRZHA DE MANUEL ARAMENDÍA, A LEGAL AND ECONOMIC ASSESSMENT OF EUROPEAN TAKEOVER REGULATION, 53 (Marccus Partners and Centre for European Policy Studies, 2012).

⁸⁰⁴ The Saudi Research and Marketing Group's file on the Saudi Stock Exchange's website, available at <http://www.tadawul.com.sa> (last visited November 25, 2015).

closely held joint stock company with 11 shareholders⁸⁰⁵ in the same year.⁸⁰⁶ SRMG has become listed on the exchange since 2006.⁸⁰⁷ The company focuses on media and publishing, specializing in publishing, printing, media sales and advertising, and distribution,⁸⁰⁸ and conducts its businesses through 31 subsidiaries.⁸⁰⁹

On November 1, 2015, SRMG announced changes in the ownership of its shares as a result of private transactions.⁸¹⁰ The announcement stated that NBC Capital's Fund (4) purchased 25.3% of SRMG's shares and NBC Capital's Fund (13) purchased 29.9% of SRMG's shares, resulting in NBC Capital acquiring, in total, 55.21% of SRMG's shares.⁸¹¹ On the same day, the Kingdom Holding Company, which is a Saudi listed company with capital of SAR 73 billion (USD 19 billion),⁸¹² announced that it sold its 29.9% stake in SRMG in a private transaction.⁸¹³

On November 1, 2015, in the same announcement, SRMG stated that it had received confirmation from both acquirers, NCB Capital's Funds (4) and (13) that they did not intend to purchase the rest of SRMG's shares, and also that they did not intend to change SRMG in any material way.⁸¹⁴

⁸⁰⁵ According to the Saudi Research and Marketing Group's bylaw, Article 8, available in Arabic on the Group's website. Available at <http://www.srmg.com/ar/page/45-#النظام-الأساسي-للمجموعة> (last visited November 25, 2015).

⁸⁰⁶ The Saudi Research and Marketing Group's file on the Saudi Stock Exchange's website, available at <http://www.tadawul.com.sa> (last visited November 25, 2015).

⁸⁰⁷ *Id.*

⁸⁰⁸ *Id.*

⁸⁰⁹ *Id.*

⁸¹⁰ SPMG's announcement on the Saudi Stock Exchange's website in Arabic (Last Update 2015-11-01), available at. See also *SRMG reveals new shareholders: NCB Capital funds 4 & 13 buy 55% stake*, November 1, 2015, available at <http://www.argaam.com/en/article/articledetail/id/393656> (last visited November 25, 2015).

⁸¹¹ *Id.*

⁸¹² See the Kingdom Holding Company's file on the Saudi Stock Exchange's website, available at <http://www.tadawul.com.sa> (last visited November 25, 2015).

⁸¹³ *Id.* See also *SRMG reveals new shareholders: NCB Capital funds 4 & 13 buy 55% stake*, November 1, 2015, available at, <http://www.argaam.com/en/article/articledetail/id/393656> (last visited November 25, 2015).

⁸¹⁴ *Id.*

The author argues that a situation such as this one demonstrates the value of amending Saudi's M&A Regulation Article 12 (a) such that the mandatory bid rule would have triggered automatically upon the sale of 50% (or, in this case, more than 50%) of SRMG's stock to NBC Capital. Instead, the Capital Market Authority retained the right to decide whether to require NBC Capital to make a mandatory offer to the rest of the shareholders. As of February 18, 2016, NBC Capital's Fund 4 and Fund 13 own a total share of 59.8% of SRMG (29.9% each), and the Capital Market Authority has not required that a mandatory offer be made.⁸¹⁵

3. The efficiency of the 50% threshold

The efficiency of the 50% ownership threshold should be addressed; specifically, the question should be addressed as to which ownership percentage—50% or 30%—would be more efficient as a trigger for the mandatory offer.

The mandatory offer essentially means that once a party acquires 50% of the target corporation, it must be prepared to acquire the rest of the target's shares.⁸¹⁶ Requiring that an acquirer must be prepared to purchase as much as 100% of a target's shares if it plans to purchase as much as 50% raises the cost/risk of an intended takeover, which in turn likely would decrease the number of takeover attempts.⁸¹⁷ Setting 50% as the ownership threshold that triggers the mandatory offer can be justified in two ways. First, it is understood that a mandatory bid rule increases the likelihood of a complete takeover and that takeover activity can disrupt markets. Transparency is also at stake in the choice of the threshold. Unlike the 30% threshold, such as the threshold stipulated by the UK Takeover Code,⁸¹⁸ the 50% threshold reveals the intent of an acquiring party. In other words, any party attempting to own 50% or more of a

⁸¹⁵ *Id.* (last visited February 18, 2016).

⁸¹⁶ Clerc, *supra* note 803, at 53.

⁸¹⁷ *Id.*

⁸¹⁸ *Id.* at 55 and 57.

company is clearly interested in controlling that company. A party attempting to gain just 30% ownership of a target may not necessarily have control or takeover in mind. Thus, the 50% threshold increases transparency about investors' intentions in the marketplace.

Second, because the mandatory offer is provided to protect the minority shareholders,⁸¹⁹ the 50% threshold is more justifiable, because once a party acquires 50% of a target, that party becomes the majority shareholder and—assuming that the rest of the shares are dispersed among at least more than one other shareholder—the acquiring party will have control of the company. 30% ownership does not give an acquirer absolute control of a target corporation, or the power to materially affect the other shareholders, in the same way that 50% ownership likely does. Once a party acquires 50% of a corporation, the other shareholders should have the opportunity to tender their shares to that buyer, which they may wish to do if they expect that the new controlling party will make changes to the company's policies or goals. In summary, the author believes that in Saudi Arabia at this time, a threshold of 50% ownership is more efficient as a trigger of the mandatory offer rule than 30%.

B. The trigger of a mandatory offer under the EC Directive

The EC Directive requires that once a controlling stake in a corporation is acquired, the offeror must make an offer to the rest of the shareholders which provides:

Where a natural or legal person, as a result of his/her own acquisition or the acquisition by persons acting in concert with him/her, holds securities of a company as referred to in Article 1(1) which, added to any existing holdings of those securities of his/hers and the holdings of those securities of persons acting in concert with him/her, directly or indirectly give him/her a specified percentage of voting rights in that company, giving him/her control of that company, Member States shall ensure that such a person is required to make a bid as a means of protecting the minority shareholders of that

⁸¹⁹ *Id.* at 52.

company. Such a bid shall be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price as defined in paragraph 4.⁸²⁰

The Directive allows EC member states to determine what percentage of a company's voting rights constitutes control, and, if acquired, triggers the mandatory offer.⁸²¹

C. Observations

The author observes a crucial point here. While the mandatory offer is triggered automatically under the EC Directive, the mandatory offer under the Saudi M&A Regulation is not automatically triggered when the threshold is crossed; rather, the mandatory offer lies under the Capital Market Authority's discretion. The author discusses above the efficiency of a 50% ownership threshold as a trigger of the mandatory offer. The author believes that 50% is a more efficient threshold than 30%, because 50% sufficiently demonstrates the intent to control the target company. Therefore, the author believes that 50% should remain the same as the triggering threshold of the mandatory offer.

D. Recommendations

The Capital Market Authority's discretionary power to decide whether to require a party that acquires 50% of a target corporation should be taken away. The mandatory offer rule cannot function according to its intended purpose if the mandatory offer is not automatically triggered when the threshold of 50% ownership of the target company's shares has been reached. Removing this from the Authority will allow the objective functioning of the rule. Instilling confidence in shareholders that they will have the opportunity to tender their shares when a controlling stake in a target company is acquired will help stabilize the market. Also, an

⁸²⁰ Council Directive on takeover bids, art. 5(1), 2004 O.J. (L 142) (EC).

⁸²¹ *Id.* at art. 5(3).

acquiring party will not attempt to reach the 50% ownership threshold unless it is prepared to acquire the rest of the target company's shares.

§6.7. The Type of Consideration and the Price Required in the Mandatory Bid

A. The Saudi M&A Regulation

Saudi's M&A Regulation states that the mandatory bid must offer a consideration of cash or cash with cash alternative at a price not less than any price that the offeror, or any person acting in concert with the offeror, paid for the same class of shares in the 12 months before the offer began.⁸²²

B. The EC Directive

The EC Directive states that the consideration of the offer may be cash or securities or both combined.⁸²³ The Directive determines that a fair price to be paid to shareholders is a price that is not less than the highest price paid for the same class of shares during the period that is 6 to 12 months prior to the date of the bid.⁸²⁴ The Directive determines that a price prescribed in this manner is equitable:

The highest price paid for the same securities by the offeror, or by persons acting in concert with him/her, over a period, to be determined by Member States, of not less than six months and not more than 12 before the bid referred to in paragraph 1 shall be regarded as the equitable price. If, after the bid has been made public and before the offer closes for acceptance, the offeror or any person acting in concert with him/her purchases securities at a price higher than the offer price, the offeror shall increase his/her offer so that it is not less than the highest price paid for the securities so acquired.⁸²⁵

⁸²² Mergers and Acquisitions Regulation, art. 12 (d).

⁸²³ Council Directive on takeover bids, art. 5(5), 2004 O.J. (L 142) (EC).

⁸²⁴ *Id.* at art.5(4).

⁸²⁵ *Id.*

C. Observations

The author observes that the Saudi M&A Regulation and the EC Directive regulate the instrument of consideration of the mandatory offer in a similar manner. The author does not recommend changes in this regard.

§6.8. The Required Disclosure of Information Regarding the Bid

A. The Saudi M&A Regulation

The Saudi M&A Regulation requires certain information regarding the bid to be published in the announcement of the bid when there is a definite intention to make an offer.⁸²⁶

The Regulation states that the announcement of the offer must set out the following:

- 2) When a firm intention to make an offer is announced, the announcement must contain:
 - i. The terms of the offer;
 - ii. The identity of the offeror;
 - iii. Details of any existing holding in the offeree company: (a) Which the offeror owns or over which it has shareholding control; (b) Which is owned or where the shareholding is controlled by any person acting in concert with the offeror; (c) In respect of which the offeror has received an irrevocable commitment to accept the offer; (d) In respect of which the offeror or any person acting in concert with it holds an option to purchase;
 - iv. All conditions (including any conditions relating to acceptances, listing and increase of capital and any consent required by law) to which the offer or the publication of the offer document is subject; and v. Details of any indemnity arrangement involving the offeror, the offeree company or any person acting in concert with the offeror or the offeree company in relation to relevant securities.⁸²⁷

The offeror must submit a suggested timeline of the offer to the Capital Market Authority that includes the following information:

- i. The delivery of the final offer document to the Authority for approval;

⁸²⁶ Mergers and Acquisitions Regulation, art. 6 (f) (2).

⁸²⁷ *Id.*

- ii. The publication of the offer document approved by the Authority and the sending out of the same to the board of the offeree company;
- iii. The publication of the board of the offeree company board circular;
- iv. Shareholders approval (if required);
- v. The earliest permitted first closing date of the offer;
- vi. The last date on which the offeree company may announce profit or dividend forecasts, asset valuations or proposals for dividend payments;
- vii. The withdrawal of acceptances if the offer has not become unconditional as to acceptances;
- viii. The publication of “no increase” in the offer statements;
- ix. The last date on which the offer can be declared unconditional as to acceptances;
- x. The last date for satisfaction of all other conditions;
- xi. The last date for money or other consideration to be provided to the offeree shareholders;

and 2) All Parties related to the offer must comply with the takeover timetable as specified in 6 (d) (1).⁸²⁸

The information that the announcement of the bid must contain, according to the Regulation, is the same as the minimum information required by the EC Directive, as the next subsection will address. Saudi’s M&A Regulation Article 26 also requires that the offer document contain quite a bit of intensive information.

B. The EC Directive

The EC Directive requires the following minimum level of information regarding the bid to be specified and made public in the offer document:

- 3. The offer document referred to in paragraph 2 shall state at least:
 - (a) the terms of the bid;

⁸²⁸ *Id.* at art. 6(d)(1),(2).

- (b) the identity of the offeror and, where the offeror is a company, the type, name and registered office of that company;
- (c) the securities or, where appropriate, the class or classes of securities for which the bid is made;
- (d) the consideration offered for each security or class of securities and, in the case of a mandatory bid, the method employed in determining it, with particulars of the way in which that consideration is to be paid;
- (e) the compensation offered for the rights[,] which might be removed as a result of the breakthrough rule laid down in Article 11(4), with particulars of the way in which that compensation is to be paid and the method employed in determining it;
- (f) the maximum and minimum percentages or quantities of securities[,] which the offeror undertakes to acquire;
- (g) details of any existing holdings of the offeror, and of persons acting in concert with him/her, in the offeree company;
- (h) all the conditions to which the bid is subject;
- (i) the offeror's intentions with regard to the future business of the offeree company and, in so far as it is affected by the bid, the offeror company and with regard to the safeguarding of the jobs of their employees and management, including any material change in the conditions of employment, and in particular the offeror's strategic plans for the two companies and the likely repercussions on employment and the locations of the companies' places of business;
- (j) the time allowed for acceptance of the bid;
- (k) where the consideration offered by the offeror includes securities of any kind, information concerning those securities;
- (l) information concerning the financing for the bid;
- (m) the identity of persons acting in concert with the offeror or with the offeree company and, in the case of companies, their types, names, registered offices and relationships with the offeror and, where possible, with the offeree company;
- (n) the national law[,] which will govern contracts concluded between the offeror and the holders of the offeree company's securities as a result of the bid and the competent courts.⁸²⁹

⁸²⁹ Council Directive on takeover bids, art. 6(1)(3), 2004 O.J. (L 142) (EC).

C. Observations

The author observes that the Saudi M&A Regulation and the EC Directive stipulate similar rules regarding the type, specification and publication of information regarding the bid that is required. The author does not recommend changes in this regard.

§6.9. The Obligation of the Board of the Offeree Company to Make a Recommendation to the Shareholders

A. Under the Saudi M&A Regulation

The Saudi M&A Regulation requires the directors of the target company to make a recommendation to shareholders regarding the acquisition transaction, unless any of the directors has a conflict of interest.⁸³⁰ The directors are required to provide advice that is in the best interest of the company:

(k) Directors of an offeror and the offeree company must always, in advising their shareholders, act only in their capacity as directors and not have regard to their personal or family shareholdings or to their personal relationships with the offeror or offeree company, as applicable, and must at all times have regard to advice given in accordance with Article 7. It is the shareholders' interests taken as a whole, together with those of employees and creditors, which should be considered when the directors are giving advice to shareholders. Directors of the offeree company should give careful consideration before they enter into any commitment with an offeror (or anyone else)[,] which would restrict their freedom to advise their shareholders in the future.⁸³¹

B. Under the EC Directive

To ensure that shareholders make informed decisions regarding a bid offer, the Directive requires that the Board of the offeree company publish its opinion regarding that bid:

The board of the offeree company shall draw up and make public a document setting out its opinion of the bid and the reasons on which it is based, including its views on the effects of implementation of the bid on all the company's interests and specifically employment, and on the offeror's strategic plans for the offeree company and their likely repercussions on employment and the locations of the company's places of business as

⁸³⁰ Mergers and Acquisitions Regulation, art. 3(k).

⁸³¹ *Id.*

set out in the offer document in accordance with Article 6(3)(i). The board of the offeree company shall at the same time communicate that opinion to the representatives of its employees or, where there are no such representatives, to the employees themselves. Where the board of the offeree company receives in good time a separate opinion from the representatives of its employees on the effects of the bid on employment, that opinion shall be appended to the document.⁸³²

C. Observations

The author observes that the Saudi M&A Regulation and the EC Directive stipulate similar rules requiring the board of directors of the offeree to provide its opinion regarding the bid to the shareholders of the offeree company. The author does not recommend changes in this regard.

§6.10. Independent Directors

A. Under the Saudi M&A Regulation

Saudi's M&A Regulation prevents a director from voting on the acquisition transaction only if that director has shares in both companies, or otherwise has a conflict of interest,⁸³³ such as (for example), having a relative who works for the acquiring company or vice versa:

(m) A director shall not vote at a meeting of directors or of a committee of directors or a general assembly meeting on any resolution concerning an offer made under these Regulations or any other relevant matter where the director or any relative of his has a conflict of interest. In this context such a conflict of interest would arise if he had, directly or indirectly, an interest (including his shareholding in the offeree company, if the director is a director of the offeror company, or his shareholding in the offeror company, if the director is a director of the offeree company) or duty (including where the director of the offeror company holds a position of a director or a manager of the offeree company, and where the director of the offeree company holds a position as a director or a manager of the offeror company) which is material and which conflicts or may conflict with the interests of the company. (n) For the purposes of these Regulations, an interest of a person who is a relative or an affiliate of a director shall be treated as an interest of the director.⁸³⁴

⁸³² Council Directive on takeover bids, art. 9(5), 2004 O.J. (L 142) (EC).

⁸³³ Mergers and Acquisitions Regulation, art. 3(m).

⁸³⁴ *Id.*

Article 3 states “(j) Where there are related parties to a transaction to which these Regulations apply, there must be full disclosure of the related party’s interest in the transaction to the affected shareholders prior to completion of the transaction. Any such transaction must be on arm’s length terms.”⁸³⁵

B. Under the UK Takeover Code

While the Takeover Code does not address the issue of interested directors, this issue is addressed in the UK Companies Act 2006,⁸³⁶ which states that situations involving conflicts of interest shall be avoided by the directors.⁸³⁷ The UK Companies Act states that such conflicts must be authorized by the board of directors in a quorum that does not count the interested director.⁸³⁸ However, the UK Companies Act stipulates that such an interest may be authorized if the constitution (i.e., the Articles of Incorporation) of the public company enables the board of directors such authorization under such circumstances.⁸³⁹

C. Observation

The Saudi M&A Regulation stipulates a rule concerning interested directors; however, the Saudi Companies Law has not properly addressed this issue, as is discussed in Chapter 5. The UK Takeover Code also does not address this issue, because it is addressed in the UK Companies Act. The author does not recommend changes in this regard.

⁸³⁵ *Id.* at art. 3(j).

⁸³⁶ The Companies Act, 2006, c. 46 (U.K.) available at, <http://www.legislation.gov.uk/ukpga/2006/46/contents>. (last visited March 5, 2016).

⁸³⁷ The Companies Act, 2006, c. 46, §§175(1) (U.K.).

⁸³⁸ *Id.* at §175 (5) (6).

⁸³⁹ *Id.*

§6.11. The Ability of the Offeror to Execute the Offer

A. Under the Saudi M&A Regulation

The Saudi Capital Market Authority is concerned about transparency in the market and wants to make sure that announcements do not mislead the market; therefore, the Authority requires that the offeror must ensure that it can keep its offer by a financial advisor.⁸⁴⁰ The Regulation states:

The announcement of a firm intention to make an offer should be made only when an offeror has every reason to believe that it can and will continue to be able to implement the offer. Responsibility for advising the offeror in this connection rests on the financial adviser to the offeror.⁸⁴¹

B. Under the EC Directive

The Directive requires EC member states to take necessary steps to ensure that before a bid is announced, the offeror is financially able to acquire all of the shares of the offeree corporation.⁸⁴²

C. Observations

The author observes that both the M&A Regulation and the EC Directive require that an offer must not be made unless the offeror has every reason to believe that he will be able fulfill the offer. The author does not recommend changes in this regard.

§6.12. The Offer Period and the Right of Withdrawal

A. Under the Saudi M&A Regulation

Saudi's M&A Regulation permits accepting shareholders to withdraw their acceptances according to Article 6 (d), which requires that the offeror specify the time in which the

⁸⁴⁰ Mergers and Acquisitions Regulation, art. 6(f).

⁸⁴¹ *Id.*

⁸⁴² Council Directive on takeover bids, art. 3(1)(e), 2004 O.J. (L 142) (EC).

acceptances can be withdrawn.⁸⁴³ However, the Regulation does not specify the duration in which the acceptances can be withdrawn. Instead, it is left to the offeror to set the timeline of acceptance and withdrawal in the offer. The Regulation requires the offeror to state the date on which the offer is opened, as well other dates, such as the first closing date of the offer.⁸⁴⁴ Regulation Article 6 gives the Capital Market Authority the discretion to review the timeline of the bid submitted by the offeror.

B. Under the EC Directive

The Directive guides EC member states to use the date on which the offer document is published as the date that opens the time period allowed for the acceptance of the bid; this time period must be at least two weeks and no longer than 10 weeks.⁸⁴⁵ The EC Directive states:

Member States shall provide that the time allowed for the acceptance of a bid may not be less than two weeks nor more than 10 weeks from the date of publication of the offer document. Provided that the general principle laid down in Article 3(1)(f) is respected, Member States may provide that the period of 10 weeks may be extended on condition that the offeror gives at least two weeks' notice of his/her intention of closing the bid.⁸⁴⁶

C. Observations

The Saudi M&A Regulation does not specify the duration of the time period during which acceptances may be withdrawn. Instead, it is left to the offeror to set the timeline of acceptance and withdrawal of the offer. The EC Directive requires that this time period must be at least two weeks and no longer than 10 weeks.

D. Recommendations

The Saudi M&A Regulation requires the offeror to specify the duration and dates of the offer in a timeline that must be approved by the Capital Market Authority.

⁸⁴³ Merger and Acquisition Regulation, art. 34(b).

⁸⁴⁴ *Id.* at art. 6(d).

⁸⁴⁵ Council Directive on takeover bids, art. 7(1), 2004 O.J. (L 142) (EC).

⁸⁴⁶ *Id.*

However, the Regulation should also require the offeror to specify the time period of the offer as not less than two weeks and not more than 10 weeks; or, if not these parameters, some limit should be placed on the time allowed for acceptance.

§6.13. Breakup Fees and Reverse Breakup Fees

A. Under the Saudi M&A Regulation

1. The cancellation fee provision (breakup fee)

The Saudi M&A Regulation permits a “breakup fee,” which may be paid in the event an acquisition offer fails; for instance, if the directors of the offeree’s company recommend a higher price than was originally offered.⁸⁴⁷ This fee must not exceed more than 1% of the initial value of the offer:

(b) Break-up Fees, 1) For the purposes of these Regulations a break-up fee is an arrangement which may be entered into between an offeror or a potential offeror and the offeree company pursuant to which a cash sum will be payable by the offeree company if certain specified events occur which have the effect of preventing the offer from proceeding or causing it to fail, including, without limitation, a recommendation by the offeree company board of a higher competing offer. 2) Any break-up fee that is proposed must be of a minimal size (no more than 1% of the offer value) and the offeree company board and its financial adviser must confirm to the Authority in writing that the fee to be in the best interests of shareholders. Any break-up fee arrangement must be fully disclosed in the announcement made under Article 6 (f) and in the offer document. 3) The Authority should be consulted prior to all cases where a break-up fee or any similar arrangement is proposed.⁸⁴⁸

2. The reverse breakup fee⁸⁴⁹

Reverse breakup fee provisions have become more important recently in Saudi Arabia as a result of the rapid growth in M&A deal activity. Saudi’s M&A Regulation only addresses the

⁸⁴⁷ Mergers and Acquisitions Regulation, art. 24(b)(1).

⁸⁴⁸ *Id.* at art. 24(b).

⁸⁴⁹ Also known as “Reverse Cancellation Fee” or “Reverse Termination Fee.”

breakup fee; it does not explicitly regulate the reverse breakup fee.⁸⁵⁰ Article 24 (b) of the Regulation states that any arrangements for a breakup fee shall be made in consultation with the Authority,⁸⁵¹ however, the Regulation does not cover the reverse breakup fee, which falls on the side of the offeror.⁸⁵² If Article 24 (a) did not state that the breakup fee is an amount of money payable by the offeree company should the offeree do something that causes the deal to fail, then this Article by default would also cover the reverse breakup fee.

The reverse breakup fee is a fee paid by the offeror to the offeree should the offeror rescind its offer for any one of a certain set of reasons.⁸⁵³ It has become widely important in M&A.⁸⁵⁴ The reverse breakup fee is included by the buyer to demonstrate its confidence and readiness to close the deal, and also to show that the buyer is prepared to overcome challenges, obstacles and risk in order to complete the acquisition.⁸⁵⁵ As M&A activity in Saudi increases,

⁸⁵⁰ ROBERT VYDRA, *GUIDE TO PUBLIC TAKEOVERS IN THE KINGDOM OF SAUDI ARABIA*, 18 (Saudi Arabian Legal Guide Series, 2014).

⁸⁵¹ Mergers and Acquisitions Regulation, art. 24(b).

⁸⁵² See Benjamin M. Grossman, *Another View: Rethinking Reverse Break-up Fees*, DealBook, NEW YORK TIMES, (August 11 2009), available at <http://dealbook.nytimes.com/2009/08/11/another-view-rethinking-reverse-break-up-fees/> (last visited December 25, 2015).

⁸⁵³ See *Id.*

⁸⁵⁴ *Id.* See also Sonali Basak, *Halliburton's \$3.5 Billion Breakup Fee Shows Regulatory Risk*, BLOOMBERG BUSINESS, November 17, 2014, available at <http://www.bloomberg.com/news/articles/2014-11-17/halliburton-s-3-5-billion-breakup-fee-highlights-regulator-risk> (last visited December 25, 2015), and Rachel Sams, *Seller's market in M&A brings on 'reverse breakup fees'*, BALTIMORE BUSINESS JOURNAL, April 24, 2006, available at <http://www.bizjournals.com/baltimore/stories/2006/04/24/story3.html> (last visited December 25, 2015).

⁸⁵⁵ A company could also claim that it did not include a reverse breakup fee provision because it was confident that the deal would be completed and that the terms of the deal would pass the regulatory reviews, as was apparently the case in the \$45 billion takeover of Time Warner Cable by Comcast in 2014; see Michael J. De LA Marced, *Comcast and Time Warner Cable Forgo A Breakup Fee*, NEW YORK TIMES, February, 13 2014, available at <http://dealbook.nytimes.com/2014/02/13/comcast-and-time-warner-cable-forgo-a-breakup-fee/> (last visited December 25, 2015). However, in fact, this deal did raise risks and challenges, such as the antitrust concern that after the deal, Comcast and Time Warner Cable would control 57% of the broadcast market and 30% of the pay television market; see Emily Steel, David Gellse, Rebecca R. Ruiz and Eric Lipton, *Comcast Is Said to End \$45 Billion Bid for Time Warner Cable*, NEW YORK TIMES, April 23, 2015, available at <http://www.nytimes.com/2015/04/24/business/media/comcast-time-warner-cable-merger.html> (last visited December 25, 2015), and Hilary Stout, *Comcast-Time Warner Cable Deal's Collapse Leaves Frustrated Customers Out in the Cold*, NEW YORK TIMES, April 26, 2015, available at <http://www.nytimes.com/2015/04/27/business/media/mergers-collapse-leaves-frustrated-cable-customers-out-in-the-cold.html> (last visited December 25, 2015). Moreover, Charter Communication Inc., made a merger deal for Time Warner Cable valued at \$55 billion that included a \$2 billion reverse breakup fee, signaling Charter Communication's confidence in completing the deal and navigating the regulatory reviews; see Kimberly Johnson,

this type of provision likely will be included in future M&A deals. At present, it is not certain what the Capital Market Authority might do if the parties began to include a reverse breakup clause. As it now stands, the Saudi M&A Regulation contains a general rule stipulating that “The Authority should be consulted prior to all cases where a break-up fee or any similar arrangement is proposed.”⁸⁵⁶ This means that the inclusion of a reverse breakup fee could fall under this requirement, in which case, the Capital Market Authority would have to be consulted before the parties include any provision for a reverse break up fee.

B. Under the UK Takeover Code

A breakup fee, also known as an “inducement fee,” of no more than 1% of the value of the transaction was permitted before the Takeover Code was amended in 2011.⁸⁵⁷ Since the 2011 amendment, the Takeover Codes now prohibits breakup fees in general, under Rule 21.2 (a) (b).⁸⁵⁸ While the Takeover Code prohibits the breakup fee, it excludes arrangements that impose obligations on the offeror, such as a reverse breakup fee, under Rule 21.2 (b) (v) of the Takeover Code.⁸⁵⁹

Charter-Time Warner Merger Makes Breaking Up Hard to Do, THE WALL STREET JOURNAL, May 28, 2015, available at <http://blogs.wsj.com/cfo/2015/05/28/charter-time-warner-merger-makes-breaking-up-hard-to-do/#> (last visited December 25, 2015). and Dan Primack, *Charter's \$2 billion promise to Time Warner Cable isn't worth much*, FORTUNE, May 26, 2015, available at <http://fortune.com/2015/05/26/charters-2-billion-promise-to-time-warner-cable-isnt-worth-much/> (last visited December 25, 2015). The author includes the examples and information in this footnote to show the different reasons and circumstances in which a reverse termination fee may be included in a proposed M&A deal, as well as to demonstrate the increase in the use of the reverse termination fee. It is expected that this mechanism will begin to see use in Saudi Arabia as well, as M&A activity in Saudi continues to increase.

⁸⁵⁶ Mergers and Acquisitions Regulation, art. 24 (b)(3).

⁸⁵⁷ THOMPSON, JR., *supra* note 490, at 1099.

⁸⁵⁸ *Id.*

⁸⁵⁹ *Id.*

C. Observations

The author observes that while the Saudi M&A Regulation permits a breakup fee of no more than 1% of the transaction's value, the UK Takeover Code prohibits the breakup fee. The author does not recommend changes in this regard.

To reiterate, the UK Takeover Code prohibits arrangements (such as a breakup fee) that place obligations on the offeree. However, the UK Takeover Code does allow arrangements that impose obligations on the offeror such as reverse breakup fees. The Saudi M&A Regulation's approach toward the reverse breakup fee is not explicitly clear; the author recommends that the Saudi Regulation should explicitly permit the reverse breakup fee, or, at the least, it should not impose any restrictions on such measures.

D. Recommendation

The Saudi Capital Market Authority should include a provision that clearly permits an arrangement that imposes an obligation on the offeror such as the reverse breakup fee. This provision will make corporations aware of the Saudi approach toward reverse breakup fees, and will also help corporations to structure their reverse breakup fee provisions accordingly.

§6.14. The Competition Provision

A. Under the Saudi M&A Regulation

The Saudi M&A Regulation contains an Article that addresses requirements for offers that are subject to the Competition Law.⁸⁶⁰ Article 16 states that a tender offer that is subject to the Competition Law must include a statement that the offer will be rescinded if Competition Council objects to it or places it under review.⁸⁶¹

⁸⁶⁰ Mergers and Acquisitions Regulation, art. 16(b).

⁸⁶¹ *Id.*

Because the offer is ended when the Competition Council makes a statement of objection or review, a new period for the offer will begin 21 days from the date that the Competition Council approves the offer (if it does).⁸⁶² The offer will end either if the 21 day period lapses without a new offer being announced, or if the offeror party announces that it does not intend to continue the offer.⁸⁶³

B. Under the UK Takeover Code

The Takeover Code also includes a competition provision, which requires that if the bid falls under the statutory provisions regarding competition, the terms of the offer must state that the offer will lapse in either of the following two conditions: (1) if the reference to Phase 2 is made by the Competition and Market Authority; or (2) if a concentration with an EU dimension would arise and cause proceedings for Phase 2 to be initiated “before the first closing date or the date when the offer becomes or is declared unconditional as to acceptances, whichever is the later.”⁸⁶⁴ The Takeover Codes states that after the offeror is cleared, there will be a 21 day period during which the offeror may clarify and confirm its intention to make the offer.⁸⁶⁵ The offer will end if the offeror announces that it does not intend to make an offer.⁸⁶⁶

C. Observations

The author observes that the UK Takeover Code and the Saudi M&A Regulation include similar competition provisions. The author does not recommend changes in this regard.

⁸⁶² *Id.* at art. 16(c).

⁸⁶³ *Id.*

⁸⁶⁴ THOMPSON, JR., *supra* note 490, at 1089; also *see* The Takeover Code, 2013, Rule 2.1(a)(b) (U.K.).

⁸⁶⁵ The Takeover Code, 2013, Rule 2.2(a) (U.K.).

⁸⁶⁶ *Id.*

§6.15. Offers and Restrictions on Defensive Measures⁸⁶⁷

Saudi's M&A Regulation is not explicit regarding the issue of hostile offers and the defensive measures a target company may take to resist such offers. However, the Saudi M&A Regulation places some restrictions on either the offeree or the offeror.⁸⁶⁸ Moreover, from a practitioner's point of view,⁸⁶⁹ boards of directors in Saudi are inclined to make decisions unanimously, meaning that hostile offers are unusual⁸⁷⁰ in Saudi Arabia.⁸⁷¹

A. Defensive measures under the Saudi M&A Regulation

1. Shareholders' approval (the board neutrality rule)

Saudi's M&A Regulation restricts the actions that a board of directors may take when a *bona fide* offer is about to be presented by an offeror.⁸⁷² For example, directors are prohibited from taking any action that could frustrate the offer before the General Assembly meeting is held and a vote is conducted.⁸⁷³ The legislature gives the board of directors the discretion to determine if the offer is genuine Article 3 (1), which reads as follows:

At no time after the board of the offeree company has reason to believe that a *bona fide* offer might be imminent may any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general assembly, which could effectively result in any *bona fide* offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.⁸⁷⁴

Saudi M&A Regulation Article 3 (i) covers all types of defensive measures, including so-called poison pills, golden parachutes and many other defensive tactics. None of these measures

⁸⁶⁷ These restrictions are adopted from Vydra, *supra* note 850.

⁸⁶⁸ *Id.*

⁸⁶⁹ Assad Abedi, an attorney at Hatem Abbas Ghazzawi & Co.

⁸⁷⁰ The word "unusual" is not the right word to use here. It would be accurate if there were many M&A offers, and if many public M&A transactions occurred that fell under the M&A Regulation. The reality is that there has been only one public transaction that fell under the M&A Regulation.

⁸⁷¹ Assad Abedi, *Public mergers and acquisitions in Saudi Arabia: overview*, *Practical Law*, available at <http://uk.practicallaw.com/5-505-9771?source=relatedcontent#a810380>. (last visited December 29, 2015).

⁸⁷² Mergers and Acquisitions Regulation, art. 3(i).

⁸⁷³ *Id.*

⁸⁷⁴ *Id.*

may be taken by the board of directors of the offeree company without the approval of offeree company's shareholders.

Saudi M&A Regulation Article 24 (a) lists other actions that the offeree company's board of directors may not take without the shareholders' approval:

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, except in pursuance of a contract entered into earlier, without the approval of the shareholders in general assembly:

- 1) Issue any authorised but unissued shares;
- 2) Issue or grant options in respect of any unissued shares;
- 3) Create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;
- 4) Sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or
- 5) Enter into contracts otherwise than in the ordinary course of business. The notice convening such a general assembly of shareholders must include information about the offer or anticipated offer.⁸⁷⁵

2. Gathering of irrevocable commitments⁸⁷⁶

The Saudi M&A Regulation stipulates that no party, including the offeree company, may contact a private individual for the purpose of gathering irrevocable commitments to accept or reject an offer without consulting with the Authority; the exact language reads: “[a]ny person proposing to contact a private individual with a view to seeking an irrevocable commitment to accept or refrain from accepting an offer or contemplated offer must consult the Authority in advance.”⁸⁷⁷ This provision intends to prevent the offeree company from seeking commitments from large shareholders to reject the offer.⁸⁷⁸ It is also meant to prevent the use of the so-called

⁸⁷⁵ *Id.* at art. 24(a).

⁸⁷⁶ VYDRA, *supra* note 850, at 19.

⁸⁷⁷ Mergers and Acquisitions Regulation, art. 8(c).

⁸⁷⁸ VYDRA, *supra* note 850, at 19.

“White Squire” defense, in which a third company agrees to buy a large stake in the offeree company in order to discourage the offeror from making an acquisition bid.⁸⁷⁹

3. Other Defensives Measures

When asked about the legality of the White Knight defensive tactic, the Saudi Capital Market Authority verbally answered that such actions may not take place.⁸⁸⁰ Mr. Vydra believes that Saudi does not have a rule that prohibits such a tactic, and he cites the need for more clarification from the Authority.⁸⁸¹ Article 3 (i) of the Regulation lists protecting the company from predatory bidders as one of the actions that an offeree company’s board of directors may **not** take (i.e., the board is prohibited from doing anything without the shareholders’ approval that might frustrate an offer).⁸⁸²

B. Defensive measures under the EC Directive

The EC Directive aims to protect the shareholders of the offeree company and contemplates acquisition bids from the offeree shareholders’ point of view. Therefore, the Directive limits the power of the board of the offeree company in terms of the defensive measures it may take.⁸⁸³ The Directive requires that the board of the offeree company must not take any action that would place barriers against the bid without the prior approval of the shareholders:

During the period referred to in the second subparagraph, the board of the offeree company shall obtain the prior authorisation of the general meeting of shareholders given for this purpose before taking any action, other than seeking alternative bids, which may result in the frustration of the bid and in particular before issuing any shares which may result in a lasting impediment to the offeror’s acquiring control of the offeree company.

⁸⁷⁹ *Id.*

⁸⁸⁰ *Id.*

⁸⁸¹ *Id.*

⁸⁸² Mergers and Acquisitions Regulation, art. 3(i).

⁸⁸³ Council Directive on takeover bids, art. 9(2), 2004 O.J. (L 142) (EC).

Such authorisation shall be mandatory at least from the time the board of the offeree company receives the information referred to in the first sentence of Article 6(1) concerning the bid and until the result of the bid is made public or the bid lapses. Member States may require that such authorisation be obtained at an earlier stage, for example as soon as the board of the offeree company becomes aware that the bid is imminent.⁸⁸⁴

The Directive's rule requiring that offeree shareholders approve any board action that might frustrate a bid offer represents a transfer of power and decision making from the board to the shareholders.⁸⁸⁵ This approach is consistent with the goal of protecting shareholders because it provides shareholders the opportunity to decide for themselves what is in their best interests. This approach differs from an approach that allows the board of the offeree company to use defensive measures. One reason to restrict offeree boards is out of concern that they may only be resisting a takeover because they fear they will lose their positions on the board should a bid succeed.⁸⁸⁶

C. Observations

The author observes that the Saudi M&A Regulation and the EC Directive include similar rules governing defensive measures. The author does not recommend changes in this regard.

§6.16. Disclosures Required During the M&A Period

A. Under the Saudi M&A Regulation

Saudi's M&A Regulation requires disclosures to either the public or the Authority in the following scenarios:

⁸⁸⁴ *Id.*

⁸⁸⁵ Goergen, M., Martynova, M., and Renneboog, L. D. R. (2005), *Corporate Governance Convergence: Evidence from Takeover Regulation Reforms in Europe*, 17-8 (TILEC Discussion Paper; Vol. 2005-017, Tilburg: TILEC, available at [https://pure.uvt.nl/portal/en/publications/corporate-governance-convergence\(a78ee12f-8ac2-4866-b3d9-080604c3ab00\).html](https://pure.uvt.nl/portal/en/publications/corporate-governance-convergence(a78ee12f-8ac2-4866-b3d9-080604c3ab00).html) (last visited December 25, 2015).

⁸⁸⁶ *Id.* at 8-9 and 17-9.

1. Reportable dealings by the offeror and offeree

Certain disclosures must be made to the public of any dealings in the relevant securities by the offeree or the offeror or any party acting in concert for their accounts during the offer period.⁸⁸⁷ Certain disclosures must be made to the Authority when either the offeree or the offeror or any party acting in concert deals in the relevant securities for their clients.⁸⁸⁸

2. Reportable ownership

Any ownership of 1% of a company's securities by a party or any party acting in concert from either the offeror company or the offeree company is obligated to be disclosed to the Authority.⁸⁸⁹

B. Under the UK Takeover Code

The UK Takeover Code also requires that disclosures of ownership of 1% or more of the securities of the offeror or the offeree must be made.⁸⁹⁰

C. Observations

The author observes that both the Saudi M&A Regulation and the UK Takeover Code stipulate that ownership of 1% or more of the securities of the offeror or the offeree must be disclosed. The author does not recommend changes in this regard.

⁸⁸⁷ M&A Regulation, art. 11(a) reads as following: “(a) Dealings by parties and by persons acting in concert Dealings in relevant securities by an offeror or the offeree company, and by any person acting in concert with an offeror or the offeree company, for their own account during an offer period must be publicly disclosed.”

⁸⁸⁸ M&A Regulation, art. 11(b) reads as following: “(b) Dealings by parties and by persons acting in concert for non-discretionary account Dealings in relevant securities during an offer period by an offeror or the offeree company, and by any person acting in concert with such persons, for the account of clients must be disclosed to the Authority.”

⁸⁸⁹ M&A Regulation, art. 11(c) reads as following: “(c) Dealings by 1% shareholders or more 1) A person who (alone or with any person acting in concert with it), during an offer period, owns 1% or more of any class of relevant securities of an offeror or of the offeree company or as a result of any transaction will own 1% or more, has a reportable interest. 2) Any reportable interest, and any change in the level of any reportable interest, must be reported to the Authority at the end of each trading day. 3) Reports made under this Article 11 may be made public by the Authority.”

⁸⁹⁰ The Takeover Code, 2013, Rule 8.3(a) (U.K.).

§6.17. Disclosures of Ownership of Shares Outside the Offer Period

A. Under the Saudi system

The Listing Rules require that any party that acquires 5% or more of the target company must, by the end of the business day in which that share is acquired, notify the target company and the Authority.⁸⁹¹ The Listing Rules also requires that the party that acquires this 5% (or more) of the target company must notify the target company and the Authority if its share increases or decreases by 1% of the 5% threshold by the end of the business day in which the 5% threshold decreases or increases.⁸⁹²

B. Under the UK system

The Financial Conduct Authority (FCA) under the UK system is equivalent to the Capital Market Authority in Saudi Arabia. The FCA provides Disclosures and Transparency Rules that require the disclosure of acquisitions of certain percentages of a UK public company.⁸⁹³ The FCA rules stipulate the required percentage that must be disclosed as the following:

A person must notify the issuer of the percentage of its voting rights he holds as shareholder or holds or is deemed to hold through his direct or indirect holding of [certain] financial instruments ...if the percentage of those voting rights:

(1) reaches, exceeds or falls below 3%, 4%, 5%, 6%, 7%, 8%, 9%, 10% and each 1% threshold thereafter up to 100% ... as a result of an acquisition or disposal of *shares* or [certain] financial instruments....⁸⁹⁴

C. Observations

The author observes that both the Saudi Listing Rules and the UK Disclosures and Transparency Rules require disclosures when certain percentages of public company's shares are

⁸⁹¹ The Listing Rules, art. 45(a)(1).

⁸⁹² *Id.* at art. 45(a)(2).

⁸⁹³ THOMPSON, JR., *supra* note 490, at 1101-02.

⁸⁹⁴ *Id.* at 1102. Also *see* The Disclosures and Transparency Rules, Rule 5.1.2, the most updated version of FCA Handbook as of 2015, November 26, available at <https://www.handbook.fca.org.uk/handbook/DTR/5/1.html?date=2015-11-26> (last visited March 13, 2016).

acquired or disposed of outside the takeover regulations. The author does not recommend changes in this regard.

§6.18. Squeeze Out and Sell Out Rules Under the EC Directive

A. The squeeze out and sell out

The Saudi M&A Regulation deals with takeover bids, but it does not include rules governing the “squeeze out” and “sell out” scenarios that may follow a bid. The squeeze out right applies to the acquirer: when the acquirer acquires a certain percentage of the target company following the bid, the acquirer is given the right to force the remaining minority shareholders to tender their shares to the acquirer for a fair price.⁸⁹⁵ The sell out right, on the other hand, applies to the minority shareholders: when the acquirer acquires a certain percentage of the target company’s shares following the bid, the remaining minority shareholders can force the acquirer to buy their shares for a fair price.⁸⁹⁶ Therefore, the information in this section presents principles stipulated in the EC Directive regarding these concepts. The author believes Saudi’s M&A Regulation should add squeeze and sell out provisions modeled after those found in the EC Directive; such provisions would allow the Saudi Regulation to better meet the economic needs of companies and shareholders involved in companies undergoing M&A activity.

The EC Directive sets general rules that the offeror should have the opportunity and the right to acquire the rest of the shares of the offeree company if the offeror, as a result of the bid, acquires a certain percentage.⁸⁹⁷ The EC Directive also states that when the offeror acquires a certain percentage of the shares of the offeree, the offeree’s minority shareholders should have

⁸⁹⁵ Clerc, *supra* note 803 , at 87.

⁸⁹⁶ *Id.*

⁸⁹⁷ Council Directive on takeover bids, the Recital (24).

the opportunity and right to require the offeror to buy their shares.⁸⁹⁸ These principles read as following:

Member States should take the necessary measures to enable an offeror who, following a takeover bid, has acquired a certain percentage of a company's capital carrying voting rights to require the holders of the remaining securities to sell him/her their securities. Likewise, where, following a takeover bid, an offeror has acquired a certain percentage of a company's capital carrying voting rights, the holders of the remaining securities should be able to require him/her to buy their securities. These squeeze-out and sell-out procedures should apply only under specific conditions linked to takeover bids. Member States may continue to apply national rules to squeeze-out and sell-out procedures in other circumstances.⁸⁹⁹

B. The squeeze out right

The EC Directive states that an offeror that acquires 90% of a company as a result of a bid should be allowed to acquire the remaining minority stake and "squeeze out" the minority shareholders at a fair price.⁹⁰⁰ The EC Directive states that the squeeze right shall be introduced under certain specific situations:

Member States shall ensure that an offeror is able to require all the holders of the remaining securities to sell him/her those securities at a fair price. Member States shall introduce that right in one of the following situations:

(a) where the offeror holds securities representing not less than 90 % of the capital carrying voting rights and 90 % of the voting rights in the offeree company, or

(b) where, following acceptance of the bid, he/she has acquired or has firmly contracted to acquire securities representing not less than 90 % of the offeree company's capital carrying voting rights and 90 % of the voting rights comprised in the bid.⁹⁰¹

The EC Directive permits an EC member state, if it chooses, to raise the percentage of shares that the offeror must acquire in order to trigger the squeeze right; however, in no case may this percentage be higher than 95%.⁹⁰²

⁸⁹⁸ *Id.*

⁸⁹⁹ *Id.*

⁹⁰⁰ Council Directive on takeover bids, art. 15(2), 2004 O.J. (L 142) (EC).

⁹⁰¹ *Id.*

⁹⁰² *Id.*

Because the time period allowed for the acceptance of a bid may not be less than two weeks nor longer than 10 weeks,⁹⁰³ the offeror has a specific time period during which it may exercise the squeeze out right.⁹⁰⁴ This time period is within three months from the end of the time period that was set for the acceptance of the bid.⁹⁰⁵

The EC Directive requires that the price offered to the minority shareholders be fair, and that the compensation may either be in cash or the in same form of compensation that was provided for payment of the bid.⁹⁰⁶

C. The sell out right

The EC Directive also gives to the shareholders who eventually follow the bid to become a 10% minority in the offeree company the right to require the offeror to buy their shares.⁹⁰⁷ The EC Directive states that the when the offeror acquires 90% of the offeree company, the sell out right shall trigger and shall proceed in the same manner prescribed for the squeeze out right in Article 15.⁹⁰⁸

D. Observations

While the EC Directive includes rules covering the squeeze out rule, the Saudi M&A Regulation does not have such rules. The EC Directive sets a percentage of 90% as the threshold of ownership at which an acquirer can squeeze out the minority.

Chapter 5 discusses the merger rules according to the Saudi Companies Law, which stipulates that a minimum of 75% of votes is required for approval of a merger. Therefore, the author argues that it would be more consistent, logical and efficient for a 75% ownership stake

⁹⁰³ *Id.* at art. 7(1).

⁹⁰⁴ *Id.* at art. 15(4).

⁹⁰⁵ *Id.*

⁹⁰⁶ *Id.* at art. 16(5).

⁹⁰⁷ *Id.* at art. 16(2).

⁹⁰⁸ *Id.* at art. 16(2)(3).

(after the bid) to also be the percentage of share ownership needed for an acquirer to be eligible to squeeze out the minority. This observation should also apply to the sell out rule, which should be included in the Saudi M&A Regulation. In other words, the minority should have the right to require the offeror to buy their shares if the offeror acquires 75% (or more) of the target company's shares following the bid. Transactions would likely become more efficient in Saudi Arabia if such sell out and squeeze out rights were included in the Saudi M&A Regulation, because the existence and exercise of such rights would mean that such actions would not require approval in a shareholder meeting.

E. Recommendations

- 1- The Saudi Companies Law requires only a 75% majority vote to approve a merger; however, adopting a “squeeze out” rule as a specific potential result of the acceptance of a tender offer would make the Saudi M&A Regulation more efficient and likely would facilitate acquisitions. The squeeze out provision would give the acquiring company the ability to acquire the target without the need for a shareholders' meeting to approve the acquisition. The Saudi M&A Regulation should include a provision that gives an offeror that acquires 75% or more of a target company via a tender offer the right to squeeze out the minority shareholders at a fair price.
- 2- The Saudi M&A Regulation also should adopt a “sell out” rule. The Saudi Companies Law should include a provision that gives the minority shareholders of the acquired company, once it 75% or more of it has been acquired by an offeror's tender offer, the right to be able to sell out their minority shares.
- 3- The squeeze out and sell out concepts are important because both provide exit mechanisms for minority shareholders in case the minority does not wish to retain stock

in a company after 75% of it has been acquired by an offeror. These mechanisms also provide a tool that the majority stake may use to squeeze the minority out, giving the majority complete control of the management of the corporation. Both concepts provide economic advantages.

§6.19. Summary of the Recommendations

- 1- The title of the Saudi M&A Regulation should be changed to “Takeover Regulation.”
- 2- The Saudi M&A Regulation states that the offeror shall specify the duration and dates of the offer in an offer timeline that the Capital Market Authority must approve. The author argues that the M&A Regulation should require the offeror to specify that the time period for acceptance of an offer must be not less than two weeks and not more than 10 weeks. Some time limit on the acceptance period must be required.
- 3- The Capital Market Authority should not have the discretionary right to trigger the mandatory offer rule in the case of a party that acquires 50% of a target corporation. The mandatory offer rule loses its intended purpose and function if it is not automatically triggered when the threshold of 50% ownership of the target company’s shares is reached. Allowing the mandatory offer rule to trigger automatically, rather than at the discretion of the Authority, would allow the rule to be exercised objectively, which would promote stability and trust in the Saudi stock market. The market would remain more stable if shareholders in the target company had confidence that they would have the opportunity to tender their shares if a bidder acquired a controlling stake in the target company. Also, the

acquiring party likely would only attempt to acquire a stake of 50% or more if it were prepared to acquire some or all of the rest of the target shares.

- 4- The Saudi Capital Market Authority should include a provision that clearly permits, or at the least, does not restrict, a reverse breakup fee. The Saudi Capital Market Authority should specify that such a fee, along with arrangements that impose obligations on the offeror, are excluded from any restrictions on inducement fees; this would bring the Saudi Capital Market Authority in line with the UK Takeover Code in this regard. This provision would make corporations aware of the Saudi approach to reverse breakup fees, which might help them to structure their breakup fee provisions accordingly.
- 5- The Saudi M&A Regulation should provide a “squeeze out” rule that could be applied in the process of the acceptance of a tender offer as it would make the M&A Regulation more efficient and would facilitate acquisitions. A squeeze out provision gives an acquiring company the ability to acquire a target without the need to call a meeting of its shareholders to approve the acquisition. The Saudi M&A Regulation should include a provision that gives an offeror that acquires 75% or more of a target company via a tender offer the right to squeeze out the remaining offeree minority shareholders at a fair price.
- 6- The Saudi M&A Regulation should adopt a “sell out” rule—a provision that gives the minority shareholders of the acquired company, when 75% or more of it is acquired via a tender offer, the right to sell out their shares to the acquiring party.
- 7- The sell out concept is important because it provides an exit mechanism for minority shareholders in the offeree company, should they not wish to own stock in a company

that may change materially under the leadership of the new 75% (or more) majority shareholder. The squeeze out mechanism provides a tool for the majority shareholder to squeeze out the minority at a fair price and thus consolidate total control over management of the company. Both concepts have economic advantages.

Chapter 7: Corporate Tax Approach to M&A in Saudi Arabia⁹⁰⁹

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§7.1. Scope

This chapter focuses on the Saudi tax rules that apply to M&A transactions in Saudi Arabia and addresses how Saudi income tax law in particular applies to M&A transactions. The chapter begins by enumerating the basic Saudi tax rules in Section 7.2. Section 7.3 deals with the application of Saudi tax rules to M&A transactions, provides a general comparison with the US tax treatment of M&A, and emphasizes the need for Saudi income tax law to adopt specific rules that govern M&A. Section 7.4 provides a summary of the chapter and Section 7.5 outlines recommendations.

§7.2. Basic Introduction to the Tax and Zakat System in Saudi Arabia

A. Introduction

According to the EY G20 Entrepreneurship Barometer 2013, “Saudi Arabia ranks at the top of the EY G20 Entrepreneurship Barometer 2013 for its tax and regulatory frameworks.”⁹¹⁰ The tax system in Saudi Arabia is not as complex systems found in other countries, but Saudi does have two types of taxes. The first, called “Zakat,” applies only to Saudi Arabian citizens or Saudi Arabian commercial entities, according to Islamic principles.⁹¹¹ The second type of tax is an income tax on non-Saudi Arabian commercial entities.⁹¹²

⁹¹⁰ ASHRAF ABU-SHARKH AND WALEED AL SHUBAILI, THE POWER OF THREE. TOGETHER, GOVERNMENTS, ENTREPRENEURS AND CORPORATIONS CAN SPUR GROWTH ACROSS THE G20, 4 (The EY G20 Entrepreneurship Barometer, 2013), available at [http://www.ey.com/Publication/vwLUAssets/EY-G20-country-report-2013-Saudi-Arabia/\\$FILE/EY-G20-country-report-2013-Saudi-Arabia.pdf](http://www.ey.com/Publication/vwLUAssets/EY-G20-country-report-2013-Saudi-Arabia/$FILE/EY-G20-country-report-2013-Saudi-Arabia.pdf) (last visited March 6, 2016).

⁹¹¹ *Thinking Beyond Borders, Saudi Arabia* (2013), available at <http://www.kpmg.com/Global/en/IssuesAndInsights/ArticlesPublications/thinking-beyond-borders/Documents/saudi-arabia-2013.pdf>. See also the *Saudi Arabian Law Overview*, available at http://www.saudilegal.com/saudilaw/10_law.html (last visited March 6, 2016).

⁹¹² *Id.*

The Department of Zakat and Income Tax (DZIT) is the government agency in charge of all tax and Zakat in the Kingdom and is controlled by the Ministry of Finance.⁹¹³ It operates according to its own income tax law and the Implementing Regulation that governs taxes in Saudi Arabia.⁹¹⁴

B. Department of Zakat and Income Tax (DZIT)

In 2016, the Director of the Department of Zakat and Income Tax, Ibrahim bin Mohammed Al Mefleh, stated that Zakat and tax revenues collected during the fiscal year 2015 increased 7% compared to those collected during the previous year; the 2015 total was SAR 30 billion.⁹¹⁵ For the purposes of this dissertation, when discussing Saudi's Income Tax Law, this paper will address only those details that the reader needs to understand in order to have a sufficient grasp of tax and Zakat concepts as they relate to M&A in Saudi Arabia.

C. Zakat

Zakat is the third pillar of Islam; it is a mandatory taxation imposed on Muslims by the Qur'an, which commands Muslims to "be steadfast in prayer and regular in charity: [a]nd whatever good ye send forth for your souls before you, ye shall find it with God. [F]or God sees Well all that ye do."⁹¹⁶ Zakat is an annual Islamic taxation of 2.5% of a Muslim's wealth that is to be given to the poor and the needy.⁹¹⁷

1. The people who deserve Zakat

The Qur'an describes 8 categories of people to whom Zakat should be paid:

⁹¹³ Department of Zakat and Income Tax, available at <https://dzit.gov.sa/en/brief-about-dzit> (last visited January 5, 2015).

⁹¹⁴ *Id.*

⁹¹⁵ *Growth in the Revenue of the Department of Zakat and Income Tax*, ALRIYADH NEWSPAPER, January 1, 2016, Issue No. 17357, available at <http://www.alriyadh.com/1115398>. (last visited March 20, 2016).

⁹¹⁶ al-Baqarah Sura, verse 110.

⁹¹⁷ See Imam Kamil Mufti, *The Third Pillar of Islam: Compulsory Charity*. Available at <http://www.islamreligion.com/articles/46/third-pillar-of-islam/> (last visited March 6, 2016).

Alms are for [1] the poor and [2] the needy, and [3] those employed to administer the (funds); for [4] those whose hearts have been (recently) reconciled (to Truth); for [5] those in []bondage and [6] in debt; [7] in the cause of God[,] and for [8] the wayfarer: [1299] (thus is it) ordained by God, and God is full of knowledge and wisdom.⁹¹⁸

These are the 8 groups of people that deserve to receive Zakat, which cannot be used for purposes other those stated in this verse of the Qur'an.

2. Zakat base

In 1950, Saudi Arabia enacted a regulation for Zakat comprising 20 articles.⁹¹⁹ The Zakat Implementing Regulation stipulates that “[c]apital and its proceeds, receipts, profits and gains of Zakat payers are subject to Zakat in accordance with relevant Islamic provisions.”⁹²⁰

D. Income tax base

Article 6 of the Saudi Income Tax Law states that income tax is a tax imposed on the income of non-Saudi shares,⁹²¹ and it defines income tax in this way: “[t]axable income is the gross income including all revenues, profits, and gains of any type and of any form of payment resulted from carrying out an activity, including capital gains⁹²² and any incidental revenues,

⁹¹⁸ al-Tawbah Sura, verse 60.

⁹¹⁹ Department of Zakat and Income Tax, available at <https://dzit.gov.sa/en/brief-about-dzit> (last visited January 5, 2015).

⁹²⁰ Zakat Implementing Regulation, art. 2, Issued in 6/8/1370 H (corresponding to 13/5/1950) according to Ministerial Resolution number 393.

⁹²¹ Article 6 of the Saudi Income Tax states the following:

“(a) The tax base of a resident capital company is the shares of non-Saudi partners in its taxable income from any activity from sources within the Kingdom, minus expenses permitted under this Law.

(b) The tax base of a resident non-Saudi natural person is his taxable income from any activity from sources within the Kingdom, minus expenses permitted under this Law.

(c) The tax base of a non-resident who performs an activity within the Kingdom through a permanent establishment is his taxable income arising from or related to the activity of such establishment, minus expenses permitted under this Law.

(d) The tax base of each natural person is determined separately.

(e) The tax base of a capital company is determined separately of its shareholders or partners.”

⁹²² Mr. Arif Saeed describes the Tax on M&A and Capital gains as the following “A capital gain arising out of a sale or transfer of assets is likely to be treated as a normal business income and will be taxed at the normal corporate tax rate. There is no transfer fee or stamp duty on the acquisition of shares or transfer of assets. There are no specific rules under the KSA taxation regime that specifically address mergers and acquisitions.” See Muhammad Arif Saeed, Saudi Arabia: Structuring Mergers & Acquisition Transactions in the Kingdom of Saudi Arabia, April 3, 2010, available at

minus exempted income.”⁹²³ In other words, where non-Saudis are concerned, Saudi Arabia lumps all different types of income into one category, which it calls “gross income.”

E. Gross income

Saudi Arabia used to collect tax on a person’s capital, but it now collects tax on gross income instead.⁹²⁴ This approach makes a distinction between tax and Zakat, and it focuses Saudi tax collection on gross income, which simplifies the tax process.

1. Capital gains case

In 2009, a certain corporation made an appeal to the Department of Zakat and Income Tax^{925, 926, 927} over a dispute regarding the capital gains realized on non-Saudi shares that resulted from a merger between Lever Co. and Bin Zagar Ltd. The case was brought by the Department of Zakat and Income Tax (the Department), and Lever Co. and Bin Zagar Ltd. (the Parties), before the Appeal Committee to review a resolution of the First Instance Committee. This resolution dealt with the Parties’ request to deduct employee bonuses from the company’s tax base, as well as with the Department’s request to impose capital gains tax on the merger.

By way of background, Lever Co. merged into Bin Zagar Ltd. (the Company). Before the merger, two shareholders owned both companies; these two shareholders owned the same percentage of shares in each company. Specifically, Abdullah and Saeed Bin Zagar Co., a Gulf State investor, owned 51% of the shares of Lever Co. and of Bin Zagar Ltd. The other investor, a foreign investor called Unilever Overseas Co., owned 49% of the shares of each company. The

<http://www.mondaq.com/x/97194/M+A+Private%20equity/Structuring+Mergers+Acquisition+Transactions+in+the+Kingdom+of+Saudi+Arabia>. (last visited January 12, 2015).

⁹²³ Saudi Income Tax Law, art. 8.

⁹²⁴ *Id.* at 34.

⁹²⁵ Tax Appeal Committee Decision No. 1284 in 2012, on the Appeal No. (ض/1084-1081) in 2009.

⁹²⁶ This case is being discussed publicly for the first time in this dissertation. The treatment of this case in this paper is also the first time the case has been translated from the Arabic.

⁹²⁷ Even though the decision is rendered by the Appeal Committee, it is still considered an administrative decision, which means it is not final and can be appealed before the Board of Grievances.

Company appealed before the Appeal Committee to dispute a resolution passed by the First Instance Committee. This resolution refused to deduct a bonus, which the Company had paid to an employee, from the Company's tax base; the Company argued that this payment exceeded the severance required by the Labor and Workmen⁹²⁸ Law, but the First Instance Committee rejected that argument. The Department appeared before the Appeal Committee to dispute the First Instance Committee's resolution that no capital gains tax should be imposed on the Company after the merger. For the purposes of this paper, only the dispute over the capital gains issues will be addressed.

2. The Capital Gains Issue

The Department appealed the First Instance Committee's resolution that upheld the Company's argument that it should not pay capital gains tax on the merger. The Department wanted to impose a capital gains tax of SAR 43,815,692 million (USD 116 million) on Lever Co.'s shares, because 49% of Lever Co. was owned by a foreign investor that was subject to taxation. The Company argued that the merger did not constitute a taxable event, because the two companies that existed before the merger were held by the same shareholders, each of which held the exact same percentage of shares in each company (as previously noted, 51% owned by Abdullah and Saeed Bin Zagar Co. and 49% owned by the Unilever Overseas Co.). The Company further argued that the two companies decided to increase the capital of the merged company to SAR 91,400,000 million (USD 24 million), and that they agreed that each shareholder would retain the same percentage of ownership in the new Company that each had held in each of the two pre-merger companies. The two companies were incorporated according to the book value. The merger took the form of an incorporation, in which Lever Co. merged into Bin Zagar Ltd. and ceased to exist, resulting in the cancellation its certificate of incorporation.

⁹²⁸ It can also be called the "Employment and Employees Law."

The Appeal Committee confirmed the original judgment of the First Instance Committee and stated that such a merger does not involve the transfer of assets or shares, nor does it involve a sale or disposal. Most importantly, the Appeal Committee agreed that the merger did not yield capital gains. The core of the current transaction under the accounting standards was merely the incorporation of interests. Therefore, the Appeal Committee rejected the Department's argument that the merger did result in capital gains.

F. Shares owned by Saudi Arabian persons in joint stock companies

Shares in joint stock companies that are held by Saudi Arabian persons are subject to Zakat according to Article 1 of the Royal Decree: "Zakat duty shall be collected in full in accordance with the provisions of Islamic law (*Sharia*) from all Saudi persons, shareholders of Saudi companies whose all shareholders are Saudi, and Saudi shareholders of joint companies whose shareholders are Saudi and non-Saudi."⁹²⁹ Thus, if any Saudi person owns shares in any company, whether that company is fully or partially owned by Saudis, such shares are subject to Zakat.

G. Shares owned by non-Saudi Arabian persons in joint stock companies

The Saudi Tax Law defines the categories of persons subject to taxation; these persons may be natural or corporate entities, and they may be Saudi residents or non-residents who are conducting business in the Kingdom.⁹³⁰ The Saudi Tax Law states the following:

Persons Subject to Taxation:

- (a) A resident capital company with respect to shares of non-Saudi partners.
- (b) A resident non-Saudi natural person who conducts business in the Kingdom.

⁹²⁹ Royal Decree No.17, /2/28/3321, dated in 21/1/1370 H (2/11/1950).

⁹³⁰ The Saudi Income Tax Law, art. 2.

(c) A nonresident who conducts business in the Kingdom through a permanent establishment.

(d) A nonresident with other taxable income from sources within the Kingdom.

(e) A person engaged in the field of natural gas investment.

(f) A person engaged in the field of oil and hydrocarbons production.⁹³¹

Article 3 of the Law defines in detail what it means to be resident in Saudi Arabia:

(a) A natural person is considered a resident in the Kingdom for a taxable year if he meets any of the two following conditions[:]

(1) He has a permanent place of residence in the Kingdom and resides in the Kingdom for a total period of not less than thirty (30) days in the taxable year.

(2) He resides in the Kingdom for a period of not less than one hundred eighty three (183) days in the taxable year.

For purposes of this paragraph, residence in the Kingdom for part of a day is considered residence for the whole day, except in case of a person in transit between two points outside the Kingdom.

(b) A company is considered resident in the Kingdom during the taxable year if it meets any of the following conditions:

(1) It is formed in accordance with the Companies Law.

(2) Its central management is located in the Kingdom.⁹³²

Article 4 of the Law describes situations that constitute the creation of a permanent non-resident entity in Saudi Arabia:

a) A permanent establishment of a nonresident in the Kingdom, unless otherwise stated in this Article, consists of the permanent place of the nonresident's activity through which it carries out business, in full or in part, including business carried out through its agent.

(b) The following are considered a permanent establishment:

(1) Construction sites, assembly facilities, and the exercise of supervisory activities connected therewith.

⁹³¹ *Id.*

⁹³² *Id.* at art. 3.

(2) Installations, sites used for surveying natural resources, drilling equipment, ships used for surveying for natural resources as well as the exercise of supervisory activities connected therewith.

(3) A fixed base where a nonresident natural person carries out business.

(4) A branch of a nonresident company licensed to carry out business in the Kingdom.

(c) A place is not considered a permanent establishment of a nonresident in the Kingdom if used in the Kingdom only for the following purposes:

(1) Storing, displaying or delivering goods or products belonging to the nonresident.

(2) Keeping a stock of goods or products belonging to the nonresident for the purpose of processing by another person.

(3) Purchasing goods or products for the sole purpose of [the] collection of information for the nonresident.

(4) Carrying out other activities of preparatory or auxiliary nature for the interests of the nonresident.

(5) Drafting contracts for signature in connection with loans, delivery of goods or activities of technical services.

(6) Performing any series of activities stated in subparagraphs (1) to (5) of this paragraph.

(d) A nonresident partner in a resident partnership is considered an owner of a permanent establishment in the Kingdom, in the form of an interest in a partnership.⁹³³

Finally, the Law states that if income can be shown to have “accrued” in Saudi Arabia, this income is subject to Saudi tax:

(a) Income is considered accrued in the Kingdom in any of the following cases:

(1) If it is derived from an activity[,] which occurs in the Kingdom.

(2) If it is derived from immovable property located in the Kingdom, including gains from the disposal of a share in such immovable properties and from the disposal of shares, stocks or partnership in a company the property of which consists mainly, directly or indirectly of shares in immovable properties in the Kingdom.

(3) If it is derived from the disposal of shares or a partnership in a resident company.

(4) If it is derived from lease of movable properties used in the Kingdom.

⁹³³ *Id.* at art. 4.

- (5) If it is derived from the sale or license for use of industrial or intellectual properties used in the Kingdom.
- (6) Dividends, management or directors' fees paid by a resident company.
- (7) Amounts paid against services rendered by a resident company to the company's head office or to an affiliated company.
- (8) Amounts paid by a resident against services performed in whole or in part in the Kingdom.
- (9) Amounts for exploitation of a natural resource in the Kingdom.
- (10) If the income is attributable to a permanent establishment of a nonresident located in the Kingdom, including income from sales in the Kingdom of goods of the same or similar kind as those sold through such a permanent establishment, and income from rendering services or carrying out another activity in the Kingdom of the same or similar nature as an activity performed by a non-resident through a permanent establishment.
- (b) Place of payment of the income shall not be taken into account in determining its source.
- (c) For purposes of this Article, a payment made by a permanent establishment of a nonresident in the Kingdom is considered as if paid by a resident company.⁹³⁴

In summary, for the purposes of this paper, the reader should understand that in Saudi Arabia, income tax is imposed on joint-stock companies with respect to foreign shares.

H. The difference between Zakat and income tax

It is important to recognize the difference between income tax and Zakat, because the two concepts are entirely different. The main difference is that Zakat is collected based on wealth, while income tax is based only on gross income.⁹³⁵ The Saudi Arabian General Investment Authority describes how gross income is examined by the Department of Zakat and Income Tax:

Saudi Arabian Tax Law does not distinguish between different categories of income. Gross income consists of all gains, profits or other net income arising from business transactions carried out within Saudi Arabia. If transactions are carried out in part or in whole inside Saudi Arabia[,] all income derived from the transactions will be considered

⁹³⁴ *Id.* at art. 5.

⁹³⁵ Department of Zakat and Income Tax, available at <https://dzit.gov.sa/en/brief-about-dzit> (last visited January 5, 2015).

part of the Saudi Tax Base and potentially taxable in Saudi Arabia. Capital gains are treated as ordinary income. The same principle applies to gains derived from the sale of shares in partnerships or companies registered in Saudi Arabia. Usually, profits from sales are calculated by subtracting the re-evaluated book value (or the market price, if it is lower) of the shares from the sale price. In the case of recently established corporations[,] sometimes only the historical book value is subtracted from the sale price. The law does not, however, prescribe any particular method. Interest earned on capital in Saudi Arabia is considered part of gross income. The same applies to rents, licen[s]e fees or royalties for the use of patents, copyrights, secret processes, formulae, good will, and trademarks, etc., registered in Saudi Arabia. Dividends on shares in corporations registered in Saudi Arabia are added to gross income, unless corporate tax or Zakat has already been charged. Income derived by Saudi-resident companies from operations outside Saudi Arabia is also assessed as gross income.⁹³⁶

While income tax is imposed on income, Zakat in Saudi Arabia is imposed on “capital and its proceeds, receipts, profits and gains of zakat payers from commerce, industrial activity, personal endeavors, financial properties and belongings, of whatever type and form, and inclusive of financial and commercial deals, dividends, in general any type of receipt that is zakatable according to Islamic Jurisprudence, are subject to zakat.”⁹³⁷ In other words, Zakat is imposed on the whole wealth of the Zakat payer. Both income tax and Zakat are collected on an annual basis.⁹³⁸ A predominant Islamic jurist, Maymun Bin Mahran (660-635),⁹³⁹ summarizes Zakat based on his interpretation of Zakat provisions in this way: “When Zakat falls due, a Muslim should see his property, whether cash or commodities, and estimate it in cash. If you owe debts to others, calculate their value and take them out of the total property and pay Zakat on the residual.”⁹⁴⁰

⁹³⁶ From the Saudi Arabian General Investment Authority, available at <https://www.sagia.gov.sa/Documents/Laws/Corporate%20Income%20Tax.pdf> (last visited March 13, 2015).

⁹³⁷ Zakat Implementing Regulation, art. 3.

⁹³⁸ SULTAN ALSULTAN, ZAKAT-PROVISIONS AND APPLICATIONS (IN ARABIC), SAUDI ORGANIZATION FOR ACCOUNTING PUBLICATIONS 17, 1st ed, 23, 43 (Riyadh, Saudi Arabia, 1997).

⁹³⁹ See Muhammed bin Ahmad, *Althahabi A'lam Alnubala*, The biographies of Nobles, 72-8 (11th ed, Lebanon, *Alresallah*). The book is in Arabic and 28 volumes that cover the biographies of Islamic scholars since the beginning of Islam until the *Althahabi's* life (1239-1347); see the first page of the same book.

⁹⁴⁰ The Ministry of Islamic Affairs, Endowments, Da`wah, and Guidance, available at <http://zakat.al-islam.com/Loader.aspx?pageid=958&TOCID=14&BookID=696&PID=17> (last visited March 19, 2016); SULTAN ALSULTAN, ZAKAT-PROVISIONS AND APPLICATIONS (IN ARABIC), SAUDI ORGANIZATION FOR ACCOUNTING PUBLICATIONS 17, 89 (1st ed, Riyadh, Saudi Arabia, 1997).

I. The corporate tax rate in Saudi Arabia

For Saudi shareholders, the Zakat on shares they hold of commercial entities is 2.5%.⁹⁴¹

Tax on the shares of a non-Saudi shareholder is generally 20% of the company's annual income.⁹⁴² Tax on natural gas companies is 30% of the company's annual income, and tax on hydrocarbon companies is 85%, as stated in Article 7 of the Saudi Tax Law:

- (a) The tax rate of the tax base is twenty percent (20%) for each of the following:
 - (1) A resident capital company.
 - (2) A non-Saudi resident natural person who conducts business.
 - (3) A nonresident person who conducts business in the Kingdom through a permanent establishment.
- (b) The tax rate of the tax base for a taxpayer engaged only in natural gas investment activities is thirty percent (30%).
- (c) The tax rate of the tax base for a taxpayer engaged in the production of oil and hydrocarbon materials is eighty five percent (85%).⁹⁴³

However, Article 6 of the Saudi Tax Law sets out a tax base according to the following provisions:

- a) The tax base of a resident capital company is the shares of non-Saudi partners in its taxable income from any activity from sources within the Kingdom minus expenses permitted under this Law.
- (b) The tax base of a resident non-Saudi natural person is his taxable income from any activity from sources within the Kingdom minus expenses permitted under this Law.
- (c) The tax base of a non-resident who performs an activity within the Kingdom through a permanent establishment is his taxable income arising from or related to the activity of such establishment minus expenses permitted under this Law.
- (d) The tax base of each natural person is determined separately.

⁹⁴¹ The Ministry of Finance, available at <https://www.mof.gov.sa/English/Pages/zakahinterest.aspx> (last visited January 5, 2015).

⁹⁴² The Saudi Income Tax Law, art. 7.

⁹⁴³ *Id.*

(e) The tax base of a capital company is determined separately of its shareholders or partners.⁹⁴⁴

Most importantly, Saudi Tax Law does not address the application of taxes on M&A transactions.

J. Tax incentives

Saudi Arabia has begun to offer tax incentives to attract investors, including conditional ten-year tax incentives in certain regions in the north of the Kingdom, such as the Border Area, Al-Jawf, Najran, Al-Baha, Jazan and Hail.⁹⁴⁵

An article written by two notable experts on Saudi tax laws explains these tax incentives and the conditions that pertain to them administratively and legislatively in the following way:

Foreign investors will be granted tax credit (tax deduction) against the annual tax payable in respect of the following costs incurred on Saudi employees for 10 years (the "Employment Incentive"), to be calculated as follows:

50% of the annual cost incurred on [the] training of Saudi employees; and

50% of the annual salaries paid to Saudi employees, if there is any balance of tax payable after applying (1) above.[] In addition, investors will be granted a tax credit for 10 years equal to 15% of the paid up capital of industrial projects whether in cash or in kind as well as in case of capital increase (the "Capital Incentive").

Conditions

The Council of Ministers['] Decision empowers the Minister of Finance to issue the instructions, procedures and forms (the[] "Conditions") required for the implementation of the Council of Ministers['] Decision.

The Minister of Finance issued his resolution No. (2106) dated 18 July 2009 with the following Conditions in relation to the Tax Incentives:

The project should be established in any of the regions of (Hai'l, Northern Borders, Jazan, Najran, Al Baha and Al Jouf) including the economic cities and industrial areas established in these regions.

⁹⁴⁴ *Id.* at art. 6.

⁹⁴⁵ Ben Cowling and Saud Alrifi, *Tax Incentives In The Kingdom of Saudi Arabia*, July 11, 2012, available at <http://www.mondaq.com/x/186196/tax+authorities/Tax+Incentives+In+The+Kingdom+Of+Saudi+Arabia> (last visited January 5, 2015).

The project should be licensed from the Saudi Arabian General Investment Authority.

The project paid up capital - whether in cash or in kind – shall not be less than SAR 1 million.

The project shall maintain regular accounts audited by a certified Saudi auditor.

If the project established in any of the above mentioned regions is a branch of a company or a corporation established in another region, it shall be an independent project with an independent capital, [and] shall maintain independent accounts to be audited by the project auditor and submitted with an independent tax return in addition to the consolidated return of the activity.

The Tax Incentives shall not be extended to other dependent projects established in regions other than those stated in the Council of Ministers['] Decision.

All the projects established in the regions stated in the Council of Ministers['] Decision shall benefit from the Tax Incentives[,] whether such projects are established before or after the issuance of the Council of Ministers['] Decision.[] The Tax Incentives set out in the Council of Ministers['] Decision shall apply as of the year in which the project starts to benefit from the Tax Incentives up to ten years in respect of the taxable years commencing and ending on or after the date of issuance of the Council of Ministers['] Decision.⁹⁴⁶

K. Note regarding taxes levied on Saudi M&A transactions

A British lawyer who works in Saudi Arabia, Mr. Abdukhalilov, raises an interesting issue regarding tax in Saudi Arabia on M&A transactions; the issue of the limitation period.⁹⁴⁷ He advises the acquiring company to make sure that it checks the target company's certificates of Zakat and tax issued by the Department of Zakat and Income Tax, as well as the filings for previous financial years.⁹⁴⁸ He also states that while Zakat has no limitation period, there is a five-year limitation period for tax liability, which means that the buyer must ask for “all pre-completion zakat and tax liabilities of the target company.”⁹⁴⁹

⁹⁴⁶ *Id.*

⁹⁴⁷ Abdukhalilov, *supra* note 109.

⁹⁴⁸ *Id.*

⁹⁴⁹ *Id.*

L. Tax practice for law firms in Saudi Arabia⁹⁵⁰

As mentioned earlier, the author interviewed several lawyers and inquired how they work with taxes when they handle M&A transactions in Saudi Arabia. The lawyers explained that they include a disclaimer or a note in the engagement letter that they sign with clients that states that they are not responsible for tax issues. The author viewed one of these provisions, which stated that the firm excludes tax advice from its duty: “Please also note that under KSA laws, we are limited in our ability to provide tax advice. Tax specific issues related to any commercial activity in KSA should be sought from an accountancy firm licensed to practice in KSA.”⁹⁵¹ The author’s research has shown that Zakat and income tax advice in Saudi Arabia is provided by accounting firms. Law firms do not offer tax-related counsel. The author spoke with several Saudi lawyers and also with several British and American lawyers who work in Saudi; all of these sources confirmed that law firms operating in Saudi are prohibited from providing Zakat or income tax advice in Saudi Arabia.⁹⁵²

M. The need for expert judges in tax cases—Saudi-British Bank v. Department of Zakat and Income Tax⁹⁵³ 2013^{954, 955}

The Saudi-British Bank (the Plaintiff) filed a case against the Department of Zakat and Income Tax (the Defendant) to force the Defendant to rescind its decision⁹⁵⁶ to refuse to deduct

⁹⁵⁰ During the course of this research, the author interviewed many lawyers, and did not encounter any lawyer who advises in tax. In fact, most say that they do not think there are any lawyers in Saudi who advise on Saudi tax matters. They say that accountancy firms deal with tax.

⁹⁵¹ A well-known law firm in Saudi Arabia.

⁹⁵² Also see Rules Governing Licensing to Provide Zakat and Income Tax Services, available at <http://www.mci.gov.sa/en/LawsRegulations/LicensingRegulationsAndDecisions/Resolutionsoftheliberaprofessions/3-11/Pages/3-41.aspx> (last visited March 29, 2016).

⁹⁵³ Decision number 8/E/D/375 for the case number K/1/4917 from the Board of Grievances Administrative Court, 8th Circle.

⁹⁵⁴ The case was initially was filed in 2009 and the decision was made in 2013.

⁹⁵⁵ This dissertation is the first scholarly work to discuss this case publicly. One of the difficulties in evaluating such a case is obtaining cases records from the court. The public do not have access to search into cases.

two sets of losses from the Plaintiff's 2003 tax base: certain operating losses in the amount of SAR 7,659,357 million (USD 2 million), and certain other losses on fixed assets not offered for sale in the amount of SAR 3.943.513 million (USD 1 million).

The plaintiff argued that the Defendant's decision violated Article 14 (d) of the Income Tax Law (1950),⁹⁵⁷ which states that losses are deductible from taxable income if these losses⁹⁵⁸ are realized and not reimbursed in any way. The Plaintiff also argued that the Defendant violated Islamic principles by requiring Zakat on capital that should not have been considered subject to Zakat, because most of the money in dispute was either debt owed by people who did not have the funds to pay it, or it was money that was stolen. The Plaintiff argued that Zakat is only required after the passing of one year, and only from those that have the money in hand to pay it.⁹⁵⁹ The Defendant contended that the Plaintiff did not prove that it had exhausted all regulatory efforts to retrieve this money, as required by Law and by the precedent of other, similar cases. The Plaintiff replied that it had pursued all means to retrieve the funds and provided the court and the Defendant with evidence of the detailed process it had followed to try to retrieve the money. The court was convinced that the Plaintiff had attempted all methods of retrieving the

⁹⁵⁶ That means that the case is an administrative case before the Board of Grievances, because it was brought against a governmental agency's decision, which is reviewed by the administrative courts in the Board of Grievances.

⁹⁵⁷ This Article was in the old Income Tax code. It became Article 9 (3) A, B, C, D, E and F of the Regulation of Income Tax Law, which was enacted in 2004. Available in Arabic at <https://dzit.gov.sa/regulations>.

⁹⁵⁸ One of the issues is that the court here uses here the word "losses," while the law calls loans that were not paid "expenses" that are deductible. The conclusion is the same, but using the wrong word confuses the reader and shows that the concepts of tax and its disputes are new to Saudi Arabian courts. This also shows that complications may arise when there are tax disputes on M&A issues. Finally, this case also demonstrates the need to improve the Saudi judicial system in handling tax issues in association with the Department of Zakat and Income Tax.

⁹⁵⁹ Another issue evident in this case is that the court used the words "Zakat" and "tax" interchangeably in some cases, and they are completely different. Tax is governed by the Income Tax Law and Zakat is governed by Zakat regulations, which were enacted in 1950. In the case, the Plaintiff in some places argued that Islamic rules prohibit imposing Zakat on money that was loaned to a person if the person went bankrupt because the money did not exist anymore. The court did not seem to object the argument. The criticism is that the court should have made it clear whether the Plaintiff is subject to tax or Zakat, because the result would be different depending on which set of regulations—the Income Tax Law and its regulations or the Zakat regulations—would apply.

money, which meant that its losses were deductible. Therefore, the court concluded that the decision of the Department of Zakat and Income Tax should be rescinded.

Judges who review tax cases in Saudi Arabia must be aware of the Saudi tax system and its terminology. The writing of a court opinion must conform to Saudi Income Tax Law, especially if it uses phrases that are mentioned in the Income Tax Law. In writing opinions, the court also must define any phrases that may confuse the reader; the author pointedly raises this issue out of an awareness of the difference between Islamic Law and others schools of legal thought. Specifically, because most judges in Saudi Arabia have studied Islamic Law, which (again) differs in many ways in principle and expression from other legal systems, Saudi judges may express their ideas in a manner that uses expressions or makes assumptions that are unique to Islamic law. Such language may be natural to these judges, but this language will not be natural to readers that are unfamiliar with Islamic law. One example is the Zakat system, which originates in Islamic jurisprudence but is quite different in intent and practice from the income tax system. Most judges have been introduced to Zakat, but most have not been introduced to the Income Tax Law, which did not exist until 2004. As few tax cases have been published, the author encourages courts to publish tax cases. Doing so may give the public a better understanding of how the courts tend to review tax cases, and it may also provide opportunities for judges to learn how their review of tax cases might be enhanced and improved.

N. An answer published by the Department of Zakat and Income Tax

The following answer was published by the DZIT to answer a question raised by the public.

Q: “A Bahraini Insurance company whose partners are Bahrainis and Saudis has established an insurance company in Saudi Arabia under the Cooperative Insurance System. The new company has acquired all operations, customers, offices and staff of the Bahraini company in the Kingdom in return for shares in the new company[,] for the

partners in the Bahraini company provided those partners dispose [sic] of their shares in the Bahraini company to the new company. Is this transaction subject to tax, or is it just an exchange of shares that result [sic] in no profit or loss to the Bahraini company?

A: “There is a taxable disposition in this case. The gain from such disposition is the difference between the compensation received for the disposed asset and its cost base. Under Article (9) (h, I, and l) of the Income Tax Law, the compensation received is not necessarily in cash; in kind compensation in [the] form of shares in the new company is deemed to be cash compensation. Therefore, the capital gain realized from this transaction is taxable.”⁹⁶⁰

O. Questions for the Department of Zakat and Income Tax regarding M&A⁹⁶¹

The author interviewed the Director General of the Department of Zakat and Income Tax, Ibrahim bin Mohammed Al Mefleh, on more than one occasion in order to gain a better understanding of the role of his Department in the process of an M&A transaction. The author was also very interested to learn more about how the Department of Zakat and Income Tax deals with forms of transactions (such as M&A) that are relatively new in Saudi Arabia. The author is the first person to have approached members of the Department with questions about M&A; further, the Department’s answers on various topics are published for the first time here in this paper. The author intends in this way to make a significant contribution to M&A lawyers and financial and accounting experts who work on M&A in Saudi Arabia. More importantly, the information provided in this paper may give corporations and investors, especially foreign investors, insight into how to structure their investments in Saudi Arabia.

⁹⁶⁰ The Department of Zakat and Income Tax, available at https://dzit.gov.sa/en/faq/-/asset_publisher/KGssb5PBvP2M/content/a-bahraini-insurance-company-whose-?redirect=https%3A%2F%2Fdzit.gov.sa%2Fen%2Ffaq%3Fp_p_id%3D101_INSTANCE_KGssb5PBvP2M%26p_p_lifecycle%3D0%26p_p_state%3Dnormal%26p_p_mode%3Dview%26p_p_col_id%3Dcolumn-3%26p_p_col_pos%3D1%26p_p_col_count%3D2 (last visited January 5, 2015).

⁹⁶¹ The author would like to take the opportunity here to thank the representatives of the Department of Zakat and Income Tax, in particular its Director General, for their support and great help. They were open to questions and very willing to help. They were modern in their methods, and the author would like to note how the Department was open to any ideas and suggestions that might help it achieve the best performance possible.

1. The relationship between the Department of Zakat and Income Tax and M&A transactions

Before the author's question and the answer session with members of the Department of Zakat and Income Tax, the author requested that the representative from the Department explain how the Department views M&A. The representative stated that "[a] merger or acquisition is a combination of two entities where one entity is absorbed by another entity. In order to effect an acquisition or a merger, the following should be done:

- 1- Obtain approval of [the] relevant regulatory agency, such as [the] Ministry of Commerce and Industry and/or the Capital Market Authority.
- 2- Have a financial statement showing [the] assets, liabilities, and equity of the absorbed/acquired entity at the date of [the] acquisition or merger.
- 3- Settle all tax and zakat liabilities and close the file of the absorbed/acquired entity with the Department of Zakat and Income Tax (DZIT)."⁹⁶²

2. Filing a tax or Zakat statement before consummating a transaction

Q1: The author asked the DZIT representative whether, in the case of an M&A transaction between two companies of which at least one is foreign, a tax document related to the merger showing that the company/companies had paid its/their tax must be filed. The author also asked whether companies must file a Zakat document (again, showing that any Zakat owed had been paid) before the consummation of a merger or acquisition transaction in a case in which at least one of the parties is Saudi.

A1: "Yes. The absorbed/acquired company should settle all its tax and [Z]akat liabilities, close its file and get a final certificate from DZIT."⁹⁶³

⁹⁶² A direct statement made to the author by a representative of the Department of Zakat and Income Tax.

⁹⁶³ A direct answer provided to the author by a representative of the Department of Zakat and Income Tax.

3. Does structuring the transaction in a certain way affect the tax and Zakat income?

Q2: The author asked the DZIT representative whether an M&A transaction can be structured in any way in Saudi Arabia that would reduce the amount of tax that must be paid. The author cited cases in certain other countries in which the structure of the M&A deal can affect the amount of tax that is levied. The author proposed a strategy in which a Saudi M&A transaction would be structured to include mostly Saudis, who would owe at most the 2.5% Zakat, and a minimal number of foreign investors, who would be taxed at 20%, in order to limit the number of people (e.g., the foreign investors) taxed at 20%.

A2: The DZIT representative agreed that “[a]n entity could be formed with most of its shares held by Saudis, and there is no legal prevention for that.”⁹⁶⁴

Q3: The author asked the DZIT representative how the DZIT views statutes of limitations, or the so-called limitation period. The author also asked what the acquirer of a company must examine before buying the company, especially in a case in which the acquired company did not pay taxes owed or had an incomplete financial report.

A3: The DZIT representative answered that “[t]he statute of limitations regards the period [in which the] DZIT can make an assessment or reassessment on tax or zakat payers. DZIT can make a reassessment of a filed return within a period of 5 years of the date of filing. But in case of non-filing, incomplete or incorrect filing with the intent of tax evasion, DZIT can make a reassessment during a period of 10 years of the date of filing. The Statute of limitations concerns the period of assessment and refund[,] not the tax or zakat liabilities. As indicated above, the absorbed/acquired entity should settle all its liabilities, close its file and get a final certificate

⁹⁶⁴ A direct answer provided to the author by a representative of the Department of Zakat and Income Tax.

from DZIT before the acquisition or merger transaction.”⁹⁶⁵ This answer agrees with the advice of Mr. Abdukhalilov cited earlier in this chapter that buyers should seek an indemnity if the acquired company has an incomplete or incorrect financial report.

4. Scenarios answered by the Department of Zakat and Income Tax

a. Question 1

What is the tax treatment for the following scenario?

CartCo Company is a listed company with three shareholders: 25% is owned by the public, 25% is owned by a foreign investor and 50% is owned by a Saudi investor.

What would the tax treatment be if CartCo is merged into SoulCo, a Saudi company, and 100% of the shares of CartCo were transferred to SoulCo, and the consideration were cash? Would the tax be due before the deal was completed or rather by the end of SoulCo's financial year? Would the companies have to file and pay tax to the Department as a condition of consummating the transaction? Would the tax treatment be different if the consideration were shares; that is to say, if SoulCo increased its capital and issued shares to CartCo shareholders as payment for the merger? Would the tax treatment change if the companies were private or closely held?

The Department of Zakat and Income Tax answered as follows:

The tax treatment of the above scenario will be as follows:

First: CartCo is subject to income tax on its income from the beginning of its financial period to the date of [the] merge[r] in [sic] regard to the foreign share (25%). CartCo is required to file a return based on its accounts for the period up to the date of the merge[r], meaning that CartCo should settle that tax and close its file with DZIT prior to completing the merge[r] transaction; [it should take these actions] as CartCo, a corporate [entity] with [a] financial position independent of SoulCo. The completion of the merge[r] means the termination and disappearance of CartCo.

⁹⁶⁵ A direct answer provided to the author by the Department of Zakat and Income Tax.

Second: The capital gain earned by [the] non-resident founding shareholders (Saudis and non-Saudis alike) is subject to income tax at a rate of 20% in accordance [with the] Income Tax Law (ITL), Article (5) and its Implementing Regulations (IR), Article (1), paragraph (2b).

Third: The capital gain earned by [the] non-resident public shareholders (Saudis [and] non-Saudis alike) is subject to income tax at a rate of 20% in accordance [with] ITL, Article (5) and IR, Article (1), paragraph (2b)[,] unless it is a tax-exempt income in accordance with ITL, Article (10), and IR, Article (7). Companies that are private or closely held cannot benefit from the exemption stipulated in ITL, Article (10) or IR, Article (7)[,] as merge[r] transaction[s] for these companies will take place outside the stock market authority.

Fourth: SoulCo will be subject to tax or Zakat, as the case may be, on its net income for [the entire] financial period during which the merge[r] has taken place. SoulCo is required to file its tax and or Zakat return (as the case may be after [the] merge[r]) based on accounts for the whole financial period and pay its due Zakat and tax accordingly.

Fifth: The treatment is the same whether the consideration is cash or shares, taking into account that foreign shares transferred to SoulCo will be subject to ITL provisions.⁹⁶⁶

b. Question 2

YukCo is a private company and has three shareholders: 25% is owned by a Saudi investor, 25% is owned by a foreign investor and 50% is owned by a Saudi investor. YukCo merges into BuCo, a private company.

What is the tax treatment if the consideration is cash?

What is the tax treatment if the consideration is stock?

What is the tax treatment if the transaction were an acquisition?

The Department of Zakat and Income Tax answered as follows:

“See the answer[s] to 1 above.

The merge[r] is the transfer of an entity's (or entities') net assets, liabilities and equity to a new or existing company[;] therefore, a merge[r] can be looked at as an acquisition of some type.”⁹⁶⁷

⁹⁶⁶ The Department of Zakat and Income Tax's answer sent to the author via email.

⁹⁶⁷ *Id.*

c. Question 3

In case of a company owned 50% by Saudi shareholders and 50% by foreign shareholders, and in which dividends are distributed, when are the taxes on these dividends assessed and when must the shareholders pay them? Are taxes filed and paid immediately or at the end of the financial year? How is the Zakat assessed?

The Department of Zakat and Income Tax answered as follows:

In such case, the non-resident shareholders (Saudis and non-Saudis alike) are subject to withholding tax at a rate of 5% of [the] gross amount distributed in accordance with IR, Article 63, paragraph 1. The distributing company is required to withhold that tax and remit it to DZIT within the first ten days of the month following the month of payment to the non-resident beneficiary. This is, of course, separate from the distributing company[’s] own tax or zakat; the distributing company will be subject to the ITL provisions in regard to non-Saudi shares and to zakat provisions in regard to Saudi shares. The company is required to file its [Z]ak[a]t/tax return after the end of its financial period and should pay due [Z]akat and tax accordingly.⁹⁶⁸

§7.3. Application of Rules to M&A

A. Introduction

This subsection addresses the rules that govern M&A transactions in Saudi Arabia, and it also provides a summary of the tax treatment of M&A transactions in the United States. The tax system in the US is complicated and unique to that country; its provisions do not fit the situation in Saudi Arabia. In comparing the two countries’ M&A regulations, the author wishes only to encourage Saudi Arabia to issue a minimum of rules that demonstrate its policy toward M&A transactions. This would provide for the equal treatment of all M&A transactions in Saudi, and would amend the current situation in which M&A transactions in Saudi are governed only by a set of generic rules, which are so broadly worded that their application sometimes varies from

⁹⁶⁸ *Id.*

one transactional situation to another. The following tax rule will apply to the non-Saudi shares of a joint-stock company.

B. Stock acquisition

1. Acquisition of stock of closely held corporations in Saudi Arabia⁹⁶⁹

a. Introduction

The Saudi Income Tax Law lacks specific rules that govern M&A transactions; it contains only general rules that apply to all M&A transactions, regardless of whether the consideration is in the form of cash or stock.

b. Cash

If a closely held acquiring corporation acquires the stock of a closely held target corporation and the consideration is cash, the transaction is taxed on the capital gain realized⁹⁷⁰ on the non-Saudi shares, according to Article 8 of the Saudi Income Tax Law. Article 8 of the Saudi Income Tax Law reads as follows:

Taxable income is the gross income including all revenues, profits, and gains of any type and of any form of payment resulted from carrying out an activity, including capital gains and any incidental revenues, minus exempted income.⁹⁷¹

Also, according to Article 1 (1) (b) of the Implementing Regulation of the Saudi Income Tax Law, income is taxed if the income is a capital gain that results from the disposal of assets, or if the income is a capital gain that results from the disposal of shares of a resident company.⁹⁷²

⁹⁶⁹ The following sections regarding the Saudi tax as applied to M&A transactions is addressed only under the Saudi Income Tax Law. Therefore, these sections do not discuss the Zakat application on Saudi citizens, because Zakat has a different system and approach. The focus here is limited to analyzing and providing solutions or suggestions to improve the Saudi Income Tax Law. The main reform needed is to explicitly address M&A transactions in specific rules.

⁹⁷⁰ As a general rule, capital gains can be calculated by taking the difference between the greater of the transaction price or the market price, and the cost basis of the stock or assets, according to Article 9 (a) of the Saudi Income Tax Law and according to Article 16 (7) (a), (b) of the Implementing Regulation of the Saudi Income Tax Law.

⁹⁷¹ The Saudi Income Tax Law, art. 8.

⁹⁷² The Implementing Regulation of the Saudi Income Tax Law, art. 1(1)(b).

c. Stock

If a closely held acquiring corporation acquires the stock of closely held target corporation in exchange for shares of the acquiring corporation, the general rule stipulated in Article 8 of the Saudi Income Tax Law and Article 1 (1) (b) applies, which means that any capital gain on the non-Saudi shares that is realized is taxed regardless of the form of consideration provided, and that therefore, the transaction is a taxable transaction.

2. Acquisition of stock of closely held corporations in the US

a. Introduction

The tax system in the United States is governed by the US Department of the Treasury's Internal Revenue Code.⁹⁷³ M&A transactions are also governed by the Internal Revenue Code.⁹⁷⁴ The brief presentation in this section regarding the US tax treatment of M&A focuses on what the US tax code recognizes as the C Corporation.⁹⁷⁵ The difference between a C corporation and an S corporation is that a C corporation is taxed separately from its shareholders; this means that the C corporation is subject to tax on ordinary income and capital gains at the corporate level at a maximum 35% tax rate, while the shareholders of the C corporation are subject to tax on capital gain and dividends at the shareholder level at a maximum 20% tax rate.⁹⁷⁶ The S corporation is not subject to tax at the corporate level, because the S corporation passes all of its income and losses on to the shareholders.⁹⁷⁷

The main factor governing whether a merger or acquisition is taxed or tax free in the US is the form of consideration provided in the transaction.⁹⁷⁸ When a certain percentage of the

⁹⁷³ JOHN A. MILLER AND JEFFERY A. MAINE, *THE FUNDAMENTALS OF FEDERAL TAXATION*, 3rd ed, 7 (Durham, North Carolina, Carolina Academic Press, 2013).

⁹⁷⁴ THOMPSON, JR., *supra* note 490, at 391.

⁹⁷⁵ *Id.* at 392.

⁹⁷⁶ *Id.* at 392-93.

⁹⁷⁷ *Id.*

⁹⁷⁸ *Id.* at 395.

consideration provided by the acquiring corporation is in form of “boot” (cash or debt instruments other than stock), the transaction is taxable.⁹⁷⁹ Under specific conditions, if a significant part of the consideration provided by the acquiring corporation is stock, the transaction receives nonrecognition treatment, known as a “reorganization” under Section 368 of the Internal Revenue Code, which gives the transaction a tax-free treatment.⁹⁸⁰ The nonrecognition treatment or tax-free status essentially means that the tax is postponed or deferred until a taxable event occurs that triggers the recognition of income or capital gain.⁹⁸¹ The reason for the tax-free treatment is that no change occurred in the economic position of the parties involved as a result of the transaction.⁹⁸²

b. Cash

Under US tax law, if stock of a closely held corporation is acquired in consideration of cash, the acquisition is considered a taxable stock acquisition.⁹⁸³ The target’s shareholders are taxed for capital gain on the money they receive upon the sale of the stock.⁹⁸⁴ The target corporation is not taxed at the corporate level if it sells its stock and the basis of its assets does not change, except in a case in which the acquirer elects Section 338 of the Internal Revenue Code, which causes the transaction to have an assets acquisition treatment.⁹⁸⁵ The election of Section 338 by the acquiring corporation causes the transaction to be treated like an asset transaction and gives it the advantage of receiving a “stepped up” basis for the target’s assets.⁹⁸⁶ The stepped up basis means that the acquiring corporation’s basis for the assets acquired is equal

⁹⁷⁹ *Id.*

⁹⁸⁰ *Id.* at 395-96.

⁹⁸¹ *Id.* at 395. See also MILLER AND MAINE, *supra* note 973, at 317.

⁹⁸² *Id.*

⁹⁸³ THOMPSON, JR., *supra* note 490, at 397.

⁹⁸⁴ *Id.*

⁹⁸⁵ *Id.* at 398.

⁹⁸⁶ *Id.*

to the money paid for the assets.⁹⁸⁷ The acquirer generally receives the tax basis of the target's stock, unless the acquirer chooses to elect Section 338; in that case, the acquirer will receive the new basis of the target's assets—in other words, the new market value of the target's assets.⁹⁸⁸

c. Stock

As a general rule, an exchanged stock receives nonrecognition treatment under Section 354 of the Internal Revenue Code.⁹⁸⁹ In a case where boot (e.g., money) is also used as additional consideration in the transaction, the gain realized from the money received by the target's shareholders is recognized under Section 356 of the Code.⁹⁹⁰

Under US tax law, if the stock of a closely held target corporation is acquired and the consideration is stock, the transaction is non-taxable.⁹⁹¹ A stock for stock acquisition can be treated as a tax-free acquisitive reorganization, known as a B reorganization, under Section 368 (a) (1) (B) of the Code, if the closely held target corporation exchanges 80% of its voting rights for stock in the acquiring corporation.⁹⁹² To qualify under this type of reorganization and have tax-free treatment, cash is not allowed as a form of payment.⁹⁹³ Stock received by the shareholders of the target and the acquirer is not taxed, which means that the shareholders of the closely held target corporation receive the same basis that they had for their shares previously in the stock of the acquiring corporation; this is known as a substituted basis.⁹⁹⁴ Also, the acquiring corporation takes the basis of the shareholders of the closely held corporation, which is known as a carryover basis.⁹⁹⁵

⁹⁸⁷ *Id.*

⁹⁸⁸ *Id.*

⁹⁸⁹ *Id.* at 407.

⁹⁹⁰ *Id.*

⁹⁹¹ *Id.* at 398.

⁹⁹² *Id.* at 412.

⁹⁹³ *Id.*

⁹⁹⁴ *Id.* at 413.

⁹⁹⁵ *Id.*

C. Assets acquisition

1. Acquisition of assets of closely held corporations in Saudi Arabia

a. Cash

If a closely held acquiring corporation acquires the assets of closely held target corporation and the consideration is cash, the general rule of Article 8 of the Saudi Income Tax Law applies. According to Article 1 (1) (b), any capital gain realized is taxed, regardless of the form of consideration provided; therefore, the transaction is also a taxable transaction.⁹⁹⁶ The shareholders of the target corporation are not taxed upon the liquidation of the target as a result of the assets acquisition.

b. Stock

If a closely held acquiring corporation acquires the assets of a closely held target corporation in exchange for shares in the acquiring corporation, the general rule of Article 8 of the Saudi Income Tax Law and Article 1 (1) (b) applies; this means that any capital gain realized is taxed, regardless of the form of consideration provided, and that therefore, the transaction is a taxable transaction. The shareholders of the target corporation are not taxed upon the liquidation of the target as a result of the assets acquisition.

2. Acquisition of assets of closely held corporations in the US

a. Cash

Under US tax law, if the assets of a closely held target corporation are acquired in exchange for cash, the acquisition is a taxable acquisition.⁹⁹⁷ The shareholders of the closely held target corporation are taxed for the capital gain on the proceeds they receive after the liquidation

⁹⁹⁶ The Implementing Regulation of the Saudi Income Tax Law, art. 1(1)(b).

⁹⁹⁷ THOMPSON, JR., *supra* note 490, at 399.

of the target as a result of the assets acquisition.⁹⁹⁸ At the corporate level, the target of a closely held corporation is taxed on the gain realized for its direct sale of assets.⁹⁹⁹ The acquiring corporation takes the tax basis that is equal to the price paid for the assets of the closely held target corporation, which is the cost basis.¹⁰⁰⁰

b. Stock

Under US tax law, if all or substantially all of the assets of a closely held corporation are acquired in exchange for stock in the acquiring corporation, the acquisition is considered a tax-free acquisitive reorganization, known as a C reorganization under Section 368 (a) (1) (C) of the Code, assuming that the boot condition is met.¹⁰⁰¹ In order to treat the assets in a stock acquisition as a tax-free reorganization, the consideration of cash can be paid but cannot exceed 20% of the value of the transaction.¹⁰⁰² The shareholders of the closely held target corporation are taxed on capital gains realized on any cash they may have received in a case when a portion of the consideration was cash.¹⁰⁰³ The shareholders of the closely held corporation will receive the basis they previously had in their stock for any stock they receive in the acquiring corporation; this is also known as the substituted basis, and the acquiring corporation will take the basis of the assets of the closely held target corporation, which is the carryover basis.¹⁰⁰⁴

⁹⁹⁸ *Id.* at 397.

⁹⁹⁹ *Id.* at 398.

¹⁰⁰⁰ *Id.*

¹⁰⁰¹ *Id.* at 410.

¹⁰⁰² *Id.*

¹⁰⁰³ *Id.* at 409 and 411.

¹⁰⁰⁴ *Id.* at 411.

D. Merger of target corporation into acquiring corporation

1. Merger of target corporation into acquiring corporation in Saudi Arabia

When a target corporation merges into an acquiring corporation, Article 8's general rule applies; this means that any capital gain that is realized on non-Saudi shares will be taxed according to Article 8 of the Saudi Income Tax Law, regardless of whether the consideration is cash or stock. No tax is imposed on the shareholders.

2. Merger of target corporation into acquiring corporation in the US

Under US tax law, if a closely held corporation merges into an acquiring corporation in exchange for stock in the acquiring corporation, the merger may be treated as a tax-free reorganization known as an A reorganization under Section 368(a) (1) (A) of the Code, if certain conditions are met.¹⁰⁰⁵ The conditions that must be met in order for the merger of closely held target corporation into an acquiring corporation to qualify as an A reorganization and receive tax-free treatment are that (a) the shareholders of the closely held target corporation receive shares in the acquiring corporation in what is known as a "continuity of interest"; (b) the business of the closely held target corporation continues after the merger in what is known as the "continuity of the business enterprise"; and (c) the transaction must not be structured as such only for the purpose of avoiding tax in what is known as "business purpose."¹⁰⁰⁶ In order for the merger of a closely held corporation into an acquiring corporation to qualify as an A reorganization, a minimum of 40% of the stock of the acquiring corporation must be paid to the closely held target corporation's shareholders.¹⁰⁰⁷

¹⁰⁰⁵ *Id.* at 407-08.

¹⁰⁰⁶ *Id.* at 407.

¹⁰⁰⁷ *Id.*

If all of the conditions of an A reorganization are met, the closely held target corporation's shareholders receive nonrecognition treatment on the shares they receive in the acquiring corporation, and they receive the basis of the stock of the acquiring corporation—the substituted basis—for these shares.¹⁰⁰⁸ The money received by the closely held corporation is taxed on any capital gain realized from the merger.¹⁰⁰⁹ The acquiring corporation takes the basis of the closely held corporation, which is the carryover basis.¹⁰¹⁰

E. Acquisition of stock of publicly held corporations through tender offers governed by the M&A Regulation

1. Acquisition of stock of publicly held corporations through tender offers governed by the M&A Regulation in Saudi Arabia

If a publicly-held target corporation is acquired through a tender offer that falls under the Saudi M&A Regulation, any capital gain realized is exempted from income taxation, according to Article 10 (a):

The following types of income are exempt from income tax:

(a) [C]apital gains realized from disposal of securities traded in the Stock Market in the Kingdom in accordance with restrictions specified in the Regulations.¹⁰¹¹

Article 7 of the Implementing Regulation of the Saudi Income Tax Law states that a capital gain is exempted from income tax if the gain realized resulted from the disposal of securities traded under the following conditions: 1) if the transaction is consummated in the stock market in Saudi Arabia; and 2) that the investment in which such securities were disposed did not occur before this Law becomes effective.¹⁰¹²

¹⁰⁰⁸ *Id.* at 408.

¹⁰⁰⁹ *Id.*

¹⁰¹⁰ *Id.*

¹⁰¹¹ The Saudi Income Tax Law, art. 10(a).

¹⁰¹² The Implementing Regulation of Saudi Income Tax Law, art. 7(1)(2).

2. Acquisition of stock of publicly held target corporations through tender offers governed by M&A regulations in the US

Under US tax law, the acquisition of a publicly held corporation is usually accomplished through a reverse subsidiary merger.¹⁰¹³ The acquisition can be structured as follows: a subsidiary is formed and provided with the consideration needed to make the acquisition.¹⁰¹⁴ The target merges into the acquiring subsidiary and the target shareholders receive cash.¹⁰¹⁵ Under this transactional structure, the tax treatment is as follows: there is no tax levied against the subsidiary, and the target is treated as tax free and takes the same basis for its assets that it held before the acquisition—except in cases in which the acquirer elects Section 388, which gives the target's assets a stepped basis and recognizes capital gain on the assets.¹⁰¹⁶ The shareholders of the target are taxed on the cash they receive as capital gains.¹⁰¹⁷ If the consideration paid to the shareholders of the target company comprises a mix of at least 80% stock in the acquiring company's parent and 20% boot, the transaction qualifies as a tax-free transaction under the E reorganization.¹⁰¹⁸

In the case of the acquisition of a publicly-held corporation via a tender offer followed by a reverse subsidiary merger, the tender offer is taxed, because it is in cash; the reverse subsidiary merger is taxed the same as a taxable stock acquisition, which was discussed above.¹⁰¹⁹

¹⁰¹³ THOMPSON, JR., *supra* note 490, at 400-01.

¹⁰¹⁴ *Id.* at 400.

¹⁰¹⁵ *Id.*

¹⁰¹⁶ *Id.* at 401.

¹⁰¹⁷ *Id.* at 400.

¹⁰¹⁸ *Id.* at 412.

¹⁰¹⁹ 2 SAMUEL THOMPSON, JR., *MERGERS, ACQUISITIONS AND TENDER OFFERS*, § 9:11.2 9-104 (Practicing Law Institute, New York, 2015).

§7.4. Summary

M&A is a relatively new financial concept in Saudi Arabia, and Saudi law does not contain specific tax rules that govern it. Therefore, the Department of Zakat and Income Tax applies general rules as stipulated in the Income Tax Code and the Implementing Regulation of the Income Tax Law; the Department also applies the general principles of Zakat. Moreover, the Department of Zakat and Income Tax deals with M&A transactions on a case-by-case basis. This practice may cause unequal treatment for companies that enter into M&A deals, as there is no single, known standard. Finally, most often, companies do not know precisely the final tax treatment that their transaction may receive; they can only make an educated guess and then wait for the DZIT to render decision.

An overview of the US tax system's treatment of M&A has been presented to show that it focuses mostly on the consideration provided by the acquirer to determine if a transaction is taxable or tax free. If the transaction does not cause an economic change for a taxpaying party, then US law holds that the taxpayer should have the opportunity to defer the tax. The author argues that Saudi legislators should adopt rules that make clear Saudi's approach to governing M&A transactions. For instance, a provision should be enacted that states that when no cash is involved in the transaction, it shall be deemed tax free. Overall, the Saudi legislature should develop rules for handling M&A transactions that support the Kingdom's intentions toward M&A activity in Saudi Arabia—does the legislature want to encourage M&A or not? In addition to the need for rules specific to M&A in Saudi Arabia, Saudi Arabia also needs to revise its tax policies. The tax rate is crucial for two reasons. First, Saudi Arabia does not need to rely substantially on tax for its economy, given its leadership in global energy; therefore, Saudi Arabia should reduce its tax rate and provide corporate incentives so that the Kingdom may

become more competitive in attracting foreign investors and multi-national corporations to invest in Saudi Arabia.

§7.5. Recommendations¹⁰²⁰

- 1- The Saudi legislature should adopt rules that govern M&A transactions and demonstrate its position regarding M&A. For instance, if no cash is involved, a transaction should be deemed tax free. Saudi Arabia needs to amend its Income Tax Law and incorporate rules that cover the issues likely to arise in the course of M&A transactions. M&A in Saudi has been increasing rapidly; the lack of a clear, known standard of rules and requirements for M&A activity may cause difficulties for companies engaging in these transactions and may also cause unequal and/or unfair treatment of various companies from one deal to the next. The author makes these recommendations after concluding that the Department of Zakat and Income Tax has only the general rules contained in the Income Tax Law to refer to in regulating M&A. The Income Tax Law should include a chapter devoted specifically to M&A issues.
- 2- Under the Saudi Income Tax Law, a merger is taxable regardless of whether the consideration is cash or stock. The Department of Zakat and Income Tax applies a general rule to mergers without any regard to the consideration provided. The Saudi Income Tax Law does not provide any special treatment for a merger in which the consideration provided to the target's shareholders is stock in the acquiring corporation. The Saudi Income Tax Law should not tax a merger if the consideration provided is stock in the acquiring corporation.

¹⁰²⁰ The author proposes these recommendations because the law is silent regarding M&A issues.

- 3- The Saudi Zakat Regulation contains 20 articles that were enacted in 1950 during the founding King's lifetime; this means that the current Zakat Regulation is not written to cope with the modern corporate era. Moreover, Islamic jurisprudence is currently overwhelmed by a deep and highly contentious set of arguments among the different Islamic schools over various Zakat issues. Saudi Arabia should update its old Zakat code, including codifying rules that have emerged recently in Islamic jurisprudence, into a single modern Zakat code written using modern terminology that includes and addresses modern corporate practices. This suggested revision of the Zakat code should be undertaken after the Department has reached a conclusion about how M&A transactions fit within the context of Zakat principles.¹⁰²¹
- 4- Courts should be more efficient (i.e., timely) in making decisions, especially in cases that involve corporate taxes. As noted in the case study described earlier in this paper, the court in some cases has taken up to 5 years to reach a decision.
- 5- Ministerial decisions and instructions regarding income tax and Zakat are made either by the Minister of Finance or the Director of the Department of Zakat and Income Tax. These decisions and instructions should be incorporated into the Income Tax Law and Zakat Regulation in the form of amendments.

¹⁰²¹ Reaching a conclusion within Islamic jurisprudence about where M&A falls in terms of Zakat rules will have to occur in several stages. First, the new situation (*Nazilah* or *Nawazil*) must be well understood as it is (*takyeeef*). Second, it must be determined whether a given situation is mentioned in the *Qur'an* or *Sunnah*. If it is mentioned, then rules will be applied. If it is not mentioned, research should be done within the community of Islamic jurisprudence to determine whether Islamic scholars and jurists have discussed the issue or something similar to it, and, if so, what rules or standards they have applied. Third, if there is no mention of the issue or a similar issue in Islamic jurisprudence, then the issue need not involve any prohibitions by the *Qur'an* or *Sunnah*, keeping in mind that the default rule is that any dealing or action is permissible under Sharia Law unless the *Qur'an* or *Sunnah* contains text that specifically stipulates otherwise.

Chapter 8: Summary and Recommendations

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This chapter summarizes all of the foregoing chapters and recommendations in this dissertation.

§8.1. Chapter 1

Chapter 1 provides an introduction to the dissertation.

§8.2. Chapter 2

Chapter 2 provides a comprehensive description of Saudi Arabia's legal system and introduces basic information about how Saudi Arabia handles mergers and acquisitions (M&A) transactions. The Chapter focuses primarily on the ministries, authorities and agencies most relevant to Saudi's M&A activity. The Chapter also describes the structure of Saudi Arabia as a kingdom (the Kingdom) and briefly discusses how the Kingdom functions.

§8.3. Chapter 3

Chapter 3 introduces the various business organizations that exist in Saudi Arabia, and it also presents information regarding changes that have been made recently to the Saudi Companies Law 1965—i.e., the enactment of the Saudi Companies Law 2015—that affect these organizations. The Chapter provides introductory information about Saudi's economy, business activities, stock market and business sectors. Most importantly, Chapter 3 discusses various M&A activities that have occurred in Saudi Arabia in the past three years in order to demonstrate the rise and importance of M&A activity in the Kingdom. As Chapter 3 demonstrates, Saudi has more M&A activity in a given year than any other country in its region.

§8.4. Chapter 4

Chapter 4 focuses on Saudi Antitrust law and how it affects the occurrence of M&A activity in the Kingdom. The Chapter discusses the pre-merger notification process, and it considers how the substance of M&A transactions is evaluated in Saudi Arabia under the Saudi Competition Law. In this Chapter, the author argues that significant reforms to the Saudi Competition Law and its Implementing Regulation are needed in order for Saudi to develop efficient M&A laws that are specific, well-defined and serve a clear purpose.

Recommendations

1. Pre-merger notification

- 1- The Competition Council should choose one method for the pre-merger notification. It should change the Competition Law to require either that every M&A transaction be approved by the Council before the transaction is completed, or to stipulate that the Council does not need to approve every M&A transaction. The author argues that as Saudi's Competition Law, and the practice of that Law, currently stands, the Council's approach does not comply with the Competition Law and its Implementing Regulation. For example, the Council has begun to require that every M&A transaction be filed, which is not what the Competition Law requires.
- 2- The Competition Council should make the full text of the cases it considers and the decisions it renders available to companies, lawyers, professors, economists, investors and many other parties. Doing so would raise awareness and transparency about the Council's policy, strategy and deliberations, as well as about the accuracy of its decisions. This would help companies and investors ensure that their investments comply with Saudi policy, and it would also help the Saudi government develop its policy toward

competition in the marketplace and develop appropriate protection measures through a process of case study, arguments, feedback, research and appeals.

- 3- The Competition Council should adopt a threshold system analogous to that used in the South African system, in which thresholds are set for various sizes of transactions, and transactions are reported to the Council only if they exceed a threshold. This change would require an amendment to the Competition Law to replace the 40% economic concentration doctrine with a threshold standard.
- 4- If the Competition Council adopts a threshold method, it will need to revise the threshold annually and modify it according to various factors: the size of the market, the size of the companies involved, consideration of consumer benefits, changes in pricing and certain other factors that tend to fluctuate from year to year.
- 5- The Competition Council needs to base its regulations, decisions and pre-notification requirements on rational economic reasoning that raises general awareness of the concepts of fair competition and monopoly. Simply setting a threshold for notification of an intended transaction, such as SAR 200 million (equivalent to USD 53 million), will not solve the 40% economic concentration issue. A transaction that occurs at a threshold of far less than SAR 200 million could give a company monopoly control in Saudi Arabia, especially if that company is engaged in a business sector that is struggling or has particularly high barriers to entry.
- 6- The Competition Council should state the methods it uses to evaluate whether an M&A transaction violates the Competition Law in Saudi Arabia, and these methods should be reliable and widely accepted. The Council should publish outlines or guidelines that companies may use to evaluate their proposed transactions at the beginning of the

transaction process. Most, if not all, articles (from both the academic and business sectors) that discuss issues of competition related to M&A activity in Saudi Arabia only touch upon broad issues; this does not add value to the field. However, the problem continues to be that even experts are not able to write about the specifics of M&A activity in Saudi Arabia because they lack of information about how the Competition Council evaluates requests for M&A transactions.

- 7- When it announces a new M&A application, the Competition Council should provide information regarding the value of the transaction and the value of the companies involved, so that the public can understand the size of the proposed transaction. Having read most of the Council's announcements published over the past 14 years, the author of this dissertation finds that none of them contains information regarding the value of the transaction or of the companies that seek to merge or acquire; this information is especially difficult to discover about private companies. The Competition Council should make amendments that specify what information it will provide regarding an economic concentration request. Because the Competition Law requires a transaction to be submitted for approval when it will result in a concentration that exceeds 40% of the market, the Law should specify what method companies should use to determine if their transaction will result in such a concentration. This will make entities aware of whether they need to notify the Competition Council of an intended transaction.
- 8- The Saudi Competition Council could provide an electronic calculator similar to the service provided by the South African Competition Commission's website. Such a tool may facilitate the process of the pre-merger notification and help parties determine whether they must notify the Competition Council of their proposed transaction. The

parties may need to consult with legal advisors as well, but a service such as an online calculator could serve as a basic tool, as well as facilitate a measurement of value that is more sophisticated than the simple 40% concentration standard.

- 9- The Competition Council should clarify whether it differentiates between the notification of the M&A transaction and the request concerning economic concentration. The Competition Council should state when companies must notify the Council, when companies must submit an economic concentration request, and when companies do not need to notify the Council about a transaction.
- 10- Filing fees should be determined relative to the size of the merger, as is the case in the South African Competition Act. The Saudi Arabian Competition Council imposes a flat fee of SAR 1000 for all types of transactions. A tiered fee system would benefit the Competition Council as M&A activity in Saudi grows.
- 11- The Saudi Competition Law should guide the Council as to how economic concentration should be reviewed in different regions. The law should determine if economic concentration in Saudi Arabia should be reviewed based on the 13 administrative areas, or based on the largest cities, such as Riyadh, Jeddah, Damam, Mecca and Medina.
- 12- The Saudi Competition Law should specify whether the Council should focus only on horizontal mergers, or whether it should also review vertical mergers and conglomerates. Neither the Law nor the Council specifies the types of mergers on which the Council should focus. Vertical and conglomerate mergers generally do not affect competition as much as horizontal mergers do. Including detailed guidelines would make the Saudi Competition Law more efficient both economically and administratively and would raise the awareness of investors and corporations about the focus of Saudi economic policy.

2. The substance

- 13- Categorizing mergers into small, intermediate and large, as the South African Competition Act does, is necessary for a country like Saudi Arabia. These categories would give Saudi Arabia a better understanding of the M&A activity in its market. It would also facilitate the process of the pre-merger notification for the Competition Council and also for the parties and investors concerned. Categorization would raise awareness of the scope and mechanisms of M&A transactions in Saudi Arabia, which would benefit interested investors, economists and lawmakers.
- 14- The Saudi Competition Law should require the Competition Council to choose a clear and certain mathematical or economic method for the evaluation of pre-merger notifications and merger review, and this method should be disclosed to the public. The author refers again to the example set by the South African Competition Act, Section 11 Subsection 3 (a), which requires the Minister of Trade and Industry and the Competition Commission to publicly “[set] out the proposed threshold and method of calculation for the purpose of this section.”
- 15- The Competition Council should provide a better explanation of some of the terms used in the Implementing Regulation of the Competition Law. This Regulation defines the concept of a relevant market by using the term “relevant products.” Defining a term by using the same term in the definition is generally considered faulty logic and may result in a definition that lacks precise meaning.
- 16- The Competition Council, by means of its proper authority and the stated legislative process, should make amendments to the Competition Law and its Implementing Regulation regarding definitions and vague terminology. Certain terms are critical to the

precise and proper application of the Competition Law and its Implementing Regulation, but many of these terms, as currently used (written) in the Law and the Regulation, are unclear or contradictory. Terms such as “relevant market,” “relevant product,” “economic concentration,” “dominance” and “geographical area” should be defined using proper technical language. Definitions should refer to clear standards that companies, experts, professors and others can use to evaluate a transaction before going forward with a transaction application. Also, parties should have the right to argue and appeal when a transaction is not approved. All of these reforms may help the Board of Grievances (the designated court) assure fair competition in Saudi Arabia.

17- The Competition Council has translated the Arabic version of the Saudi Competition Law into English. This English version is provided only as a guideline; the Arabic version is the only formally accepted version. However, the English version should still reflect the same meaning as the Arabic version. This issue becomes even more crucial when a law or legal term is adapted (borrowed) from a law that was originally written in English, translated into Arabic, and added to the Saudi Competition Law. For example, the term “relevant market” in English is a term of art for M&A; it means a specific thing. However, this term means nothing in Arabic unless the law explains what it is and attaches a specific meaning to it in the Arabic language. This recommendation—that translations must accurately reflect the *de facto* meaning of the original language’s terms of art—should be applied whenever the Saudi Competition Law attempts to follow another country’s legal model for the purpose of drafting or amending Saudi legislation.

18- The author recommends that the Competition Council use consistent terminology throughout all of the Articles in the Competition Law and its Implementing Regulation.

For example, the author recommends that the word “ownership,” as used in Article 9 (1), be replaced with the word “acquisition.”

19- The Competition Council should define the terms it uses in its decisions, such as “unified marketing” and “pricing policy.” It should also use more precise language. For example, the word “discretion” is used in this way in Article 32(5) of the Implementing Regulation of the Competition Law (note that the use of italics is the author’s): “If the Council concludes that the economic concentration will restrict the freedom of competition, it shall decide the following: 5) Take the necessary precautions to terminate, prevent or mitigate the economic concentration, at the [*discretion*] of the Council.” This use of the word “discretion” here is broad. Therefore, the law should explain to what extent “discretion” is given to the Council. The word “discretion” should not be left with a broad meaning.

20- The Competition Council should use the words “mergers” and “acquisitions” properly to reflect the exact terms of the proposed transaction. Since M&A activity has increased in Saudi, the Competition Council should make amendments to the Competition Law and its Implementing Regulation, or create an outline, to define more clearly the forms of that mergers and acquisitions may take. This would make investors and the public aware of the terms that the Council uses in its announcements or decisions.

21- The Competition Council should use its power as designated by the Competition Law and its Implementing Regulation. However, the author also encourages attorneys and companies to appeal Council decisions about their requests, and also to appeal any requirements made by the Council that go beyond its authority or are not supported by the Saudi Competition Law. This would help improve fair competition in the Kingdom.

- 22- The Competition Council should be a separate and independent authority that reports directly to the Ministers' Council and not to the Ministry of Commerce and Industry. Also, the Council should employ experts from different fields such as law, economics, accounting, finance and business. This would enhance fair competition and make the Competition Council more efficient, professional, independent and modern.
- 23- The Competition Law should include rules governing independency issues. The members of the Competition Council should not be investors, or, at the least, they should not be allowed to participate in evaluating an M&A transaction in which they have an interest. Also, they should be fiscally independent. There should be mandatory disclosure requirements when any member has an interest that might affect his ability to conduct his Council duties, either generally or regarding a specific transaction that is under review. To reiterate, this recommendation becomes especially important if Council members have investments in one or more of the companies involved in an M&A transaction about which they are required to make a decision.
- 24- The Competition Council's purview should be limited to making recommendations to the Board of Grievances only; it should leave decisions regarding transactions to the courts. As an example, the author refers to the relationship between the South African Competition Commission and the South African Competition Tribunal. This will make the review of transactions more independent. Establishing an independent competition tribunal that reviews issues of competition that arise in connection with M&A transactions would accomplish this change.
- 25- Unlike the South African Competition Act, the Saudi Competition Law does not cover the Competition Council's right to revoke its own decisions, even though such a right is

crucial and cannot exist without the regulatory grounds for it. Therefore, the Saudi Competition Law should include a specification giving the Council the right to revoke a decision if the Council discovers that information submitted regarding a merger was false or deceptive, or if it discovers that one or more of the parties involved did not comply with conditions attached to the decision.

26- The Saudi Competition Law does not provide rules or guidelines that help the Competition Council handle different types of mergers, such as horizontal, vertical and conglomerate. The Saudi Competition Law should provide principles that guide the Competition Council.

27- The Saudi Competition Law should have a theme and purpose that it aims to achieve. Demonstrating the purpose of the Competition Law would help the Competition Council when it reviews mergers, and it would also help judges review cases if a Council decision is appealed.

28- The Saudi Competition Law should state explicitly that the law does not cover mergers that involve a failing company merging with another company.

29- The Saudi Competition Law should state explicitly that the law does not apply to mergers between small businesses.

§8.5. Chapter 5

Chapter 5 focuses on the corporate aspects of M&A activity in Saudi Arabia. The Chapter reinforces the substance of its discussion by referencing the Model Business Corporation Act and certain provisions from the law of the US state of Delaware to show how other systems derive solutions for M&A issues that arise. In this Chapter, the author argues that while the Saudi Companies Law 2015 is a new law, it has not solved all of the issues that were problematic under

the previous Saudi Companies Law 1965. The Saudi Companies Law 2015 needs to be amended by the addition of provisions that allow it to be applied with transparency, which would help to foster financial transactions and make transactions economically efficient.

Recommendations

- 1- The Ministry of Commerce and Industry issued an order in the Saudi Chemical case stating that the transaction required shareholder authorization at the general meeting; the transaction ultimately did not receive this approval. However, the transaction should not have been sent to the Ministry of Commerce and Industry, because Article 69 of the Saudi Companies Law 1965 states that a shareholder vote is required in a case that involves a conflict of interest. Contentious debate and disagreement arose because of this case over how an interested acquisition transaction should be handled; this debate was caused in large part by the broad language of the Saudi Companies Law 1965 regarding conflicts of interest. The board of directors of the acquiring company argued that because the interested director would not be attending the board meeting at which the vote on the transaction would be taken, there was no conflict, and that therefore, it (the board of directors) should not have needed to obtain shareholder approval of the transaction. The adoption of a rule similar to Rule 144 of Delaware's law would clearly define how such an issue should be handled, and had Saudi had such a rule at the time of this case, the controversy may have been prevented. Indeed, a rule such as Rule 144 could help guide other corporations in their future transactions in Saudi Arabia. Further, the Saudi Companies Law 2015 does not address the issue of whether interested directors may be counted for the purpose of a board quorum, and it should do so. The Saudi Companies

Law 2015 should also specify that “interest” means specifically (and only) financial interest.

- 2- The Saudi Companies Law 2015 should provide mechanisms that facilitate stock acquisitions that are economically efficient and attractive. If the acquiring corporation is not able to acquire 100% of a target corporation, the stock acquisition may become less desirable to the acquirer.
- 3- The Saudi Companies Law 2015 should provide a mechanism for stock exchange between/among closely held corporations via stock purchase agreements that requires only the majority (not 100%) of the acquired corporation’s shareholders to approve.
- 4- The Saudi Companies Law 2015 should make it lawful and enforceable for companies to include in their bylaws a mechanism for selling shares and ownership interests; for example, instruments such as buy/sell orders and put/call options. These agreements help companies respond to various financial changes. The Saudi Companies Law 2015 does not recognize agreements that may be taken to facilitate share exchanges or the disposal of minority or ownership interests, nor does it distinguish between minority and majority shareholders.
- 5- Regarding the acquiring company, the Saudi Companies Law 2015 should model the NYSE rules and not require shareholder approval of a transaction unless a significant issuance of shares, such as 20% or more, is involved. This would give acquiring companies the latitude to guide their organizations according to efficient business strategies. Again, an exception here would be a case in which a significant issuance of stock is involved.

- 6- The Saudi Companies Law 2015 should adopt a dissenting right in a case of a stock exchange plan. It should also stipulate that those who dissent have the right to have their shares appraised, so that they may obtain fair value for their shares.
- 7- The rule that the courts currently may invoke to prohibit squeezing out minority shares, which it applies according to the Islamic rule that no shareholder may be forced to sell his shares, should not be applicable. The Saudi Companies Law 2015 should be amended such that it adopts the right to force minority shares to be sold when the majority shareholders vote in favor of a stock acquisition. The proposed amendment would enhance the attractiveness and competitiveness of companies and help to regulate efficient combinations between corporations.
- 8- The Saudi Companies Law 2015 should incorporate a rule requiring an acquiring corporation to obtain the majority of its shareholders' votes before issuing a significant number of shares.
- 9- The Saudi Companies Law 2015 should adopt a provision that gives shareholders the right to vote on the acquisition of all or substantially all of the corporation's assets.
- 10- The Saudi Companies Law 2015 should give those who dissent an acquisition the right to have their shares appraised and also the right to obtain fair value for their shares, unless the corporation is going to be dissolved as a result of the assets acquisition plan.
- 11- The Saudi Companies Law 2015 should provide a proper test to determine when a disposition of assets requires the approval of the shareholders of the target company.
- 12- The Saudi Companies Law 2015 does not provide the appraisal right, which should be included in Saudi law. The appraisal right would play a crucial role in ensuring a balance among majority and minority shareholders, and it would provide a relatively equitable

mechanism by which dissenters could exit the corporation and be fairly compensated for their shares. The appraisal right would be the most suitable remedy for minority shareholders who vote against a merger.

13- The Saudi Companies Law 2015 does not give a parent entity the right to merge with its 90%-owned subsidiary without the approval of shareholders, even though the conclusion of such a merger is automatic. The adoption of a rule that permits a parent corporation to merge with its 90%-owned subsidiary without shareholder approval would facilitate efficient transactions. Requiring the approval of shareholders in cases in which a parent corporation wishes to merge with a 90%-owned subsidiary has no basis in corporate governance. The Saudi Companies Law 2015 should adopt rules that can fill the legislative gaps regarding circumstances such as this one; these gaps have been ignored thus far, because issues such as (for example) mergers between a parent corporation and a 90%-owned subsidiary were not in play when the law was enacted.

§8.6. Chapter 6

Chapter 6 focuses on the Saudi M&A Regulation. The Chapter compares the Regulation with the Directive of the European Commission (EC) on Takeover Bids and finds that the Saudi M&A Regulation generally is in accordance with the EC's Directive. However, Saudi's M&A Regulation lacks several crucial rules that the author argues must be added, as well as some rules that should be amended, in order to protect the shareholders of the offeree company.

Recommendations

- 1- The title of the Saudi M&A Regulation should be changed to "Takeover Regulation."
- 2- The Saudi M&A Regulation states that the offeror shall specify the duration and dates of the offer in an offer timeline that the Capital Market Authority must

approve. The author argues that the M&A Regulation should require the offeror to specify that the time period for acceptance of an offer must be not less than two weeks and not more than 10 weeks. Some time limit on the acceptance period must be required.

- 3- The Capital Market Authority should not have the discretionary right to trigger the mandatory offer rule in the case of a party that acquires 50% of a target corporation. The mandatory offer rule loses its intended purpose and function if it is not automatically triggered when the threshold of 50% ownership of the target company's shares is reached. Allowing the mandatory offer rule to trigger automatically, rather than at the discretion of the Authority, would allow the rule to be exercised objectively, which would promote stability and trust in the Saudi stock market. The market would remain more stable if shareholders in the target company had confidence that they would have the opportunity to tender their shares if a bidder acquired a controlling stake in the target company. Also, the acquiring party likely would only attempt to acquire a stake of 50% or more if it were prepared to acquire some or all of the rest of the target shares.
- 4- The Saudi Capital Market Authority should include a provision that clearly permits, or at the least, does not restrict, a reverse breakup fee. The Saudi Capital Market Authority should specify that such a fee, along with arrangements that impose obligations on the offeror, are excluded from any restrictions on inducement fees; this would bring the Saudi Capital Market Authority in line with the UK Takeover Code in this regard. This provision would make corporations

aware of the Saudi approach to reverse breakup fees, which might help them to structure their breakup fee provisions accordingly.

- 5- The Saudi M&A Regulation should provide a “squeeze out” rule that could be applied in the process of the acceptance of a tender offer; such a provision would make the M&A Regulation more efficient and would facilitate acquisitions. A squeeze out provision gives an acquiring company the ability to acquire a target without the need to call a meeting of its shareholders to approve the acquisition. The Saudi M&A Regulation should include a provision that gives an offeror that acquires 75% or more of a target company via a tender offer the right to squeeze out the remaining offeree minority shareholders at a fair price.
- 6- The Saudi M&A Regulation should adopt a “sell out” rule—a provision that gives the minority shareholders of the acquired company, when 75% or more of it is acquired via a tender offer, the right to sell out their shares to the acquiring party.
- 7- The sell out concept is important because it provides an exit mechanism for minority shareholders in the offeree company, should they not wish to own stock in a company that may change materially under the leadership of the new 75% (or more) majority shareholder. The squeeze out mechanism provides a tool for the majority shareholder to squeeze out the minority at a fair price and thus consolidate total control over management of the company. Both concepts have economic advantages.

§8.7. Chapter 7

Chapter 7 discusses the Saudi tax system and its application in relation to M&A activity in Saudi Arabia. The Chapter begins with a basic description of the rules of the Saudi tax system and the rules that govern M&A transactions in Saudi Arabia. It provides an overview of the US

tax model as a comparison. In this Chapter, the author notes that Saudi does not have specific rules that govern M&A transactions. Rather, only general tax rules are applied. Therefore, Chapter 7 provides recommendations for ways that the Saudi legislature could improve Saudi Income Tax Law and how it interacts with M&A transactions.

Recommendations

- 1- The Saudi legislature should adopt rules that govern M&A transactions and demonstrate its position regarding M&A. For instance, if no cash is involved, a transaction should be deemed tax free. Saudi Arabia needs to amend its Income Tax Law and incorporate rules that cover the issues likely to arise in the course of M&A transactions. M&A in Saudi has been increasing rapidly; the lack of a clear, known standard of rules and requirements for M&A activity may cause difficulties for companies engaging in these transactions and may also cause unequal and/or unfair treatment of various companies from one deal to the next. The author makes these recommendations after concluding that the Department of Zakat and Income Tax has only the general rules contained in the Income Tax Law to refer to in regulating M&A. The Income Tax Law should include a chapter devoted specifically to M&A issues.
- 2- The Saudi Zakat Regulation contains 20 articles that were enacted in 1950 during the founding King's lifetime; this means that the current Zakat Regulation is not written to cope with the modern corporate era. Moreover, Islamic jurisprudence is currently overwhelmed by a deep and highly contentious set of arguments among the different Islamic schools over various Zakat issues. Saudi Arabia should update its old Zakat code, including codifying rules that have emerged recently in Islamic jurisprudence, into a single modern Zakat code written using modern terminology that includes and addresses

modern corporate practices. This suggested revision of the Zakat code should be undertaken after the Department has reached a conclusion about how M&A transactions fit within the context of Zakat principles.¹⁰²²

- 3- Under the Saudi Income Tax Law, a merger is taxable regardless of whether the consideration is cash or stock. The Department of Zakat and Income Tax applies a general rule to mergers without any regard to the consideration provided. The Saudi Income Tax Law does not provide any special treatment for a merger in which the consideration provided to the target's shareholders is stock in the acquiring corporation. The Saudi Income Tax Law should not tax a merger if the consideration provided is stock in the acquiring corporation.
- 4- Courts should be more efficient (i.e., timely) in making decisions, especially in cases that involve corporate taxes. As noted in the case study described earlier in this paper, the court in some cases has taken up to 5 years to reach a decision.
- 5- Ministerial decisions and instructions regarding income tax and Zakat are made either by the Minister of Finance or the Director of the Department of Zakat and Income Tax. These decisions and instructions should be incorporated into the Income Tax Law and Zakat Regulation in the form of amendments.

¹⁰²² Reaching a conclusion within Islamic jurisprudence about where M&A falls in terms of Zakat rules will have to occur in several stages. First, the new situation (*Nazilah* or *Nawazil*) must be well understood as it is (*takyeef*). Second, it must be determined whether a given situation is mentioned in the *Qur'an* or *Sunnah*. If it is mentioned, then rules will be applied. If it is not mentioned, research should be done within the community of Islamic jurisprudence to determine whether Islamic scholars and jurists have discussed the issue or something similar to it, and, if so, what rules or standards they have applied. Third, if there is no mention of the issue or a similar issue in Islamic jurisprudence, then the issue need not involve any prohibitions by the *Qur'an* or *Sunnah*, keeping in mind that the default rule is that any dealing or action is permissible under Sharia Law unless the *Qur'an* or *Sunnah* contains text that specifically stipulates otherwise.

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Appendix to Chapter 2: Relevant Laws Cited

§2.1 Saudi Constitution, Articles 1, 7, 5, , 20, 21, 22, 24, 32 and 44

A. Article 1

The Kingdom of Saudi Arabia is a sovereign Arab Islamic State. Its religion is Islam. Its constitution is Almighty God's Book, The Holy Qur'an, and the Sunnah (Traditions) of the Prophet (PBUH). Arabic is the language of the Kingdom. The City of Riyadh is the capital.

B. Article 7

Government in the Kingdom of Saudi Arabia derives its authority from the Book of God and the Sunnah of the Prophet (PBUH), which are the ultimate sources of reference for this Law and the other laws of the State.

C. Article 5

- Monarchy is the system of rule in the Kingdom of Saudi Arabia
- Rulers of the country shall be from amongst the sons of the founder King Abdulaziz bin Abdulrahman Al-Faisal Al-Saud, and their descendants.
- The most upright among them shall receive allegiance according to Almighty God's Book and His Messenger's Sunnah (Traditions).
- The Crown Prince shall devote himself exclusively to his duties as Crown Prince and shall perform any other duties delegated to him by the King.
- Upon the death of the King, the Crown Prince shall assume the Royal powers until a pledge of allegiance (bay'a) is given.

D. Article 44

The Authorities of the State consist of:

- The Judicial Authority
- The Executive Authority
- The Regulatory Authority

These Authorities will cooperate in the performance of their functions, according to this Law or other laws. The King is the ultimate arbiter for these Authorities.

E. Article 20

No taxes or fees shall be imposed, except in need and on a just basis. Imposition, amendment, cancellation or exemption shall take place according to the provisions of the Law.

F. Article 21

Zakat shall be collected and spent for legitimate expenses.

G. Article 22

Economic and social development shall be carried out according to a fair, wise plan.

H. Article 32

The State shall work towards the preservation, protection and improvement of the environment, as well as prevent pollution.

I. Article 24

The State shall develop and maintain the Two Holy Mosques. It shall provide care and security to pilgrims to help them perform their Hajj and Umra and visit to the Prophet's Mosque in ease and comfort.

§2.2 Succession Commission Law, Articles 5, 6, 7, 8 and 9

A. Article 5

The Commission's chairman, members and secretary general shall take the following oath before the King and prior to assuming their duties in the Commission:

I swear to God Almighty to be loyal to my religion and then to my King and country and shall not disclose any of the State's secrets, protect its interests and laws, safeguard the solidarity and cooperation of the royal family and the national unity and discharge my duties with truthfulness, integrity, sincerity and fairness.

B. Article 6

Upon the King's death the Commission shall call for the pledge of allegiance to the Crown Prince as King of the country in accordance with this Law and the Basic Law of Governance.

C. Article 7

(a) After receiving the pledge of allegiance and after consultation with members of the Commission, the King shall choose one or two or three he deems fit to be crown prince. Such choice shall be brought before the Commission which shall exert effort to agree on one nominee to be named Crown Prince. In case the Commission does not nominate any of them, then it shall nominate whom it deems fit to be crown prince.

(b) The King may at any time ask the Commission to nominate whom one it deems fit to be crown prince. In case the King disapproves the Commission's nominee in accordance with any of paragraphs (a) and (b) of this Article, then the Commission shall vote on its nominee and another chosen by the King, and the one with the majority of votes shall be named crown prince.

D. Article 8

A nominee for crown prince must satisfy the provisions of paragraph (b) of Article 5 of the Basic Law of Governance.

E. Article 9

The crown prince shall be chosen in accordance with the provision of Article 7 within a period not exceeding thirty days from the date of the pledge of allegiance to the King.

§2.3 Council of Ministers Law, Articles 1 and 24

A. Article 1

The Council of Ministers is a regulatory authority presided over by the King.

B. Article 24

The Council, being the direct executive authority, shall have full power over all executive and administrative affairs. The following shall be included in its executive powers:

(i) Monitoring the implementation of laws, regulations and resolutions.

(ii) Establishing and organizing public institutions.

(iii) Following up on the implementation of the general development plan.

(iv) Setting up committees for the review of the ministries' and other governmental agencies' conduct of business as well as any specific case. Said committees shall submit the findings of their review at the time set by the Council. The Council shall consider such findings and shall have the right to set up committees of investigation accordingly to draw a final conclusion, subject to laws and regulations.

§2.4 Law of the Judiciary, Article 1, 16, and 19-22

A. Article 1

Judges are independent and, in the administration of justice, they shall be subject to no authority other than the provisions of Sharia and laws in force. No one may interfere with the judiciary.

B. Article 16

The courts of appeals panels are:

- (1) Jural panels.
- (2) Penal panels.
- (3) Family panels.
- (4) Commercial panels.
- (5) Labor panels.

C. Article 19

General courts in provinces shall consist of specialized panels that include panels for execution and for ex parte and similar cases, which are outside the jurisdiction of other courts and notaries public, and decide on traffic accident cases and violations provided for in the Traffic Law and its Implementing Regulations. Each panel therein shall consist of a single judge or three judges as determined by the Supreme Judicial Council.

D. Article 20

A penal court shall be composed of specialized panels as follows:

(a) Panels for qisas (lex talionis retribution) and hadd („Qur‘‘anic prescribed punishment“) cases.

(b) Panels for ta‘zir („discretionary punishment“) cases.

(c) Panels for juvenile cases.

Each panel shall be composed of three judges except for cases determined by the Supreme Judicial Council which shall be reviewed by one judge.

E. Article 21

A family court shall be composed of one or more panels, and each panel shall consist of one or more judges as determined by the Supreme Judicial Council and may include specialized panels as needed.

F. Article 22

A commercial court and a labor court shall be composed of specialized panels, and each panel shall consist of one or more judges as determined by the Supreme Judicial Council.

§2.5 Law of the Board of Grievances, Article 1, 2, 8 and 13

A. Article 1

The Board of Grievances is an independent administrative judicial body reporting directly to the King and its seat shall be the City of Riyadh. The Board’s judges and judgments shall enjoy the guarantees provided for in the Law of the Judiciary and shall observe the duties provided for therein.

B. Article 2

The Board of Grievances consists of a president of the rank of minister, one or more vice presidents and a sufficient number of judges in addition to the necessary number of researchers, specialists, administrators and the like.

C. Article 8

Courts of the Board of Greivances shall consist of the following:

- (1) The High Administrative Court.
- (2) The Administrative Courts of Appeal.
- (3) The Administrative Courts.

Administrative courts of appeal shall be formed of a chief judge and a sufficient number of judges whose rank shall not be less than the rank of an Appeals Judge. Administrative courts shall consist of a chief judge and a sufficient number of judges. The Administrative Judicial Council may establish other specialized courts with the approval of the King.

D. Article 13

Administrative courts shall have jurisdiction to decide the following:

(a) Cases relating to rights provided for in civil service, military service and retirement laws for employees of the Government and entities with independent corporate personality or their heirs and their other beneficiaries.

(b) Cases for revoke of final administrative decisions issued by persons concerned when the appeal is based on grounds of lack of jurisdiction, defect in form or cause, violation of laws and regulations, error in application or interpretation thereof, abuse of power, including

disciplinary decisions and decisions issued by quasi-judicial committees and disciplinary boards as well as decisions issued by public benefit associations – and the like – relating to their activities. The administrative authority's refusal or denial to make a decision required to be made by it in accordance with the laws and regulations shall be deemed an administrative decision.

(c) Tort cases initiated by the persons concerned against the administrative authority's decisions or actions.

(d) Cases related to contracts to which the administrative authority is party.

(e) Disciplinary cases filed by the competent authority.

(f) Other administrative disputes.

(g) Requests for execution of foreign judgments and arbitral awards.

§2.6 M&A Regulation, Article 2

A. Article 2: Extent & Scope of the Regulations

(a) The Regulations apply in any situation where there is a restricted purchase of, or a restricted offer for shares relating to any listed company.

(b) The persons to whom the Regulations apply include:

1) Exchange participants, including (without limitation) issuers, shareholders, authorised persons, and any person involved directly or indirectly in, or giving an opinion on, any transaction regulated by these Regulations;

2) Directors of companies which are subject to these Regulations; and

3) Any person who seeks to or consolidate effective acquisition of such companies.

(c) These Regulations should be read in conjunction with and in addition to the provisions of the Listing Rules.

§2.7 Qualified Foreign Financial Institutions Investment in Listed Shares Rules, Articles 1,2, 6 and 21

A. Article 1: Preliminary

a. The purpose of these Rules is to set out the procedures, requirements and conditions for the registration of qualified foreign investors (“QFIs”) with the Authority and the approval of their clients to invest in listed shares, and to specify their obligations and the obligations of authorised persons in this regard.

b. These Rules shall be read in conjunction with and in addition to the Capital Market Law and its Implementing Regulations, including, the Listing Rules, the Market Conduct Regulations, the Authorised Persons Regulations, the Merger and Acquisition Regulations and the Anti-Money Laundering and Counter-Terrorist Financing Rules.

c. These Rules shall not apply to Citizens of the Cooperation Council for the Arab States of the Gulf.

d. Subject to sub-paragraph b (1) of Article 7 of these Rules, QFIs and approved QFI clients are entitled to exercise all rights related to listed shares owned by them, including trading in rights issues.

B. Article 2: Definitions

a. Any reference to the “Capital Market Law” in these Rules shall mean the Capital Market Law issued by Royal Decree No. M/30 dated 2/6/1424H.

b. Subject to paragraph (c) of this Article, expressions and terms in these Rules have the meaning which they bear in the Capital Market Law and the Glossary of defined terms used in the Regulations and Rules of the Capital Market Authority, unless the contrary intention appears.

c. For the purpose of implementing these Rules, the following expressions and terms shall have the meaning they bear as follows unless the contrary intention appears:

- QFI assessment agreement: an agreement between the assessing authorised person and the QFI meeting the requirements set out in Article 12 of these Rules.

- bank: a financial institution that has a legal personality which engages in banking business.

- assessing authorised person: an authorised person who has agreed with an applicant to assess its application for registration as a QFI, or an authorised person who has executed a QFI assessment agreement with a QFI.

- insurance company: a financial institution that has a legal personality which engages in insurance business.

- brokerage and securities firm: a financial institution that has a legal personality which engages in securities business.

- investment fund: means any of the following legal persons: 1) a sovereign wealth fund that is fully owned by a government entity, or by a legal person fully owned by a government

entity. 2) a pension fund in which its main objective is to collect fees or periodic contributions from participants or for their interest, for the purpose of compensating them according to a specific mechanism. 3) a collective investment scheme aimed at providing investors therein with an opportunity to participate collectively in the profits of the scheme.

- approved QFI client: a client of a QFI who has been approved in accordance with these Rules.

- Fund manager: a financial institution that has a legal personality which manages the assets of an investment fund.

- qualified foreign investor: a foreign investor registered with the Authority in accordance with these Rules to invest in listed shares.

- applicant: a foreign investor that submits an application for registration to an assessing authorised person.

- Citizens of the Cooperation Council for the Arab States of the Gulf: natural persons who hold the citizenship of one of the Cooperation Council for the Arab States of the Gulf countries, or legal persons that (i) capital of which is majority owned by citizens or governments of the Cooperation Council for the Arab States of the Gulf; and (ii) holding the citizenship of one of the Cooperation Council for the Arab States of the Gulf countries, in accordance with the definition set out in the resolution of the Supreme Council of the Cooperation Council for the Arab States of the Gulf in its 15th session approved by the Council of Ministers Resolution number (16) dated 20/01/1418H.

C. Article 6: The registration conditions

a. Type of the financial institution

1) The applicant must be a financial institution that has a legal personality which falls within one of the following types:

- a) banks;
- b) brokerage and securities firms;
- c) fund managers; and
- d) insurance companies.

2) The financial institutions referred to in sub-paragraph a (1) of this Article must be licensed or otherwise subject to regulatory oversight by a regulatory authority and incorporated in a jurisdiction that applies regulatory and monitoring standards equivalent to those of the Authority or acceptable to it. For the purposes of this paragraph, the Authority may, at its absolute discretion, determine whether the regulatory and monitoring standards are equivalent to those of the Authority or acceptable to it, and the Authority shall provide authorised persons duly authorised to conduct dealing activities with a list of jurisdictions that applies regulatory and monitoring standards equivalent to those of the Authority or acceptable to it, and any update occurs to that list.

b. Size of the financial institution

1) The applicant must have assets under management of SAR 18,750,000,000 eighteen billion seven hundred and fifty million Saudi Riyals (or an equivalent amount) or more. The Authority may reduce the minimum for these assets to SAR 11,250,000,000 eleven billion two hundred and fifty million Saudi Riyals (or equivalent amount).

2) For the purposes of these Rules, assets under management include:

- a) assets owned by the applicant or its group for the purpose of investment; and
- b) assets managed by the applicant or its group for the account of another person or persons.

c. Investment experience

The applicant or any of its affiliates must have been engaged in securities activities and investment therein for a minimum of 5 years.

D. Article 21: Investment limits

a. Investments of QFIs and approved QFI clients shall be subject to the following limitations:

1) Each QFI, together with its affiliates, or each approved QFI client together with its affiliates may own a maximum of 5% of the shares of any issuer whose shares are listed.

2) Where a QFI invests on behalf of an approved QFI client, it must not execute a transaction which would result in the relevant client, together with its affiliates, owning more than 5% of the shares of any issuer whose shares are listed.

3) The maximum proportion of the shares of any issuer whose shares are listed that may be owned by all foreign investors (in all categories, whether residents or non-residents) in aggregate is 49%, including interests under swaps.

4) The maximum proportion of the shares of any issuer whose shares are listed that may be owned by QFIs and approved QFI clients is 20%.

5) The maximum proportion of the shares of all issuers whose shares are listed that may be owned by QFIs and approved QFI clients in aggregate is 10% by market value, including any interests under swaps.

6) Other legislative limitations on foreign ownership in joint stock companies.

7) The limitations set forth in the articles of association or by-laws of the listed companies or any instructions issued by the supervisory or regulatory authorities to which these companies are subject.

b. The Exchange shall publish on its website, as determined by the Authority in this regard, the following information:

1) A statistic reflecting the ownership percentages specified in sub-paragraphs a (3); a (4) and a (5) of this Article.

2) The limitations specified in sub-paragraphs a (6) and a (7) of this Article, according to the information received by the Exchange from listed companies in this regard.

§2.8 Foreign Investment Law Article 1

A. Article 1

The following terms and expressions shall have the meanings assigned to them, unless the context requires otherwise:

(a) The Council: The Supreme Economic Council.

(b) Board of Directors: The Board of Directors of the General Investment Authority.

(c) The Authority: The General Investment Authority.

(d) The Governor: The Governor of the General Investment Authority.

(e) Foreign Investor: A natural person who is not of Saudi nationality or a legal person whose partners are not all Saudi.

(f) Foreign Investment: Investment of foreign capital in an activity licensed by this Law.

(g) Foreign Capital: In this Law, foreign capital shall mean, for example, but not limited to, the following funds and rights so long as they are owned by a foreign:

(1) Cash, securities and negotiable instruments.

(2) Foreign investment profits, if invested to increase capital, expand existing projects, or establish new ones.

(3) Machinery, equipment, furnishings, spare-parts, means of transport and production requirements related to the investment.

(4) Intangible rights, such as licenses, intellectual property rights, technical know-how, administrative skills and production techniques.

(h) Commodity Firms: enterprises that produce industrial, agricultural, plant and animal commodities.

(i) Service Firms: Service and contracting enterprises.

(j) Law: The Foreign Investment Law.

(k) Regulation: The Implementing Regulation of this Law.

§2.9 Listing Rules, Article 45(a) 1

A. Article 45

Notification Related to Substantial Holdings in Shares or Convertible Debt Instruments

(a) Where a person is subject to one or more of the following events, the person must notify the issuer and the Authority at the end of the trading day of the occurrence of the relevant event: 1) becoming the owner of, or interested in, 5% or more of any class of voting shares or convertible debt instrument of the issuer...

§2.10 Capital Market Authority Law, Article 3

A. Article Three

Commercial bills such as cheques, bills of exchange, order notes, documentary credits, money transfers, instruments exclusively traded among banks, and insurance policies shall not be considered Securities.

§2.11 Saudi Certified Public Accountants Law, Articles 19, 24, 29 and 32

A. Article (19)

An organization shall be established under the name of (Saudi Organization for Certified public Accountants). It shall operate under the supervision of the Ministry of Commerce in order to promote the accountancy and auditing profession and all other related matters that might lead to the development of this profession and raising its status.

This Organization shall be specifically entrusted with the following:

1. Review , develop and approve accounting and auditing standards.

2. Establish the necessary rules for fellowship certificate examination provided that such rules cover the professional , practical , theoretical aspects of the audit profession including all Regulations pertaining to the profession.
3. Organize courses of continuous education.
4. Conduct special research work and studies covering accounting , auditing and other allied subjects.
5. Publish periodicals, books and bulletins covering accounting and auditing subjects.
6. Establish an appropriate quality review program in order to ensure that Certified Public Accountants comply with accounting and auditing standards and the provisions of these Regulations and its by - laws.
7. Participate in local and international committees and symposiums relating to the profession of accounting and auditing.

B. Article (29)

Subject to the provisions of other Regulations , investigations for non - compliance with the provisions of these regulations shall be carried out by a committee to be formed by the Minister of Commerce. The Committee shall be chaired by the Deputy Minister of Commerce with membership consisting of a Saudi legal advisor and one member of the board of directors of SOCPA . Should the committee decide that the non - compliance act constitutes a crime it shall refer it to the competent authority . Following issue of a ruling , the forecited committee shall consider the non - compliance act in terms of professional ethics and may impose any of the following penalties : Reprimand , Warning , or suspension from practicing the profession for a period not to exceed six months . The non - compliant member have a right to appeal to the

Grievance Board against the resolution issued imposing any of the foregoing penalties. However , should the investigation committee determine that the non - compliance act does not constitute a crime , it may impose one of the following penalties upon completion of investigation : Reprimand , Warning , or suspension from practicing the profession for a period not to exceed six months. In case the committee beleived that the non - compliance act does not deserve any of the specified penalties it shall dismiss the case . The committee's decision should be in all cases based on just causes , and the non - compliant member shall have the right to appeal to the Grievance Board against the penalty decision . In the event that the committee is of the opinion that the penalty of removal of the name of the non - compliant from the Register should be imposed , it shall refer the matter to the Grievance Board for taking the appropriate decision.

C. Article (32)

The Grievance Board shall have the jurisdiction to impose the penalty of the removal of the name from the Register provided for in these Regulations . It shall also have the jurisdiction to consider all claims filed by or against the certified public accountant for any reason relating to the practice of the profession in conformity with the provisions of these Regulations .

D. Article (24)

The Organization's affairs shall be managed by a Board of Directors consisting of Fifteen members , as follows :

1. The Minister of Commerce or his delegate - Chairman
2. The Deputy Minister of Commerce - Member

3. The Deputy Minister of Finance and National Economy for Financial Affairs and Accounts or any official of grade 14 and above appointed by the Minister of Finance and National Economy. - Member
4. The Vice President of the General Controller's Bureau or any official of grade 14 and above appointed by the President of the General Controller's Bureau. - Member
5. Two Saudi members of the teaching staff of the accounting department of one or more of the universities of the Kingdom , to be appointed by the Minister of Commerce upon the nomination of the Minister of Higher Education.
6. A representative for the Council of Chambers of Commerce and Industry , to be appointed by the Minister of Commerce upon nomination by the said Council. - Member
7. Six members from among Saudi practitioner Certified Public Accountants to be elected by the Organization's general meeting for a term of three years , renewable for one more term. By way of exception , these members shall be appointed in the first Board of Directors for five years by a resolution to this effect from the Minister of Commerce

The Secretary General of the Organization shall attend the meetings of the Board of Directors without having the right to vote on decisions taken .

The Board of Directors meets once at least every ninety days at the invitation of its Chairman or his designated representative . The chairman shall invite the Board for a meeting if requested to do so in writing by at least four members.

Meetings of The Board of Directors shall be valid only if attended by the majority of members including the chairman or his designated representative. Decisions of the Board shall

be adopted by the majority vote of members present , and in case of equal votes , the chairman shall have the casting vote.

§2.12 Competition Law, Articles 8 and 9

A. Article Eight

1) An independent council named "Competition Protection Council" shall be established.

It shall be located in the Ministry of Commerce and Industry.

2) A Royal Order shall be issued for the formation of the Council as follows:

- The Minister of Commerce and Industry Chairman
- A representative of the Ministry of Commerce and Industry Member
- A representative of the Ministry of Finance Member
- A representative of the Ministry of Economy and Planning Member
- A representative of the General Investment Authority Member
- Four members of expertise and competence selected for their merits and nominated by

the Minister

3) The term of membership in the Council shall be four years renewable for one term.

The Council member shall remain in his post upon expiration of his term until a successor is appointed.

4) The Council shall convene headed by the chairman or whomever he deputizes of the members and with the attendance of two thirds of the members. Council's decisions shall be taken by majority vote, and in case of equal votes, the chairman shall have the casting vote.

5) Council members may not disclose any information they obtain as a result of their membership in the Council.

6) A Council member may not participate in the deliberation of any case or subject matter in which he has an interest or with which he has a relation, or if he is related by blood or marriage to any of the parties involved, or if he has represented any of the parties concerned.

B. Article Nine

Subject to provisions of other laws, the Council shall have jurisdiction over the following tasks:

1) Approving cases of merger, acquisition, or combining two managements or more into one joint management resulting in a dominant position in the market.

2) Ordering the undertaking of proceedings of inquiry, research and collection of evidence pertaining to complaints and practices in violation of provisions of this Law, and ordering the investigation and prosecution thereof.

Competition Law, Promulgated under the Royal decree No. M/25, Date 4/5/1425H and the amending based on Royal decree No. M/25, Dated 11/4/1435H Page no:6

3) Approving the initiation of criminal case procedures against violators of provisions of this Law.

4) Forming the Council's bodies and issuing the financial and administrative regulations, in coordination with the Ministry of Finance and the Ministry of Civil Service.

5) Proposing relevant draft laws that affect competition in light of the variables occurring in the market, and proposing necessary amendments to provisions of this Law.

6) Issuing the Implementing Regulations of this Law.

7) Preparing an annual report of Councils activities and plans, to be submitted to the Council of Ministers by chairman of the Council.

§2.13 Execution Law, Articles 11, 8 and 96

A. Article 11

Notwithstanding the provisions of treaties and conventions, the execution judge may not enforce any court judgments and orders passed in any foreign country except in cases of equal treatment and after verifying the following: 1. That the Saudi courts are not competent to hear the case in respect of which the court judgment or order was passed and that the foreign courts which passed it are competent in accordance with the international rules of jurisdiction set down in the laws thereof. 2. That the litigants to the case in respect of which the judgment was issued were duly summoned, properly represented and enabled to defend themselves. 3. That the court judgment or order has become final in accordance with the law of the court that passed it. 4. That the court judgment is in no way inconsistent with any judgment or order previously passed by the Saudi courts. 5. That the judgment does not provide for anything which constitutes a breach of Saudi public order or ethics.

B. Article 8

1. The execution department in every general court shall undertake execution and its procedures. More than one department may be constituted when needed. 2. The single judge in the general court shall undertake execution and its procedures. 3. Foreign judgments, orders and writs shall be executed by one judge or more, as needed. The Supreme Judicial Council may, when necessary, create special courts for execution.

C. Article 96

This law shall supersede articles from 96 thru 232 of the Law of Procedure before Sharee'ah Courts issued by Royal Decree No. M/21 dated 20.5.1421 AH and paragraph g of article 13 of the Law of the Board of Grievances No. M/78 dated 19.9.1428 AH and all other contradicting provisions.

Appendix to Chapter 3: Relevant Laws Cited

§3.1 Saudi Companies Law 2015,¹⁰²³ Articles 2, 3, 48, 52, 54, 55, 68, 108, 149, 151, 153, 154, 155, 157, 161, 164, 182, 184 and 186

D. Article (2)

A company is defined as a contract under which two or more persons undertake to participate in an enterprise for profit, with each contributing a share in the form of money, services or both, with a view to dividing any profits (realized) or losses (incurred) as a result of such enterprise.

E. Article (3)

1. The Company established in the Kingdom of Saudi Arabia shall have one of the following forms:

- a. General Partnerships
- b. Limited partnership
- c. Partnerships (Un-registered)/ Mahasa Company;
- d. Joint Stock Company;
- e. Limited liability Company

2. Subject to the provisions of paragraph (3) of this Article, a company in any form other than the ones stated in paragraph (1) hereinabove shall be considered void, and people who have contracted in its name shall be jointly and severally responsible for the obligations arising from such contract.

¹⁰²³ This is not the official translation.

3. Without prejudice to such companies as are known in Islamic jurisprudence, any company that does not assume one of the forms mentioned in paragraph (1) hereinabove shall not be subject to the provisions of these regulations.

F. Article (48)

A third party shall have recourse only against the Partner with whom he has dealt. But if the partners have acted in a certain way that disclose the existence of the partnership company to a third party, the partnership company shall be considered a de facto general partnership in regard to such third party, without prejudice to the effectiveness of the conditions of the partnership company's articles of association between the partners.

G. Article (52)

A Joint Stock Company's capital shall be divided into negotiable shares of equal value. The Joint Stock Company shall be solely responsible for the debts and liabilities resulted from its activities.

H. Article (54)

The capital of the joint stock company at the time of incorporation shall be enough to achieve its objective. In all cases, the capital may not be less than 500,000 Riyals, 25% of which shall be paid at the date of incorporation.

I. Article (55)

Notwithstanding article 2 of these regulations, the state and public juristic personality and the companies full owned by the state and the companies with a capital of no less than 5 million Riyals, may establish a single person joint stock company, provided that the said person has all the powers of the shareholders' assemblies including the constituent general meeting powers.

J. Article (68)

1. A Joint Stock Company shall be administered by a board of directors whose number is specified in the company's bylaws, provided that it is not less than three and not more than eleven.

2. Each director may nominate himself/herself, another or more for the membership of the Board of Directors, within the limits of their share in the capital.

3. The regular general assembly shall appoint the directors for the term specified in the company bylaws, provided that it does not exceed three years. Directors, however, shall always be eligible for re-appointment, unless the company bylaws provide otherwise. The company bylaws shall specify the manner upon which the board membership ends or terminated upon the request from the Board of Directors. In any case, the regular general assembly may, at any time, remove all or any of the board of directors members even if the company's bylaws provide otherwise, without prejudice to the right of a removed board member to claim compensation against the company if the removal is made without acceptable justification or at an improper time. A director may resign, provided that such resignation is made at a proper time; otherwise, he/she shall be responsible before the company for damages that occur out of such resignation.

K. Article (108)

The Company's bylaws may provide for the imposition of restrictions on the negotiability of shares provided these do not permanently prohibit such negotiability.

L. Article (149)

If all the shares of a Joint Stock Company are transferred to a single shareholder to whom the requirements stipulated for in Article (55) of these Regulations do not apply, the company solely shall be responsible for all its debts and obligations. Nevertheless, such shareholder must

adapt the situation of the company to the provisions stipulated for in this Part or convert it to a limited liability company of one person within a period of no more than one year; otherwise, the company shall be dissolved by force of these Regulations.

M. Article (151)

1. A limited liability company is a company, consisting of no more than fifty shareholders. Its financial entity shall be separate of the financial entity of each shareholder therein. The company solely shall be responsible for the subsequent debts and obligations, and its owner or shareholders shall not be held responsible for such debts and obligations.

2. If the number of shareholders exceeds the number specified in paragraph (1) of this Article, the company shall be converted into a joint stock company, within a period of no more than one year. In case this period passes without such conversion, the company shall be dissolved by force of these Regulations, unless such excess is the result of succession or will.

N. Article (153)

The purpose of limited liability company may not consist in carrying out any banking business, financing, saving, insurance or investment of fortune on behalf of third parties.

A limited liability company may not resort to public subscription to form or increase its capital or to get a loan, nor to issue negotiable instruments.

O. Article (154)

1- Notwithstanding the provisions of Article (2) of these Regulations, a limited liability company may be constituted of one person or all its shares may be transferred to one person. In such a case, the responsibility of this person shall be restricted to the fortune he allocates for the company's capital. Such a person shall have the powers and authorities of the director, Board of Directors, and the General Assembly of Shareholders, stipulated for in this Part. Furthermore, He

shall be entitled to appoint one (or more) director who shall be a representative before juridical and arbitration bodies and third parties, in addition to being responsible for managing the company before the shareholder, owner of company shares.

2- In all cases, the natural person may not establish or own more than one limited liability company of one person, and the limited liability company, owned by one person (of natural or legal entity) shall not establish or own another limited liability company of one person.

P. Article (155)

The person who owns a limited liability company shall be responsible in his fortune for the company's liabilities against any third parties, with whom he transacts in the name of the company, in the following cases:

- a- If he, in bad faith, liquidates the company or stops its activity before the expiration of its term or achievement of the objective, for which it is incorporated.
- b- If he does not separate the business of the company from his own businesses.
- c- If he carries out businesses of the company before it gains the corporate body.

Q. Article (157)

1. Subject to Article (14) of the Regulations, a limited liability company shall not be incorporated unless all contributions in cash and in kind are distributed among all shareholders and are entirely fulfilled. The contributions in cash shall be deposited in a licensed bank, which shall not be entitled to release them prior to the finalization of the procedures of the company's publication and registration in the commercial register.

2. To evaluate the contributions in kind, the provisions, stipulated for evaluating these shares in the joint stock company, shall apply. Nevertheless, shareholders who submit these contributions shall be jointly liable in all their fortune against any third parties for the fair

evaluation of the contributions in kind they submit. Nevertheless, a Liability Action shall in this case be disregarded after the lapse of five years from the date of company publication and registration in the commercial register, pursuant to Article (158) of these Regulations.

R. Article (161)

1. A shareholder may assign his share to a co-shareholder or to a third party in accordance with the terms of the Company's Articles of Association. Nevertheless, if a shareholder wishes to assign his share to a third party for valuable consideration, he must notify his co-shareholders through the manager of the Company, of the terms of such assignment in which case every shareholder shall have the right to recover the share at its fair value, within thirty days of the date of being notified of the same, unless the company's Articles of Association shall stipulate for another evaluation method or period of time. If the right of recovery is exercised by more than one shareholder and the assignment involves a number of shares, these shall be divided among the applicants for recovery in proportion to the interest of each of them in the capital. The right of recovery provided for in this Article shall not apply to the transmission of shares by inheritance or bequest, or by virtue of a judgement of a competent judicial body.

2. In case the prescribed time for the exercise of the right of recovery is expired without being used by any shareholder, the holder of the share shall have the right to waive it for a third party.

S. Article (164)

1. The Company shall be administered by one or more managers who may or may not be shareholders in the Company. The shareholders shall appoint the managers in the Articles of

Association or in a separate contract for a specified or unspecified term. Shareholders may issue a resolution to form a board of managers, if management is entrusted to several persons.

2. The Company's Articles of Association or Shareholders' resolution shall specify the manner in which this board shall operate and the majority necessary for the adoption of its resolutions. The Company shall be bound by the acts performed by the managers within the scope of company's purposes.

T. Article (182)

1. The holding company is a joint stock or limited liability company that aims to have control over other joint stock or limited liabilities companies, so-called “subsidiaries”, through owning more than half of the capital of these companies or controlling the formation of their boards of directors.

2. The name the company chooses, in addition to its type, shall be coupled by the word (Holding).

U. Article (184)

A subsidiary may not own shares or stakes in the holding company. Every disposition to transfer shares or stakes from the holding company to a subsidiary shall be deemed void.

V. Article (186)

The holding company shall be governed by the provisions set forth in this chapter and any other provisions that do not contradict with the provisions of these Regulations, according to the legal form adopted by the company.

§3.2 Saudi Companies Law 1965, articles 1, 2 and 157

A. Article (1)

A company is defined as a contract under which two or more persons undertake to participate in an enterprise for profit, by contributing a share in the form of money or work, with a view to dividing any profits (realized) or losses (incurred) as a result of such enterprise.

B. Article (2)

The provisions of this Law, as well as such conditions laid down by the partners and such customary rules that are consistent with this Law, shall apply to the following companies:

A. 1) General partnership; 2) Limited partnership; 3) Joint venture; 4) Joint-stock corporation; 5) Partnership limited by shares; 6) Limited liability partnership; 7) company with variable capital; and 8) Cooperative company.

Without prejudice to such companies known in Islamic jurisprudence, any company that does not assume one of the mentioned forms shall be (considered) null and void, and the persons who have made contracts in its name shall be personally and jointly liable for the obligations arising from such a contract.

The Council of Ministers may, by a decision, amend the minimum and maximum limits of the capital of companies provided for in this Law.

The provisions of this Law shall not be applied to companies incorporated in whole or in part by the Government or by any other public legal person, provided that a Royal Decree shall be issued authorizing its incorporation and containing the provisions which the company shall subject to.

C. Article (157)

A limited liability company is a company that consists of two or more partners who are responsible for the debts of the company as much as their shares in the capital. The number of partners in this company does not exceed fifty.

Appendix A to Chapter 4: Relevant Laws Cited

§4.1 Saudi Competition Law, Articles 7, 8, 9 and 15

A. Article (7)

The firm referred to in Article Six of this Law may complete the procedures of merger, acquisition or combining two or more managements into one joint management in the following cases:

1) Upon notification in writing of the approval by the Council.

2) Upon expiration of sixty days from the date of notification without being notified by the Council in writing of its objection to the deal or of that it is under study and investigation.

Competition Law, Promulgated under the Royal decree No. M/25, Date 4/5/1425H and the amending based on Royal decree No. M/25, Dated 11/4/1435H Page no:5

3) Upon expiration of ninety days from the date of notification with the deal being under review and investigation, without being notified by the Council in writing of its approval or rejection.

B. Article (8)

1) An independent council named "Competition Protection Council" shall be established. It shall be located in the Ministry of Commerce and Industry.

2) A Royal Order shall be issued for the formation of the Council as follows:

- The Minister of Commerce and Industry Chairman
- A representative of the Ministry of Commerce and Industry Member

- A representative of the Ministry of Finance Member
- A representative of the Ministry of Economy and Planning Member
- A representative of the General Investment Authority Member
- Four members of expertise and competence selected for their merits and nominated by the Minister

3) The term of membership in the Council shall be four years renewable for one term. The Council member shall remain in his post upon expiration of his term until a successor is appointed.

4) The Council shall convene headed by the chairman or whomever he deputizes of the members and with the attendance of two thirds of the members. Council's decisions shall be taken by majority vote, and in case of equal votes, the chairman shall have the casting vote.

5) Council members may not disclose any information they obtain as a result of their membership in the Council.

6) A Council member may not participate in the deliberation of any case or subject matter in which he has an interest or with which he has a relation, or if he is related by blood or marriage to any of the parties involved, or if he has represented any of the parties concerned.

C. Article (9)

Subject to provisions of other laws, the Council shall have jurisdiction over the following tasks:

1) Approving cases of merger, acquisition, or combining two managements or more into one joint management resulting in a dominant position in the market.

2) Ordering the undertaking of proceedings of inquiry, research and collection of evidence pertaining to complaints and practices in violation of provisions of this Law, and ordering the investigation and prosecution thereof.

Competition Law, Promulgated under the Royal decree No. M/25, Date 4/5/1425H and the amending based on Royal decree No. M/25, Dated 11/4/1435H Page no:6

3) Approving the initiation of criminal case procedures against violators of provisions of this Law.

4) Forming the Council's bodies and issuing the financial and administrative regulations, in coordination with the Ministry of Finance and the Ministry of Civil Service.

5) Proposing relevant draft laws that affect competition in light of the variables occurring in the market, and proposing necessary amendments to provisions of this Law.

6) Issuing the Implementing Regulations of this Law.

7) Preparing an annual report of Councils activities and plans, to be submitted to the Council of Ministers by chairman of the Council.

§4.2 Implementing Regulation of Competition Law, Articles 2, 10, 11, 19, 20, 21, 26, 27, 28, 31, and 33

A. Article (2)

Wherever they occur in these Regulations, the following terms shall have the meanings expressed next to them unless the context requires otherwise:

Law: Competition Law promulgated under Royal Decree No. (M/25) dated 4/5/1425 AH.

Council: Competition Council.

Ministry: Ministry of Commerce (Trade) and Industry.

Minister/Chairman of the Council: Minister of Commerce and Industry /Chairman of Competition Council.

Regulations: Provisions stipulated herein.

Committee: Committee for Settlement of Violations of Competition Law.

Relevant Market: The Market that consists of two elements: relevant products and geographical area.

Commodity / Commodities: any good or service or a combination thereof which may, in terms of price, characteristics and uses, substitute each other to meet a specific consumer need in a given geographical area of homogenous competition conditions.

Implementing Regulations of the Competition Law, Promulgated under the resolution of Competition Council No. 126, Dated 4/9/1435 AH (1/7/2014 AD) Page no:2

Economic Concentration: any act resulting in full or partial transfer of ownership rights or usufruct of an entity's properties, rights, stocks, shares or obligations to another entity that puts an entity or a group of entities in a position of domination of an entity or a group of entities, by way of merger, takeover, acquisition, or combining two or more managements into one joint management or any other means which leads to having a market share of 40% of the total sales of a commodity in the market.

B. Article (10)

When studying the impact of a practice of a violating dominant entity on the fair competition, the Council may take into consideration any or some of the following items or decide the appropriate study approach:

1) The impact on competition;

2) Whether a practice is or not consistent with the normal competitive behavior when it is possible to construe that fact based on the normal commercial concerns and interests in the situations in which the person who commits such practice is not in a position that enables it to influence the total demand or supply of the relevant goods or services or influence the prevailing price in the market;

3) Whether a practice is or not complying with the direct protection of intellectual property rights while the usage of intellectual property rights by market players to commit the practices stipulated herein constitutes violation to the Law.

Exemptions

C. Article (11)

The Council, upon the request of the relevant entities, may exempt from the application of article (4) of the Competition Law and article (4) of the Implementing Regulations thereof any anticompetitive practice and agreement that will lead to the improvement in the performance of entities and realize benefits to the consumer exceeding the impacts of restriction of free competition.

D. Article (27)

The Council shall study the concentration application to ensure that it will not affect the competition. Such study shall be through evaluating one or more of the following factors:

- 1) The level of competition in the market;
- 2) The entry possibility of new entities to the market;
- 3) The effect of demand on the price of the commodity;
- 4) The existence of any regulatory or realistic barriers to enter the market;
- 5) The level and historical trends of the anticompetitive practices in the market;
- 6) The possibility of acquiring power in the market by the concentrating parties due to the economic concentration;
- 7) The variable characteristics of the market including the growth, innovation and creativity.
- 8) The opinions of the related entities in accordance to article 26 hereof.

E. Article (26)

The Council shall receive the opinions of entities related to the economic concentration application. The council will not take into consideration any opinions that are not supported by reasons, not clarifying the anticompetitive impacts of the concentration, or not including full data about the entity which provide such opinions.

F. Article (28)

The Council shall take into consideration the following upon evaluating the impacts of the economic concentration:

- 1) Maintaining and promoting the effective competition among the producers and distributors of goods and services in the market;
- 2) Enhancing the interests of the consumers with regard to quality and price;
- 3) Encouraging, through competition, for decreasing costs, improving new commodities, and facilitating the entry of new competitors in the market.

G. Article (33)

Subject to the provisions of article 30 hereof, the entities, which apply for the economic concentration may complete the concentration transaction after the elapse of 90 days from the application date if not notified in writing by the Council with the approval or refusal.

The entity applying for the concentration may decline the application by notifying the Council in writing with such desire whether during the review period or after the issuance of approval decision by the Council.

H. Article (19)

Any entity intending to realize the economic concentration shall submit a written application to the Council 60 days prior to the accomplishment of the concentration transaction and shall fill in a form including the following:

- 1) Names of parties related to the concentration transaction;
- 2) The description of the requested concentration and the effectiveness date;
- 3) Relevant goods and services in addition to its sale volume and percentage;
- 4) The relevant market and the volume thereof;
- 5) The main commodities dealt in by the applicant entity;

- 6) The positive impacts of the concentration;
- 7) The negative impacts of the concentration and the proposed procedures to limit such impacts;
- 8) The markets that will be affected by the concentration transaction;
- 9) The name, capacity, and official domicile of the applicant.

I. Article (20)

The applicant shall provide, with the application, information about each entity involved in the concentration transaction, particularly the following information:

- 1) The name, nationality, address, number of branches, commercial register number, and the licensed activity of the entity;
- 2) List of the main commodities dealt in by the entity;
- 3) List of the names of the board of directors;
- 4) The main clients and their percentage in the market;
- 5) The volume, value, and percentage of the sales in the market;
- 6) List of the competitors and their market shares;

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- 7) The existing concluded agreements;
- 8) The factors that affect market entry;

- 9) The nature of distribution channels;
- 10) The factors that affect price fixing during the last five years;
- 11) The volume of the available production capacity and the percentage of its utilization;
- 12) The volume of demand on the commodity and the structure thereof;
- 13) The alternative/substitute commodity;
- 14) Types of clients.

J. Article (31)

The applicant shall be informed in writing with the decision of the Council, which shall be any of the following:

- 1) The approval on the economic concentration application, supported by reasons;
- 2) The refusal of the economic concentration application, supported by reasons;
- 3) The conditional approval on the economic concentration.

§4.3 M&A Regulation, Article 16

A. Article 16: Compliance of the Offer with Competition Law

(a) Notification

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

(b) Requirement for Appropriate Term in Offer

Where an offer would, if completed, be subject to the Competition Law, it must be a term of the offer that it will lapse if the Council of Competition Protection notifies the offeror or the offeree company in writing that it objects to the deal or has placed it under study and review as specified in the Competition Law.

(c) Offer Period Ceases During Competition Reference Period

When an offer or possible offer is objected to by the Council of Competition Protection, placed under study or forms the subject of proceedings or inquiries pursuant to paragraph (b), the offer period will end. Any new offer must be announced within 21 days after the announcement of a final decision made that the transaction is permissible under the Competition Law. A new offer period will be deemed to begin on the date on which a final decision made that the transaction is permissible under the Competition Law. If there is no announcement of a new offer within 21 days after 22 Capital Market Authority the announcement of a final decision made that the transaction is permissible under the Competition Law, this offer period will last until either the expiry of the 21 day period or the announcement by all relevant offerors (affected by the decision that the transaction is permissible under the Competition Law) that they do not intend to make an offer, whichever is earlier.

Appendix B to Chapter 4: Rules Governing Economic Concentration

Rules Governing Economic Concentration

I. Definitions

For the purposes of the Rules:

- **Office Hours**

Office Hours shall be 7.30 am – 2.30 pm Saturday to Wednesday, except on national holidays.

- **Receipt of applications**

Applications for economic concentration shall be received by the Council during official working days from 9.00 am to 2.00 pm.

- **Computation of time**

Period of time determined by the Law or the Executive Regulations and the decrees issued for their implementation shall be calculated as follow:

- a- Computation of time shall begin the next day of the day on which the prescribed act or event dates.
- b- Where the prescribed time expires on an official holiday, the prescribed period of time shall be extended to the first working day.

- **Reference to Articles**

Unless otherwise specified, Articles in the rules refer to Articles of the Regulations of Competition Law.

- For the purposes of Article 7 (a):

- A commodity is any commodity or service or a combination thereof which may, in terms of price, characteristics and uses, substitute each other to meet a specific consumer need in a given geographical area of homogenous competition conditions.
- To calculate the total supply of commodities, the gross value of sales over a 12 month period in the Kingdom of Saudi Arabia shall be calculated.
- Economic Concentration shall mean holding a market share of at least 40 % of the total supply of a commodity in the market.
- Transactions representing Economic Concentration include firms involved in merger operations or desiring to acquire assets, proprietary rights, usufructs or shares, which causes them to be in an Economic Concentration or competing firms desiring to combine two or more management into one joint management, if that results in an Economic Concentration

2. Notification of a proposed Economic Concentration

- 2.1. The Parties to an Economic Concentration shall notify the Council in writing at least sixty days prior to completion of such Economic Concentration.
- 2.2. An application for Economic Concentration approval under Article (7-a) shall be submitted to the Council in the form prescribed in Schedule 1 attached to all the necessary documents which are stated in Article (7-a).
- 2.3. An Application shall be lodged at the Council's head office during office hours.
- 2.4. On receipt of an application for Economic Concentration approval under Article (7-a) the Council shall issue a receipt in the form prescribed in Schedule 2.
- 2.5. The receipt issued by the Council shall be an evidence for the lodgement of the application and the date of that lodgement.
- 2.6. The Council shall maintain and publish a Register of Applications for Economic Concentration approval under Article (7-a), as prescribed in schedule 3.
- 2.7. The Council shall maintain and publish a Register of Decisions in respect of applications for approval under Article (7-a) as prescribed in schedule 4.

3. Economic Concentration Proceedings

- 3.1. Application for Economic Concentration Approval shall be submitted to the General Secretariat by the applicant or his legal representative. The General Secretariat shall verify the completeness of the necessary documents for the application of Economic Concentration approval. In the case the file is complete, the council shall submit a notification to the entity and the period of time shall start from that date. If the file is not complete, the file shall not be received and the entity shall be notified with the missing documents. A document declaring receipt of such notification shall be signed by the responsible employee in the General secretariat and the applicant or his legal representative.

- 3.2 After receiving an application for Economic Concentration accompanied by the prescribed documents, the Council may request the parties to provide further documents or data that it deems necessary for the review of the application. This request shall be:

- a. Made in writing.
- b. Specify the required documents or information.

The parties shall provide the Council with the necessary documents within a period of 15 days from the receipt of the Council request.

- 3.3 The Council shall publish a summary of the application of Economic Concentration in the local press or media. Any concerned party may object the proposed Economic Concentration setting out the reasons for his objections or the basis it may have to deem the Economic Concentration as likely to have the

effect of restricting competition in the market, provided such objection shall only be admissible if:

- a. It is made in writing.
- b. It is presented by no later than 15 days from the day of the publication made by the Council.
- c. Addressed to the Secretary General of the Council.
- d. Setting out the name and address of the sender of the objection.

The Council warrants that all communication shall be dealt with in strict confidence.

4 Consideration of an Economic Concentration

4.1 When considering an Economic Concentration, the Council shall determine whether the Economic Concentration would have the effect on Competition by assessing the following matters:

- The actual and potential level of competition in the market.
- The ease of entry into the market.
- The effect on the commodity price.
- The existence of any regulatory barriers affecting the entrance of new competitors.
- The level, trends and history of anti-competitive conduct in the market.
- The likelihood that the Economic concentration would result that the Concentration parties would have market power.
- The dynamic characteristics of the market including growth and innovation.

4.2 When assessing the previous factors, if it appears to the Council that the Economic Concentration is likely to substantially prevent or lessen competition, the Council shall determine:

- Whether the Economic Concentration is likely to result in any technological efficiency or other pro-competitive gain which will be greater than the effects of any prevention or lessening of competition.
- Whether the Economic Concentration can be justified for achieving public interest.

4.3 In order for the Council to determine whether the Economic concentration will affect the competition in the Kingdom, the Council shall consider:

- Maintaining and promoting effective competition between persons producing or distributing commodities and services in the market.

- Promoting the interests of consumers, purchasers, and other users in the region, in regard to the quality, price, and variety of such commodities and services.
- Promoting through competition, the reduction of costs and the development of new commodities and facilitating the entry of new competitors into the market.

5 Decision of an Economic Concentration

- 5.1. The Council shall make its decision concerning the Economic Concentration and shall notify it to the applicant within 60 days from the date of receiving the application complete with all required documents. The council has the right to extend the period by 30 days in a condition of notifying it in writing to the applicant before the expiry of 60 days from the date of submitting the application.
- 5.2. The applicant shall be addressed with the Council requirements and decisions by the General Secretariat on the selected address stated in the application for approval.
- 5.3. A firm may complete the procedures of the Economic Concentration in the following cases:
- a. Upon notification in writing of approval by the Council.
 - b. Upon expiration of sixty days from the date of notification without being notified by the Council in writing of its objection to the deal or of that it is under study and investigation.
 - c. Upon expiration of ninety days from the date of notification with the deal being under review and investigation, without being notified by the Council in writing of its approval or rejection.
- 5.4 The Council decision concerning the Economic Concentration shall be one of the following:
- a- Approval of the Economic Concentration.
 - b- Reasoned refusal of the Economic Concentration.
 - c- Conditional approval of the Economic Concentration.
- 4.5 If the Council is satisfied that an Economic Concentration will lessen competition in the Kingdom, the Council shall make one or more of the following orders;
- a. Declaring the Economic Concentration unlawful.
 - b. Prohibiting the acquisition of any of the parties of the whole or part of an undertaking or the assets of the undertaking, if the acquisition is likely to lead to a Merger.
 - c. Requiring any person to take steps to secure the dissolution of any organisation, whether corporate or unincorporated, or the termination of any association where the Council is satisfied that the person is concerned in or is a party to an Economic Concentration.

- d. Requiring that if any Economic Concentration takes place, any party thereto who is named in the order shall observe such prohibitions or restrictions in regard to the manner in which it carries on business as specified in the order.
- e. Generally making such provisions as, in the opinion of the Council are necessary to terminate or prevent the Economic Concentration or alleviate its effect.

4.6. Such order shall be in writing and informed to every concerned party.

6. Abandonment of an Economic Concentration

- 6.1. Should the parties to an Economic Concentration approved by the Council wish to abandon the intended Concentration they shall notify the Council in writing with their intention.
- 6.2. Upon the filing of the Economic Concentration abandonment notice the parties to the Concentration will remain in the same position as if the Concentration has never been notified.

Schedule 1
Application for Economic Concentration Approval

H.E Secretary General
Council of Competition Protection

Pursuant to Artical (6) of the Competition Law and Artical (7-a) of the Implementing Regulations , [*Name of submitting entity*] herby makes application notifying the Council of its intention to , the result of which the applicant will have or is likely to have a market share of 40% of a market in the kingdom of Saudi Arabia.

Name of the firm

Location Number of branches

Number of the commercial Registry

Activities of the firm

Full address P.O . Box

City Phone

Fax

Please explain the following

1. The required economic concentration
2. The date of intended economic concentration / /14 (/ /20)
3. A list of main goods or services related to entities involved in the process of economics concentration.

.....

.....

.....

.....

4. The relevant market(s)
5. Estimation of the relevant market(s) (mention the sources of data)
6. The value of sales
7. The quantity of sales
8. Sales as percentage of total relevant market
9. A list of main goods or services the applicant deal with them
10. Type and size of the capital
11. The positive effects of the economic concentration on the market
12. The potential negative effects of the economic concentration on the market (stat any obligations or suggestions deem necessary to minimize negative effects)
13. A list of all entities involved in the economic concentration

- The following information is provided by each party in order to support this application:

Name of the firm

Nationality

Number of the commercial Registry

Activities of the firm

Full address P.O. Box

City Phone

Fax

E-mail

1. The quantity of sale.....
2. The value of sale
3. The share of sale in the domestic market
4. A list of board member in the firm :.....
 - a) e).....
 - b) f).....
 - c) g).....
 - d) h).....
5. Number of competitors and their market shares

 - a)
 - b)
 - c)

6. The main customers and their purchase shares

.....

.....

7. Cooperation agreements between firms applied in the relevant markets (distribution agreement , scientific cooperating agreements , joint production and similar agreements).....

.....

.....

8. Elements affecting entry to the market

.....

.....

9. Nature of the distribution channels.....

.....

.....

10. Factors affecting the price fixing in the relevant market and the improvement registered for last five years.....
.....
.....

11. The available production capacity and the proportion which is actually utilized
.....
.....

12. The volume of demand and its structure (nature of customers, volume of general purchase, importance of trade mark and similar subjects)
.....
.....

13. The substitute goods or services
.....
.....

14. Types of customers
.....
.....

15. Markets affected by the economic concentration
.....
.....

16. Details of any acquisition by any of the concentration parties or other parties in the relevant industry during the last 5 years.....
.....
.....

17. Does this concentration involve foreign partner(s)? If yes, provide full details:
.....
.....

18. Is this concentration affected by conduct occurring abroad? If yes, provide full details
.....
.....

19. Does the applicant have or intend to lodge application or notice in respect of this or a related economic concentration with a foreign competition authority? If yes, provide full details:
.....
.....

- Any information that may facilitate the examination of the application or support it such as:

1. The sources of the provided information:

.....

2. The confidential information that the firm refrains to mention when publishing the Economic Concentration Summary:

.....

3. Any additional information that was not provided when submitting the application can be provided later to support the application :

.....

- Required documents to support this application:

1. Memorandum of Association or Articles of association of the applicant firm and all related firms.
2. Financial statements for the last two fiscal years of the applicant firms involved in the process of economic concentration as well as their branches.
3. Memorandum of Association or Articles of Association of the target firm and all related firms.
4. Financial statements for the last fiscal years of the target firms involved in the process of economic concentration as well as their branches.
5. A draft contract or agreement of economic concentration and any public offer document, number and type of shares or the assets to be acquired.
6. Payment receipt of one thousand riyals which is non refundable for review of the application.

<p>Note:</p> <p>(i) The Council shall announce through one more media channels, at the expense of the applicant, an abstract of the economic concentration application, and invite all persons with interest to give their opinions thereon within a period not exceeding fifteen days from the announcement date.</p> <p>(ii) An application must be lodged at the Council's head office during office hours.</p>	
<p>I affirm that all of the information and documents in this application are correct.</p>	
Name of the applicant	Position
.....
Signature	Name of firm
.....
Date	
.....	

Schedule 2

Receipt for application of realization of Economic Concentration

Name of applicant :
Number of the application Date
Name of the recipient
Signature :
Position :
Date :

Schedule 3

Register of application for Economic Concentration approval.

Number of submitting the application
Date of submitting the application
Description of economic concentration in respect of which approval is sought
Name of applicant :
Full address :
City : P. O. Box
Phone : Fax
E-mail :
Commercial Registry number
Entity activities
State of the application in respect of the Council approval
.....
Issued decision concerning the application
.....

Schedule 4

Register of Decisions in respect of Economic concentration applications

Name of applicant :
Full address :
City : P.O. Box
Phone : Fax
E-mail :
Number of submitting the applicant
Date of submitting the applicant / /14 (/ /20)
Decision number Date / /14 (/ /20)
Practices included in the decision
.....
.....
Summary of the decision
.....
.....
Effectiveness date of the economic concentration Expiry date
.....
Summary of any Council decision concerning decision of economic concentration
.....
.....

Appendix C to Chapter 4: Form of Economic Concentration Request

Form of Economic Concentration Request

نموذج خدمة طلب تركيز اقتصادي

نأمل الاطلاع على وصف خدمة طلب تركيز اقتصادي (نبذه عن الخدمة) قبل الشروع بتعبئة النموذج.

معلومات عن مقدم الطلب

Form of Economic Concentration Request

Please read the description of Economic Concentration Request (About the service) before proceeding to fill the form

Applicant information

<input checked="" type="checkbox"/>	الاسم الرباعي Full Name	<input type="text"/>
<input checked="" type="checkbox"/>	رقم الهوية الوطنية/الإقامة National Identity Number/Iqama	<input type="text"/>
<input checked="" type="checkbox"/>	صفة مقدم الطلب Applicant Description	<input type="text"/> select: Owner/Agent اختر: صاحب المنشأة/وكيل
<input checked="" type="checkbox"/>	رقم الجوال Mobile Number	<input type="text"/> 966 _____ Example: 9665XXXXXXXX مثال: 9665 XXXXXXXX
<input checked="" type="checkbox"/>	البريد الإلكتروني Email Address	<input type="text"/>
	تأكيد البريد الإلكتروني Email Address Confirmation	<input type="text"/>

معلومات عن المنشآت المشاركة في التركيز الاقتصادي

Information about the establishments involved in the Economic Concentration

Names and data of the establishments involved in the Economic Concentration (including the applicant's establishment)

أسماء وبيانات المنشآت المشاركة في التركيز الاقتصادي (بما فيها مقدمه الطلب) :



السنة المبيعات/الإيرادات
آخر سنة

نشاط المنشأة

رقم السجل التجاري

اسم المنشأة

--	--	--	--	--

Year Sales/Last Year Incomes Establishment Activity

Commercial Register Number Establishment Name

معلومات عن التركيز الاقتصادي وآثاره

Information about the Economic Concentration and its implications



وصف التركيز الاقتصادي المطلوب
Description of the Desired Economic Concentration

--	--	--	--	--



مبررات طلب التركيز الاقتصادي
Reasons for Requesting Economic Concentration

--	--	--	--	--



ما هي حصة المنشآت بعد التركيز لأعلى سلعة/خدمة على مستوى السوق المعني (المناطق أو المحافظات أو الأحياء السكنية ... إلخ)؟

What is the highest commodity/service allocation to the establishments after Concentration at the level of the related market (regions, governorates, residential areas, etc.)?

فأكثر 30% أقل من 30%



ما هي حصة المنشآت بعد التركيز لأعلى سلعة/خدمة على مستوى المملكة؟

What is the highest commodity/service allocation to the establishments after Concentration at the Kingdom level?

أكثر من 30% أقل من 30%

More 30% Less 30%

Documents to be Attached

<p>✓ الميزانيات المالية للمنشآت المشاركة بعملية التركيز الاقتصادي (بما فيها مقدمه الطلب)</p> <p>Financial Budgets of the establishments involved in the Concentration process (including the applicant's establishment)</p>	<p>بالإمكان جمع ميزانيات كل المنشآت بملف واحد مضغوط وإرفاقه</p> <p>The budgets of all of the establishments may be gathered and attached in one compressed file</p> <p>• <input type="text"/></p>
<p>✓ عقود تأسيس المنشآت المشاركة بعملية التركيز الاقتصادي (بما فيها مقدمه الطلب)</p> <p>Articles of Association of the establishments involved in the Concentration process (including the applicant's establishment)</p>	<p>بالإمكان جمع عقود تأسيس كل المنشآت بملف واحد مضغوط وإرفاقه</p> <p>Articles of Association of all of the establishments may be gathered and attached in one compressed file</p> <p>• <input type="text"/></p>
<p>ملاحظة عامة تود إيصالها لنا</p> <p>A general notice you would like to deliver</p>	<p><input type="text"/></p>
<p>✓ كود التحقق</p> <p>Verification Code</p>	<p>الرجاء كتابة ما يظهر لك في الصورة</p> <p>Please enter the code shown here</p>

Appendix A to Chapter 5: Relevant Laws Cited

§5.1 Saudi Companies Law 2015,¹⁰²⁴ Articles 1, 12, 60, 65, 68, 70, 71, 74, 75, 76, 78, 86, 87, 90, 92, 93, 94, 95, 111, 112, 113, 114, 115, 116, 117, 118, 161, 190, 191, 192, 219, 224, 225, 226 and 161

A. Article (1)

The following terms and expressions shall have the definitions and meaning affixed thereto hereunder, wherever mentioned in these regulations unless the context requires otherwise.

The Ministry: The Ministry of Commerce and Industry

The Minister: The Minister of Commerce and Industry

CMA: The Capital Market Authority

The Chairman: The Chairman of the Board of the CMA

The Competent Authority: The Ministry of Commerce and Industry, except for the matters related to the joint stock companies which is listed before the CMA, the competent authority shall mean the Capital Market Authority

Regulations: The Companies' Regulations

B. Article (12)

1. Save the partnerships (un-registered)/Mahasa Company, a company's Articles of Association as amended must be in writing and attested before the relevant competent authority; otherwise such Articles of Association shall not be valid vis-à-vis third parties.

¹⁰²⁴ This is not the official translation.

2. The company's managers or directors, as the case may be, shall be held jointly responsible for damages sustained by the company, by the shareholders or by third parties as a result of the failure to record the Articles of Association in accordance with paragraph (1) hereinabove.

C. Article (60)

1. The Ministry shall decide upon licensing the incorporation of the joint stock company, including the joint stock company in which the state or other juristic persons is part. In case the activity of the joint stock company requires a license from the competent authority before licensing its arbitration, the decision for the incorporation of joint stock company shall not be issued before obtaining such license of approval.

2. The joint stock company may not exercise its activities unless the incorporation procedures are completed and the final licenses necessary for the activity is obtained by the competent entity, if any.

3. In case the incorporation applications form of the joint stock company in which the state or the juristic persons are part includes exemption of any of the regulations' provisions, the licensing request shall be referred to the Cabinet to consider the same.

D. Article (65)

1. The Ministry shall issue a decision to announce the incorporation of the company, after verifying that all the requirements stated in the provisions of this regulations regarding establishment of joint stock company are met. The decisions shall be published on the Ministry's website.

2. The board members must, within fifteen days of the date (of issue) of the above decision as stated in paragraph 1 above, apply for the registration of the company in the

companies commercial registry. Such registration shall specifically contain the following information:

- a) The company's name, object, head office and term.
- b) The founders' names, residence addresses, occupations, and nationalities.
- c) The classes, value and number of shares, the amount of paid-in capital
- d) The Ministry's decision number and date concerning the incorporation of the company.
- e) The Ministry's decision number and date concerning the announcement of incorporation of the company.

E. Article (68)

1. A Joint Stock Company shall be administered by a board of directors whose number is specified in the company's bylaws, provided that it is not less than three and not more than eleven.

2. Each director may nominate himself/herself, another or more for the membership of the Board of Directors, within the limits of their share in the capital.

3. The regular general assembly shall appoint the directors for the term specified in the company bylaws, provided that it does not exceed three years. Directors, however, shall always be eligible for re-appointment, unless the company bylaws provide otherwise. The company bylaws shall specify the manner upon which the board membership ends or terminated upon the request from the Board of Directors. In any case, the regular general assembly may, at any time, remove all or any of the board of directors members even if the company's bylaws provide otherwise, without prejudice to the right of a removed board member to claim compensation against the company if the removal is made without acceptable justification or at

an improper time. A director may resign, provided that such resignation is made at a proper time; otherwise, he/she shall be responsible before the company for damages that occur out of such resignation.

F. Article (70)

1. Unless the company's bylaws provide otherwise, if a board member seat becomes vacant, the board may - temporarily - appoint a member in accordance with the order in votes, provided that this member shall have the required experience and competence. The Ministry shall be informed of such, as well as the authority if the company is listed in the financial market, within five working days as of the appointment date, and it shall be laid before the first regular general assembly. The new member shall complete the unexpired term of his predecessor.

2. If the number of directors falls below the minimum prescribed in these Regulations or in the company's bylaws, the rest of the board members must call the regular general assembly to convene within sixty days to elect the required number of members.

G. Article (71)

1. A director may not have any interest, whether directly or indirectly, in the transactions or contracts concluded for the company, unless through prior authorization from the regular/ordinary general assembly, to be renewed annually. A director must declare to the board (of directors) any direct or indirect interest that he may have in the transactions or contracts concluded for the company. Such declaration must be recorded in the minutes of the (board) meeting, and this member shall not participate in voting for the resolution to be adopted in this respect in the board of directors and the shareholders' meetings. The chairman of the board of directors shall inform the regular/ordinary general assembly upon convening, of the transactions

and contracts in which any director has a direct or indirect interest. Such notification shall be accompanied by a special report from the company's external auditor.

2. If the board member fails to declare its interest referred to in Paragraph 1 of this Article, the company or any interested party may claim before a competent judicial entity voidance of the contract or oblige such member to pay any profit or benefit gained thereto from it.

H. Article (74)

Directors may not disclose outside of general assembly meetings the secrets related to the company; and they shall not exploit what has come to their knowledge by reason of their membership, to achieve an interest for themselves or their relatives or third parties; otherwise, they will be removed and held liable for damages.

I. Article (75)

1. With due regard to the prerogatives vested in the general assembly, the board of directors shall enjoy full powers in the administration of the company to achieve its objectives, except where explicitly stipulated by law or the company's articles of association that acts or actions are within the competence of the general assembly; The board shall also be entitled, within the scope of its competence, to delegate one or more of its members or others to perform an act or certain acts.

2. The board of directors may contract loans for any periods of time, or sell or mortgage the assets or the place of business of the company, or release the debtors of the company from their liabilities, unless the articles of association of the company or the ordinary general assembly limit the powers of the board.

J. Article (76)

1. The company's bylaws shall specify the manner of remunerating directors. Such remuneration may consist of a specified amount, or meeting attendance fee, material benefits, or a percentage of the net profits; and it may also be a combination of two or more of these benefits.

2. If such remuneration represents a certain percentage of the company's profits, it must not exceed 10% of the net profits after the deduction of the reserves as are determined by the general assembly pursuant to the provisions of these Regulations and the company's bylaws, and after distribution of a dividend of not less than 5% of the company's paid capital to shareholders, provided that the entitlement to this remuneration is proportional to the number of sessions attended by the member. Any determination (of remuneration) made in violation of this (provision) shall be null and void.

3. In all cases, the total remunerations and financial or in kind benefits that a director receives shall not exceed an amount of 500,000 Riyals annually, according to the regulations set by the competent entity.

4. The board of directors' report to the regular/ordinary general assembly must include a comprehensive statement of all the amounts received by directors during the financial year in the way of remuneration, expenses, and other benefits, as well as of all the amounts received by the directors in their capacity as officers or executives of the company, or in consideration of technical, administrative or advisory services. It must also include the number of sessions of the board and the number of sessions each director attended as of the date of the last general assembly.

5. The general assembly may – upon the recommendation of the board – terminate the membership of the members who are absent for more than three consecutive board meetings without a legitimate excuse.

K. Article (78)

1. Directors shall be jointly responsible for damages to the company, or the shareholders, or third parties, arising from their maladministration of the affairs of the company, or their violation of the provisions of these Regulations or of the company's bylaws. Any stipulation contrary to this provision shall be considered nonexistent. (Joint) liability shall be assumed by all directors if the wrongful act arises from a resolution adopted unanimously. With respect to resolutions adopted by majority vote, dissenting directors shall not be liable if they have expressly recorded their objection in the minutes of the meeting. Absence from the meeting during which such resolution is adopted shall not constitute cause for release from liability, unless it is established that the absentee was not aware of the resolution, or, on becoming aware of it, was unable to object to it.

2. The ordinary general assembly's approval to discharge the board members from their liability shall not hinder any liability actions.

3. Such action shall be disregarded after the lapse of three years from the date of discovering such wrongful act. Except for fraud and forgery, such action shall be disregarded in all cases after the lapse of five years from the end date of the financial year in which such act took place or three years as of the end of membership of the concerned director, whichever is later.

L. Article (86)

1. The shareholders' general assembly meetings shall be chaired by the Chairman, or the vice chairman in his absence, or any board member delegated by the Board of Directors for this purpose in the absence of the chairman and vice chairman.

2. Each shareholder is entitled to attend the shareholders' general assembly meeting even if the company's bylaws states otherwise. The shareholder may authorize another person other than the directors or the company's employees to attend the meeting on his behalf.

3. Shareholders' general assembly meetings may be held and the shareholder may participate in its deliberations and vote on its resolutions through modern technology methods, according to the regulations set by the relevant entity.

4. The Ministry of Commerce, as well as the Authority for companies listed in the financial market, may delegate one or more representatives to attend the general assembly meetings as observers, in order to ensure the application of the provisions.

M. Article (87)

Except for matters falling within the competence of the extraordinary general assembly, the regular/ordinary assembly shall be competent in all matters related to the company and shall convene at least once a year within six months from the end of the company's financial year. Other regular/ordinary general assemblies may be called for whenever the need arises.

N. Article (90)

1- Shareholders general or special meetings shall be convened at the invitation of the board of directors, as stipulated for in the bylaws of the company. The board of directors must call for a regular/ordinary general assembly, if so requested by the auditor or the Audit Committee or a number of shareholders representing at least 5% of the capital. Meetings shall be convened at the invitation of the auditor if the board did not call for it within thirty days of the auditor's request.

2- The competent authority may by its decision invite the regular/ordinary general assembly to be convened in the following cases:

- a. After the lapse of the term set out in Article 87 of the law without being convened.
- b. If the number of the board of directors is reduced to less than the minimum number required for its validity to convene, taking into account the provisions of Article 69 of the law.
- c. If there are violations of the provisions of the law or the bylaws of the company or maladministration of the affairs of the company.
- d. If the board did not call for the general assembly meeting within fifteen days from the date of the auditor's request or the Audit Committee or a number of shareholders representing at least 5% of the capital.

3- A number of shareholders representing at least 2% of the capital, may submit a request to the relevant entity to call for a meeting of the ordinary general assembly if any of the cases mentioned in Paragraph 2 of this Article apply. The competent entity shall within thirty days as of the shareholders' request, send invitations, provided that the invitation includes the meeting agenda and the items to be approved by the shareholders.

O. Article (92)

Shareholders - wishing to attend a general or special assembly - shall register their names at the company's head office before the time fixed for such meeting to convene, unless the bylaws of the company provide for another place and means.

P. Article (93)

1. The regular general assembly meeting shall be valid only if attended by shareholders representing at least a quarter of the company's capital, unless the bylaws of the

company provide for a higher proportion, provided not to exceed one half of the company's capital.

2. If this quorum was not achieved as stated in Paragraph 1 of this Article, a notice shall be sent for a second meeting to be held within thirty days of the date of the previous meeting. This notice shall be published in the manner prescribed in Article (91). However, the second meeting may be held one hour after the lapse of the term specified for holding the first meeting, provided that this is permitted in the bylaws, and that the notice of the first meeting includes the possibility of holding this meeting. In all cases, the second meeting shall be valid no matter the number of shares represented therein.

3. Resolutions of the regular general assembly shall be adopted by absolute majority vote of the shares represented thereat, unless the bylaws of the company provide for a higher proportion.

Q. Article (94)

1. An extraordinary general assembly meeting shall be valid only if attended by shareholders representing at least one half of the company's capital, unless the company's bylaws provide for a higher proportion, on condition not to exceed two thirds of the company's capital.

2. If this quorum was not achieved as stated in Paragraph 1 of this Article, a notice shall be sent for a second meeting with the same conditions as stipulated for in Article 91. However, the second meeting may be held one hour after the lapse of the term specified for holding the first meeting, provided that the notice of the first meeting includes the possibility of holding this meeting. In all cases, the second meeting shall be valid if attended by a number of shareholders representing at least a quarter of the company's capital.

3. If this quorum was not achieved in the second meeting, a notice shall be sent for a third meeting with the same conditions as stipulated for in Article 91 of the law. However, the third meeting shall be valid no matter the number of shares represented therein, after the approval of the competent entity.

4. Resolutions of an extraordinary general assembly shall be adopted by a two-thirds majority vote of the shares represented thereat. But if a resolution pertains to an increase or a decrease in capital, or to extension of the term of the company, or the dissolution of the company prior to expiry of the term specified in its bylaws or the merger of the company with another company, it shall be valid only if adopted by a three-fourths majority vote of the shares represented at the meeting.

5. The board of directors must publish, in accordance with the provisions of Article 65 of the law, the resolutions adopted by the extraordinary general assembly if they provide for alteration of the company's bylaws.

R. Article (95)

1. The company's bylaws shall state the manner of voting at shareholders' meetings. Cumulative voting shall be used in electing the board of directors, i.e. the right of vote for one share may not be used more than one time.

2. Directors may not participate in voting on assembly resolutions pertaining to their discharge from liability for their administration of the company or pertaining directly or indirectly to their interest.

S. Article (111)

1. The company's bylaws may provide for the redemption of shares during the company's existence if it is a gradually exhaustible type of project or based on temporary rights.

Shares shall be redeemed only out of profits or of a disposable reserve fund. Redemption shall be effected successively either by way of annual draw or by any other method insuring equality among shareholders.

2. Redemption may be effected by the company's purchasing its own shares either at a discount or at par value, and shall destroy the shares so obtained.

3. A shareholder whose shares were redeemed in accordance with paragraph (1) of this Article shall be granted enjoyment shares (actions de jouissance). A certain percentage of the annual net profit shall be set aside for the unredeemed shares by priority over the enjoyment shares in accordance with the Company's bylaws.

4. Upon the dissolution of the company, the holders of unredeemed shares shall have priority in receiving the par value of their respective shares out of the company assets.

T. Article (112)

1. The company may purchase or pledge its own shares in accordance with rules established by the competent authority. The shares purchased by the company shall not have any votes in shareholders' meetings.

2. The shares may be pledged in accordance with rules to be established by the competent authority. The hypothecary creditor may receive the profits and use the rights attached to the share unless otherwise agreed in the pledge contract. However, the hypothecary creditor may not attend the shareholders' general meetings or vote therein.

U. Article (113)

1. A shareholder shall exercise the right of voting at general or special meetings in accordance with the provisions of the company's bylaws. Each share shall have one vote in the shareholders' meetings.

2. The company's bylaws may prescribe a maximum limit for the number of votes vested in the holder of several shares on behalf of a third party.

V. Article (114)

The company's extraordinary general meeting may, based on a provision in the company's bylaw and in accordance with the rules established by the competent authority, issue preferred shares or resolve to purchase the same or convert ordinary shares to preferred shares or convert the preferred shares to ordinary shares. The preferred shares shall not give the right to vote in the shareholders' General Assemblies. Such shares shall give their holders the right to obtain a percentage more than the holder of the ordinary shares in the company's net profits after setting aside the statutory reserve.

W. Article (115)

If the capital includes preferred shares, no new shares with prior preference to these may be issued except with the consent of a special meeting formed, in accordance with Article (89) of the Regulations, of the holders of the preferred shares who would be harmed by such issue, and with the consent of a general meeting representing all classes of shareholders, unless the company's bylaws provide otherwise. This rule shall also apply to alteration or cancellation of the priorities established in favour of preferred shares in the bylaws of the company.

X. Article (116)

1. In case of no dividends are distributed for any fiscal year, the profits for the coming years may only be distributed after paying the holders of the preferred shares the

percentage stated in accordance with the provision of Article (114) of the Regulations for that year.

2. Where the company fails to pay the percentage stated in accordance with the provision of Article (114) of the Regulations out of the profits for three consecutive years, the special meeting of the holders of these shares convened in accordance with the provisions of Article (89) of the Regulations may resolve that they either attend the general meetings and vote or delegate representatives on their behalf to the board of directors in proportion to the percentage of their shares in the capital until the company is able to pay in full all priority profits prescribed for these shareholders for the previous years.

Y. Article (117)

1. A shareholder is obligated to pay the value of his share on the dates set for such payment. If a shareholder defaults in payment when it becomes due, the board of directors may, after notifying him by the means stated in the Company's bylaws or notifying him by a registered letter, sell the share at a public auction or stock market – as the case may be- in accordance with the rules to be established by the competent authority.

2. The company shall recover from the proceeds of the sale such amounts as are due to it and shall refund the balance to the shareholder. If the proceeds of the sale fall short of the amounts due, the company shall have a claim on the entire fortune of the shareholder for the unpaid balance.

3. A shareholder defaulting on payment till the sale day may pay the value payable thereby in addition to the expenses spent by the company in this regard.

4. The company shall cancel the share sold in accordance with the provisions of this Article and issue a new share bearing the serial number of the cancelled share to the purchaser. It

shall make a notation to this effect in the shares register along with the statement of the new holder's name.

Z. Article (118)

The company may not ask any shareholder to pay any sums in excess of the amount to which he has committed himself upon the issue of his share, even if the company's bylaws provide otherwise. A shareholder may not recover his interests in the capital of the company. The company may not release any shareholder from his liability for the unpaid balance of the value of his share. Nor may this liability be offset against any rights due to the shareholder from the company.

AA. Article (161)

1. A shareholder may assign his share to a co-shareholder or to a third party in accordance with the terms of the Company's Articles of Association. Nevertheless, if a shareholder wishes to assign his share to a third party for valuable consideration, he must notify his co-shareholders through the manager of the Company, of the terms of such assignment in which case every shareholder shall have the right to recover the share at its fair value, within thirty days of the date of being notified of the same, unless the company's Articles of Association shall stipulate for another evaluation method or period of time. If the right of recovery is exercised by more than one shareholder and the assignment involves a number of shares, these shall be divided among the applicants for recovery in proportion to the interest of each of them in the capital. The right of recovery provided for in this Article shall not apply to the transmission of shares by inheritance or bequest, or by virtue of a judgement of a competent judicial body.

2. In case the prescribed time for the exercise of the right of recovery is expired without being used by any shareholder, the holder of the share shall have the right to waive it for a third party.

BB. Article (190)

Taking into account the other relevant laws, a company, may even during the liquidation stage, merge into another of the same or different type.

CC. Article (191)

1. Merger shall be affected by the combination of one or more companies into another existing company, or by the consolidation of two or more companies into a new company under formation. The merger agreement shall specify the terms of merger and sets out specifically the method to follow in evaluating the merged company's liabilities, and the number of interests or shares to be allotted for it in the capital of the absorbing company or the company resulting from merger.

2. The merger shall only be valid upon evaluating the net assets of the merged company and the absorbing company if the value, or part thereof, of quotas and shares of the merged company are versus those quotas or shares of the absorbing company.

3. In all cases, each company that is a party to a merger shall pass a resolution approving such merger, subject to the conditions prescribed for the amendment of the Articles of Association or by-laws of such company.

4. The shareholder who own shares or stakes in the absorbing company and the merged company may not vote on the resolution except in one of the two companies.

DD. Article (192)

All rights and liabilities of the merged company shall be transferred to the absorbing company or the new company resulting from merger after making all merger procedures and registration of the company according to provisions of these Regulations. The absorbing company or the company resulting from merger shall be deemed a successor of the merged company within the limits of transferred assets, unless otherwise agreed to in merger agreement.

EE. Article (219)

Without prejudice to the provisions of these Regulations, and the powers of the Saudi Arabian Monetary Agency pursuant to any relevant regulations, particularly banks control system, Cooperative Insurance Companies Control System and the finance institutions control system, the Authority shall be competent to supervise joint stock companies listed on the Saudi Stock Market companies and their control, and issue governing regulations thereof, including the organization of mergers if one of the parties is listed on the Saudi Stock market

FF. Article (224)

Existent companies as of the effective date of these Regulations shall adjust their conditions, in accordance with the provisions of these Regulations within one year as maximum commencing from the effective date of these Regulations. Notwithstanding, the Ministry and Board of the Authority, each within its own jurisdiction, shall identify the provisions contained therein governing such companies during such period.

GG. Article (225)

1- The Minister shall issue a resolution with indicative forms of articles of association and by-laws for each type of companies within one hundred and twenty days from the date of issuance of these Regulations. Such forms shall be published at the Ministry's Web Site, and shall be effective as of the effective date of these Regulations.

2- The Minister and Board of the Authority shall issue necessary resolutions to implement their respective provisions of these Regulations.

HH. Article (226)

These Regulations shall supersede the Companies Law, issued by Royal Decree No. M/6 dated 22/3/1385 AH. Any provisions inconsistent with or in contrary to these Regulations shall be repealed

§5.2 Saudi Companies Law 1965, Articles 10, 74, 52, 51, 65, 66, 67,69, 87, 83, 88,72,72, 91,92, 95, 165, 213 and 214

A. Article (10)

With the exception of a joint venture, a company's contract shall be recorded in writing before a notary public. Otherwise, such contract shall be null and void in relation to third parties. This article was amended by the Royal Decree No. M/22 dated 30/7/1412H (corresponding to 4/2/1992AD).

The partners may not invoke the invalidity of the contract, or any amendment thereto that was not recorded in the above manner, against third parties, but the latter may invoke it against the partners.

The directors or the members of the board of directors shall be jointly responsible for damages sustained by the company, the partners, or third parties, as a result of failure to record the contract or any amendment thereto.

B. Article (74)

The company's bylaws shall specify the manner of remunerating directors.

Such remunerations may consist of a specified salary, a fee for attending the meetings, material benefits, a certain percentage of the profits, or a combination of two or more of these benefits.

If, however, such remuneration represents a certain percentage of the company's profits, it must not exceed 10% of the net profits after deduction of expenses, deprecations, and such reserves determined by the general meeting pursuant to the provisions of this Law or the company's bylaws, and after distribution of a dividend of not less than 5% of the company's capital to the stockholders. Any determination of remuneration made in violation of this provision shall be null and void.

The board of directors' report to the regular general meeting must include a comprehensive statement of all the amounts received by directors during the financial year in the way of salaries, share in the profits, attendance fees, expenses, and other benefits, as well as all the amounts received by the directors in their capacity as employees or executives of the company, or in consideration of technical, administrative, or advisory services.

C. Article (52)

The following joint-stock corporations may be incorporated only by virtue of an authorization issued upon a royal decree based on the approval of the Council of Ministers and the recommendation of the Minister of Commerce, with due regard to the provisions of the Regulations:

- a) Chartered corporations.
- b) Corporations managing a public utility.
- c) Corporations receiving subsidy from the government.

d) Corporations in which the government or any other public legal person participates, except for General Organization for Social Insurance and Pension Fund.

e) Corporations practicing banking activities.

Other corporations may be incorporated only by an authorization to be issued by the Minister of Commerce and published in the Official Gazette.

The Minister of Commerce shall issue the said authorization only after reviewing a study proving the economic feasibility of the company's objectives, unless the company has submitted such study to another competent government agency that has authorized the establishment of the enterprise.

The application for such authorization shall be signed by at least five partners of the corporation and submitted in the manner to be prescribed by a decision of the Minister of Commerce.

The application shall state the manner of subscription in the corporation's capital, the number of shares reserved by the founders to themselves and the amount subscribed by each founder. The applicant should attach thereto a copy of the corporation's contract and bylaws both signed by the partners and other founders.

The said application shall be recorded in the register kept for that purpose by the Companies General Department.

The said General Department may request that modifications be made to the corporation's bylaws so as to be consistent with the provisions of this Law or conformable to the standard form referred to in Article 51.

D. Article (51)

The Minister of Commerce shall issue a decision in a form for joint-stock corporation bylaws. Such form may not be violated except for reasons satisfactory to the said minister.

E. Article (65)

The decision of the Minister of Commerce and Industry announcing the incorporation of the company shall, together with a copy of its memorandum of association and bylaws, be published in the Official Gazette at the expense of the company.

The directors must, within 15 days of the date of issue of the above decision, apply for the registration of the company in the Register of Companies at the General Department of Companies. Such registration shall specifically contain the following particulars:

- 1) The company's name, object, head office, and term.
- 2) The founders' names, residence of place, occupations, and nationalities.
- 3) The types, value, and number of shares, as well as the amount offered for public subscription, the amount subscribed by the founders, the amount of paid-in capital, and the restrictions imposed on the circulation of shares.
- 4) Method of the division of profits and losses.
- 5) The particulars concerning contributions in kind and the rights attached thereto, and special privileges granted to the founders or others.
- 6) The date of the royal decree authorizing the incorporation of the company, and the issue number of the Official Gazette in which the royal decree was published.

7) The date of the decision issued by the Minister of Commerce announcing the incorporation of the company, and the issue number of the Official Gazette in which the decision was published.

The directors must also register the company in the Commercial Register in accordance with the provisions of the Law of Commercial Register.

F. Article (66)

A corporation shall be administered by a board of directors whose number shall be specified by the bylaws of the company, provided that it is not less than three directors.

The regular general meeting shall appoint the directors for the term specified in the company bylaws, which shall not exceed 3 years.

The Council of Ministers may determine the number of the boards of directors on which a director may serve.

Directors, however, shall always be eligible for re-appointment, unless the company bylaws provide otherwise.

The company bylaws shall specify the manner of retirement of directors; but the regular general meeting may, at any time, remove all or some of the directors even if the company's bylaws provide otherwise, without prejudice to the right of a removed director to hold the company liable if the removal is made without acceptable justification or at an improper time.

A director may resign, provided that such resignation is made at a proper time; otherwise, he shall be responsible to the company for damages.

G. Article (67)

Unless the company bylaws provide otherwise, if the position of a director becomes vacant, the board of directors may appoint a temporary director to fill the vacancy, provided that such appointment shall be laid before the first regular general meeting. The new director shall complete the unexpired term of his predecessor.

If the number of directors falls below the minimum number prescribed in this Law or in the company's bylaws, the regular general meeting must be convened as soon as possible to appoint the required number of directors.

H. Article (69)

A director may not have any interest whether directly or indirectly, in the transactions or contracts made for the account of the company, except with an authorization from the regular general meeting, to be renewed annually.

Transactions made by way of public bidding shall, however, be excluded from this restraint if the director has submitted the best offer.

The director must inform the board of directors of any personal interest he may have in the transactions or contracts made for the account of the company. Such declaration must be recorded in the minutes of the board meeting, and the interested director shall not participate in voting on the resolution to be adopted in this respect.

The chairman of the board of directors shall inform the regular general meeting when it convenes of the transactions and contracts in which any director has a personal interest. Such communication shall be accompanied by a special report from the auditor.

I. Article (87)

Stockholders' general or special meetings shall be convened at the summons of the board of directors in the manner prescribed in the bylaws of the company.

The board of directors must call for a regular general meeting, if so requested by the auditor or by a number of stockholders representing at least 5% of the capital.

The General Department of Companies may, at the request of a number of stockholders representing at least 2% of the capital or pursuant to a decision by the Minister of Commerce, call for a general meeting if such a meeting is not called within one month from the date set therefore.

J. Article (83)

The bylaws of the company shall specify the classes of stockholders entitled to attend general meetings. Nevertheless, every stockholder who holds 20 shares shall have the right to attend, even if the bylaws of the company provide otherwise.

A stockholder may, in writing, give proxy to another stockholder other than a director to attend the general meeting on his behalf.

The Ministry of Commerce may delegate one or more representatives to attend the general meetings as observers.

K. Article (88)

Notices of general meetings shall be published in the Official Gazette and in a daily newspaper distributed in the locality of the head office of the company, at least 25 days prior to the date set for the meeting.

Nevertheless, if all the stock of the company is registered as nominative, a notice sent by registered mails at least 25 days before the date of the meeting shall suffice. The notice shall contain an agenda of the meeting. A copy of both the notice and the agenda shall be sent to the General Department of Companies at the Ministry of Commerce within the period specified for publication.

L. Article (72)

Directors may not disclose to the stockholders or to third parties outside a general meeting, such secrets of the company because they are liable for its administration; otherwise, they must be removed and held liable for damages.

M. Article (73)

With due regard to the prerogatives of the general meeting, the board of directors shall enjoy full powers in the administration of the company. It shall be entitled, within the scope of its competence, to delegate one or more of its members or others to perform an act or certain acts.

Nevertheless, the board of directors may not contract loans for terms exceeding 3 years, or sell or mortgage the real property or the place of business of the company, or release the debtors of the company from their liabilities, unless so authorized in the bylaws of the company and subject to the terms set forth therein. If the company's bylaws do not contain any provisions in this regard, the board may perform the above acts with an authorization from the regular general meeting, unless such acts fall by virtue of their nature within the scope of the company's objects.

N. Article (91)

The regular general meeting shall be valid only if attended by stockholders representing at least one half of the company's capital, unless the bylaws of the company provide for a higher proportion. If this quorum has not been obtained at a first meeting, a notice shall be sent for a second meeting to be held within 30 days of the previous meeting. This notice shall be published in the manner prescribed in Article (88). The second meeting shall be considered valid, regardless of the number of shares represented thereat.

Resolutions of the regular general meeting shall be adopted by absolute majority vote of the shares represented thereat, unless the bylaws of the company provide for a higher proportion.

O. Article (92)

An extraordinary general meeting shall be valid only if attended by stockholders representing at least one half of the company's capital, unless the company's bylaws provide for a higher proportion. If this quorum has not been obtained at the first meeting, a notice shall be sent for a second meeting in the manner prescribed in Article (91). The second meeting shall be valid if attended by a number of stockholders representing at least one quarter of the company's capital.

Resolutions of an extraordinary general meeting shall be adopted by a two-thirds majority vote of the shares represented thereat. But if a resolution pertains to an increase or a decrease in capital, or to extension of the term of the company, or to dissolution of the company prior to expiry of the term specified in its bylaws or to merger of the company into another company or firm, it shall be valid only if adopted by a three-fourths majority vote of the shares represented at the meeting.

The board of directors must publish, in accordance with the provisions of Article (65), the resolutions adopted by an extraordinary general meeting if these provide for amendment of the company's bylaws.

P. Article (95)

Minutes shall be kept for every general meeting, showing the names of stockholders present or represented thereat, the number of shares held by each of them, whether personally or by proxy, the number of votes allotted thereto, the resolutions adopted, the number of consenting and dissenting votes, and a comprehensive summary of the debate conducted at the meeting.

Following every meeting, the minutes shall be regularly entered in a special book, which shall be signed by the chairman, the secretary, and the teller of the meeting.

Q. Article (165)

A partner may waive his portion to one of the partners or others in accordance with the terms of the company's contract, however if he wants to waive his portion to others with a compensation, he shall notify the other Partners through the director of the company with the terms of the waiver. In this case, each partner may ask for refund the money of the portion with its true value. If thirty days passed from the date of notification without any of the partners using his right of restitution, the owner of the portion has the right to dispose of it, taking into account the provisions of the second paragraph of

Article (157). If more than one of the partners used the right of restitution and the waiver was related to a group of portions, these portions shall be divided between those who asked for restitution by the portion of each of them in the capital. If the waiver was related to one portion, it shall be given to the partners who have asked for restitution, taking into account the provisions

of the second paragraph of Article (158). If the waiver of the portion was without compensation, then the asking partner shall pay the value according to the latest inventory conducted by the company.

The right of restitution provided for in this article on shall not be applied to the transfer of ownership of the portions by inheritance or a will.

R. Article (213)

It is permissible for the company, even if it is in the phase of liquidation, To integrate into another company of its kind or of another kind, but the cooperative company shall not be integrated into a company of another kind.

S. Article (214)

The integration is conducted by the annexation of one or more Companies to another existing company or by combining two or more companies in a new company under foundation. The integration contract determines the conditions and shows, in particular, the method of evaluating the security of the integrated company and the number of portions or the shares belong to it in the capital of the integrating company. The integration shall not be valid unless the decision made by each company is issued in accordance with the conditions of transforming the company prescribed in the contract of the company or its regulation. This decision shall be registered and declared in the set ways of registering of the amendments that occur to the contract of the integrated company or its regulation.

§5.3 Corporate Governance Regulation, Articles 1(b), 11 and 18.

A. Article 1: Preamble

(a) These Regulations include the rules and standards that regulate the management of joint stock companies listed in the Exchange to ensure their compliance with the best governance practices that would ensure the protection of shareholders' rights as well as the rights of stakeholders.

(b) These Regulations constitute the guiding principles for all companies listed in the Exchange unless any other regulations, rules or resolutions of the Board of the Authority provide for the binding effect of some of the provisions herein contained.

(c) As an exception of paragraph (b) of this article, a company must disclose in the Board of Directors' report, the provisions that have been implemented and the provisions that have not been implemented as well as the reasons for not implementing them.

B. Article 11: Responsibilities of the Board

(a) Without prejudice to the competences of the General Assembly, the company's Board of Directors shall assume all the necessary powers for the company's management. The ultimate responsibility for the company rests with the Board even if it sets up committees or delegates some of its powers to a third party. The Board of Directors shall avoid issuing general or indefinite power of attorney.

(b) The responsibilities of the Board of Directors must be clearly stated in the company's Articles of Association.

(c) The Board of Directors must carry out its duties in a responsible manner, in good faith and with due diligence. Its decisions should be based on sufficient information from the executive management, or from any other reliable source.

(d) A member of the Board of Directors represents all shareholders; he undertakes to carry out whatever may be in the general interest of the company, but not the interests of the group he represents or that which voted in favor of his appointment to the Board of Directors.

(e) The Board of Directors shall determine the powers to be delegated to the executive management and the procedures for taking any action and the validity of such delegation. It shall also determine matters reserved for decision by the Board of Directors. The executive management shall submit to the Board of Directors periodic reports on the exercise of the delegated powers.

(f) The Board of Directors shall ensure that a procedure is laid down for orienting the new board members of the company's business and, in particular, the financial and legal aspects, in addition to their training, where necessary.

(g) The Board of Directors shall ensure that sufficient information about the company is made available to all members of the Board of Directors, generally, and, in particular, to the non-executive members, to enable them to discharge their duties and responsibilities in an effective manner.

(h) The Board of Directors shall not be entitled to enter into loans which spans more than three years, and shall not sell or mortgage real estate of the company, or drop the company's debts, unless it is authorized to do so by the company's Articles of Association. In the case where the company's Articles of Association includes no provisions to this respect, the Board

should not act without the approval of the General Assembly, unless such acts fall within the normal scope of the company's business.

C. Article 18: Conflict of Interest Within the Board

(a) A Board member shall not, without a prior authorization from the General Assembly, to be renewed each year, have any interest (whether directly or indirectly) in the company's business and contracts. The activities to be performed through general bidding shall constitute an exception where a Board member is the best bidder. A Board member shall notify the Board of Directors of any personal interest he/ she may have in the business and contracts that are completed for the company's account. Such notification shall be entered in the minutes of the meeting. A Board member who is an interested party shall not be entitled to vote on the resolution to be adopted in this regard neither in the General Assembly nor in the Board of Directors. The Chairman of the Board of Directors shall notify the General Assembly, when convened, of the activities and contracts in respect of which a Board member may have a personal interest and shall attach to such notification a special report prepared by the company's auditor.

(b) A Board member shall not, without a prior authorization of the General Assembly, to be renewed annually, participate in any activity which may likely compete with the activities of the company, or trade in any branch of the activities carried out by the company.

(c) The company shall not grant cash loan whatsoever to any of its Board members or render guarantee in respect of any loan entered into by a Board member with third parties, excluding banks and other fiduciary companies.

§5.4 Listing Rules, Article 32

A. Article 32

Conditions Related to Capital Increase for Acquiring a Company or Purchasing an Asset:

Where the purpose of a capital increase is to acquire a company or purchase or an asset, the following additional requirements must be complied with as applicable:

1) the issuer must submit to the Authority a report prepared by the issuer's financial advisor comprising the issuer's valuation and a valuation of the target company to be acquired or the asset to be purchased;

2) the issuer must submit to the Authority a financial due diligence report and a legal due diligence report issued by the legal advisor for the target company to be acquired or assets to be purchased; and

3) the prospectus shall include:

(a) the general structure of the transaction;

(b) the rationale behind the acquisition or purchase;

(c) an outline of the business of the target company to be acquired and market Listing Rules 33 details of its relevant industry and trends;

(d) a management discussion and analysis section on the target company to be acquired or the target asset to be purchased;

(e) annual audited financial statements for the past three years (if any) preceding the date of the application for the target company to be acquired;

(f) disclosure of any related parties;

(g) pro forma financial statements reflecting the financial position of the issuer following the acquisition or the purchase;

(h) any change in the issuer or the target company to be acquired as a result of the transaction (including changes to the board or senior executives);

(i) the risk factors related to the acquisition transaction or to the asset to be purchased;

(j) the valuation of the company to be acquired or the asset to be purchased;

(k) the time period of the acquisition process; and

(l) the issuer's share price performance.

§5.5 Offers of Securities Regulations, Articles 9 and 11

A. Article 9: Categories of Private Placement

(a) An offer of securities is a private placement in any of the following categories:

1) The securities are issued by the government of the Kingdom, or a supranational authority recognised by the Authority;

2) The offer is restricted to sophisticated investors; or

3) The offer is a limited offer.

(b) The Authority may, in circumstances other than those described in paragraph (a) of this Article and upon application of a person seeking to make an offer of securities, determine that such an offer shall be treated as a private placement subject to compliance with such limitations as the Authority may impose.

B. Article 11: Limited Offers

(a) An offer of securities is a limited offer if:

1) (a) It is directed at no more than 60 offerees excluding sophisticated investors; and

(b) the minimum amount payable per offeree is not less than one million Saudi Riyals or an equivalent amount. The minimum amount payable per offeree may be less than one million Saudi Riyals or an equivalent amount where the total value for the securities being offered does not exceed Saudi Riyals five million or an equivalent amount;

2) The offeree is an employee of the issuer or its affiliate;

3) The offeree is an affiliate of the issuer; or

4) The offer complies with any other requirement prescribed by the Authority.

(b) Securities of the same class may not be offered as a limited offer under paragraph (a-1) of this Article more than once in a 12 month period ending with the date of the offer in question.

Appendix B to Chapter 5: Relevant Memoranda of Understanding of the Jurisdiction of MOCI & CMA

The Memorandum of Understanding of the Jurisdiction of the Ministry of Commerce and Industry and the Capital Market Authority over companies in Saudi Arabia

Due to the vagueness and blurriness of the lines between what falls under the Ministry Commerce and Industry and falls under the Capital Market Authority, The following memorandum sets steps and explanations of when a company is under the Ministry Commerce and Industry's authority and when the company is required to comply with the Capital Market Authority. This memorandum is not provided for the public which required efforts to be found.

A. The Memorandum¹⁰²⁵

Firstly: the stages and steps of establishing stock companies according to companies Law and Capital market Law:

In accordance with the ministry of commerce and industry jurisdictions and authorities which are obtained from companies Law, what is related to licensing and establishing the company and its enrolling in the commercial register for the ministry is of the specialization of the ministry of commerce and industry according to the two articles (52, 53) of the companies Law. As for what is related to listing and offering securities and the approval it is of the terms of reference and the specialization of the Capital Market Authority which are obtained from the Capital Market Law. The two articles: A/6, 6A/3. The stages and steps of establishing stock companies and its listing,

¹⁰²⁵ This memorandum is written in Arabic and had to be translated to English to contribute in understanding when M&A transactions fall under both authorities and when it only falls under the Ministry of Commerce and Industry. Even though the memorandum helped to unveil part of the vagueness of the jurisdictions of the Ministry of Commerce and Industry and the Capital Market Authority, there still several contradictions between the two authorities which needs to be solved through legislation not by memorandums.

- A- The founders make a request of establishing the company to the ministry of commerce and industry, and the ministry takes this request into consideration according to the companies Law.
- B- The request is transferred to the Capital Market Authority to study the placement and the approval of it.
- C- Then, the minister of commerce and industry makes his decision about the license of establishing the company, and it should be taken into consideration the perfecting of the procedures that are mentioned above within a maximum period of time which is about 22 working days.
- D- As for the company that needs to issue a royal decree, the minister of commerce and industry displays this request for the Royal Highness to issue a royal decree about the warrant of establishing the company. The ministry of commerce and industry is specialized for applying the article (60) of the companies system concerning what have been existed of the in kind shares or advantages belonging to the founders or others.
- E- After issuing the ministerial decision or the royal decree about the license of establishing the company, the Capital Market Authority organizes the placement of the company shares, makes such shares specialized, and repays the surplus according to the Capital Market Law and its regulations.
- F- After holding the constituent general assembly of the company according to the article (61) of the companies Law, the minister of commerce and industry issues a decision about the declaration of establishing the company, making such declaration to be published in the official newspaper, and enrolling the company in the commercial record for the ministry of commerce and industry.

G- The company makes a request of enrolling, inserting, and trading its shares in the market for the Capital Market authority according to the Capital Market Law and its regulations.

Secondly: the amendment of the capital of the stock company according to the companies system and the Capital Market Law:

A- The company board of directors issues a recommendation of reducing or increasing the capital and the placement of the shares (the capital should be fully paid). The Ministry of Commerce and Industry is specialized for applying the article (137) of the companies system which is related to the calibration of the in kind shares.

B- The company makes a request for the Capital Market Authority for the approval of the placement of the shares according to the Capital Market Law and its regulations.

C- After the approval by the Authority, the company makes a request of setting a date of holding an extraordinary general assembly for the Ministry of Commerce and Industry and making the call be accredited.

D- The matter of increasing the capital of the company should be displayed for the shareholders of the extraordinary general assembly with the aim of approving it.

E- The Authority becomes responsible for the supervision of organizing of the placement of the increasing shares, specializing it, and repaying the surplus according to the Capital Market Law and its regulations.

F- The Authority informs the Ministry of Commerce and Industry about the result of increasing the capital and the placement of the company shares to amend the capital in the commercial record for the Ministry of Commerce and Industry.

Thirdly: Companies' transference: in the case of making a request for the transferring into a public joint-stock company, the procedures and steps that are mentioned in (firstly) above should be taken into consideration.

Appendix C to Chapter 5: Safola Case

(Safola Case in Arabic)

الدائرة التجارية الخامسة/ع

حكم رقم 38/د/تج/5 لعام 1427هـ
الصادر في القضية رقم 1/3021/ق لعام 1426هـ
المقامة من / م
ضد / ع

الحمد لله وحده والصلاة والسلام على نبي الهدى محمد بن عبدالله وعلى آله وصحبه
أجمعين وبعد:

ففي يوم السبت الموافق 2/4/1427هـ اجتمعت بمقر ديوان المظالم بالرياض الدائرة
التجارية الخامسة المشكلة من :-

المستشار	ب	رئيساً
المستشار المساعد	أ	عضواً
المستشار المساعد	س	عضواً
بعضور	ص	أميناً للسر

واطلعت على القضية الموضح رقمها وطرفا نزاعها أعلاه ، وبعد سماع
الدعوى والإجابة والدراسة والتأمل والمداولة أصدرت بشأنها حكمها التالي :-

تتلخص وقائع هذه الدعوى في أن "غ" تقدم للديوان بدعوى بالوكالة عن
المدعي بتاريخ 1426/7/23هـ حاصلها أن موكله "م" شريك في شركة "ن"
شركة ذات مسؤولية محدودة بالإضافة لوالده وإخوته وقد ترك العمل بهذه

الشركة أثر خلاف مع والده حول الإدارة وأنه فوجئ قبل أيام بمن يخبره بأن والده قد باع الشركة بكامل حصصها على شركة "ع" وفوراً قام بإبلاغ كاتب عدل وزارة التجارة بأنه معترض على البيع في حصته التي يملكها حيث لم يبيع بنفسه ولم يوكل والده للقيام بذلك كما أنه معترض على بيع باقي الحصص ويطلب استردادها انطلاقاً من حق الشفعة المقرر شرعاً ونظماً وقد أبلغه كاتب العدل بأنه لن يجري أي تصرف على الحصص لكنه فوجئ بأن شركة "ع" قد أعلنت بالصحف عن شرائها للشركة وأنها سجلتها لدى كاتب العدل، وطلب في ختام هذه الدعوى الحكم وبصفة عاجلة بوضع الشركة تحت الحراسة القضائية لئلا تتصرف شركة "ع" فيها بأي تصرف يضر بها أو بتحميل الشركة أي قروض أو مستحقات مالية وجرد المستودعات والمخازن التي تحتوي على بضائع بملايين الريالات حتى لا يتم إخفاؤها من قبلها،

والحكم كذلك في مواجهة شركة "ع" والشركاء السابقين بشركة "ن" بإبطال التصرف الواقع على حصص موكله في الشركة لعدم موافقته على بيعها ولأنه لم يحضر العقد ولم يصدر عنه ولا عن وكيل شرعي عنه أي إيجاب متعلق بالبيع، مع رفع يد المدعى عليها شركة "ع" عن باقي الحصص والحكم لموكله باستردادها وفقاً لأحكام الشفعة في الفقه الإسلامي وأحكام استرداد الحصص الواردة بنظام الشركات طبقاً للمادة [165] التي نصت على إلزام كل شريك يريد التنازل عن حصته أن يخطر غيره من الشركاء بذلك ولهم مدة ثلاثين يوماً لإعلان حق الاسترداد بثمنها الحقيقي ونص المادة رقم (8) من عقد تأسيس الشركة على أنه لا يجوز لأي شريك التنازل عن حصته للغير بعوض أو بغير عوض إلا بموافقة باقي الشركاء وفي هذه الحالة يجوز للشركاء الآخرين استرداد تلك الحصص عملاً بنص المادة (165) من نظام الشركات وموكله

مستعد بأن يدفع فوراً لشركة "ع" ما دفعته كقيمة للحصص محل الدعوى بالشفعة حسبما هو وارد بعقد المبايعة ، فسجلت هذه الدعوى قضية بالرقم المشار إليه أعلاه وأحيلت أوراقها لهذه الدائرة حيث باشرت نظرها على النحو المبين في دفاتر الضبط و بجلسة السبت الموافق 1426/9/12 هـ حضر المدعي "م" ووكيله "غ" وحضر لحضورهما كل من "ح" بصفته وكيلاً عن "ك" وباقي الشركاء السابقين بشركة "ن" بموجب الوكالة رقم 262 وتاريخ 1425/4/19 هـ المرفق صورة منه بالأوراق و"ف" الذي أفاد الدائرة أنه وكيل عن شركة "ع" وسيقوم بإحضار الوكالة في الجلسة القادمة و"ج" والذي أفاد الدائرة أيضاً بذات الجلسة أنه مدير الإدارة القانونية بشركة "ع" المدون اسماؤهم وهوياتهم بدفتر الضبط وبذات الجلسة سألت الدائرة المدعي عن دعواه فأجاب قائلاً أن دعواه لا تخرج عما ورد بلائحة الدعوى المقدمة للديوان من وكيله "غ" السالف ذكرها وهي في مواجهة كل من الشركاء السابقين بشركة "ن" باستثناء والده وهم "ز" و"ر" و"د" و"هـ" و"ي" و"ق" أبناء "ك" الذي يملكون ما مقداره 6% من حصص هذه الشركة وفي مواجهة شركة "ع" وأشار بذات الجلسة أن والده "ك" كان يملك ما نسبته 93% من حصص شركة "ن" وهو لا يرغب بالمطالبة لحصص والده استجابة لرغبة والده بذلك وقد انحصرت مطالبته في هذه الدعوى بحصص بقية الشركاء المذكورين باستثناء حصص والده وبعد سماع وكيل الشركاء السابقين بشركة "ن" الحاضر في هذه الجلسة والحاضران عن شركة "ع" لدعوى المدعي أجاب وكيل الشركاء السابقين بشركة "ن" قائلاً بصحة قيام موكله "ك" ببيع شركة "ن" بما فيها حصة المدعي "م" بصفة والدهم وكيل عن ابنائه وقت التبائع مع شركة "ع" فعقب وكيل المدعي بذات الجلسة قائلاً أن موكله قد قام بفسخ وكالته التي أعطاها لوالده بتاريخ 1423/3/13 هـ

وقبل قيام والده ببيعه لحصص هذه الشركة لشركة "ع" وفقاً لما هو مدون بالوكالة التي أرفق صورة منها عندها طلب "ح" أمهاله لمراجعة موكله "ك" والتأكد من صحة ما ذكره المدعي بهذا الأمر وأما الحاضران عن شركة "ع" فإنهما طلبا من الدائرة بذات الجلسة وبعد سماعهما لدعوى المدعي إمهالهما حتى يتمكنوا من تقديم إجابة شركة "ع" مع أن المدعي وممثلي شركة "ع" قد أفادوا الدائرة أنهم يرغبون بحل هذا النزاع بالطرق الودية وطلبوا من الدائرة إعطاءهم مهلة كافية لدراسة هذا الأمر استجابة لرغبة الدائرة في هذا الشأن فتم تأجيل جلسة نظر هذه الدعوى إلى يوم السبت الموافق 1426/10/17 هـ حضرها وكيل المدعي و"ف" بالوكالة عن شركة "ع" حسبما جاء بالوكالة المرفق صورة منها و"ح" الوكيل عن الشركاء السابقين بشركة "ن" كما حضرها مدير الإدارة القانونية بشركة "ع" "ج" وقد أفاد وكيل الشركاء السابقين بشركة "ن" أن موكله "ك" والد المدعي عندما قام ببيع وتنازل عن حصصه وحصص بقية الشركاء بالشركة لم يكن وكيل عن المدعي وإنما كان "م" يمثل نفسه في هذا العقد وحسب إفادة موكله "ك" من أن المدعي "م" لم يحضر وقت إبرام ذلك العقد وموكله لم يستخدم الوكالة التي لديه عن ابنه "م" وقت إبرام ذلك العقد وبذات الجلسة أفاد الدائرة مدير الإدارة القانونية بشركة "ع" قائلاً أن وقت التوقيع على عقد البيع والتنازل عن حصص شركة "ن" لشركة "ع" يكن المدعي "م" حاضراً وإنما جاء ذكره بصفته حاضر وقت ذلك البيع كون والده أفادهم بأنه وكيل عن ابنه "م" وأبرز وكالة عنه برقم 257 وتاريخ 1426/3/25 هـ وعلى إثر ذلك تم توقيع كافة الأطراف على ذلك علماً بأن شركة "ع" لم تعلم وقت التوقيع على هذا العقد بقيام المدعي بفسخ وكالته التي أعطاها لوالده "ك" وبعد سماع وكيل المدعي لما أدلى به كل من وكيل الشركاء السابقين

بشركة "ن" ووكيل شركة "ع" ومدير الإدارة القانونية فيها عقب قائلاً أنه لو كان صحيحاً ما ذكرته شركة "ع" في هذه الجلسة لكانت شركة "ع" اشترت كامل حصص شركة "ن" بما فيها حصص موكله "م" لكن الثابت من الأوراق والإعلان وما أقرت به شركة "ع" أن موكله "م" شريكاً معها بحصة قدرها 1% من إجمالي حصص شركة "ن" وبالتالي يتضح عدم صحة ما ذكرته شركة "ع" وموكله لا زال يتمسك بطلباته المتمثلة بأحقية بالشفعة لخصص إخوانه بشركة "ن" فعقب وكيل شركة "ع" بعد ذلك وبذات الجلسة قائلاً أن المادة [20] من عقد تأسيس شركة "ن" المؤرخ في 1421/1/3هـ تضمنت أنه في حالة وجود نزاع لم يتم تسويته بالطرق الودية فإنه يحال ذلك النزاع للتحكيم حسبما جاء بالمرسوم الملكي رقم م/46 وتاريخ 1403/7/12هـ ولائحته التنفيذية ومن ثم فإن موكلته تطالب بالتحكيم لنظر ذلك النزاع ، فأجاب وكيل المدعي بذات الجلسة على ذلك الدفع قائلاً أن شركة "ع" لم تكن طرفاً في ذلك العقد الذي اشتمل على شرط التحكيم كما أنه ليس لشركة "ع" المطالبة بالتحكيم بعد أن أجابت على موضوع النزاع في دعوى موكله فيما افاد كل من وكيل المدعي ومدير الإدارة القانونية بشركة "ع" أنهما في طور بحث ذلك النزاع وحله بالطرق الودية وفي حالة توصلهما لشيء من ذلك سيتم إفادة الدائرة به في حينه وبجلسة السبت الموافق 1426/12/19هـ أفادوا الدائرة بأنهم لم يتوصلوا إلى حل ينهي ذلك النزاع حيث قدم وكيل شركة "ع" لأنظمة التغليف مذكرة مكونة من ست صفحات جاء فيها أن المادة [20] من عقد تأسيس شركة "ن" نصت على أن : (يبذل الأطراف قصارى جهدهم لتسوية جميع الخلافات المتعلقة بهذا العقد أو تفسيره بصورة ودية وإذا عجزوا عن الوصول إلى تسوية ودية لأي نزاع أو خلاف أو مطالبة قد تنشأ عن هذا العقد أو ما يتعلق به فإنه يتم بصورة نهائية

تسوية هذا النزاع أو الخلاف أو المطالبة بموجب نظام التحكيم الصادر بالمرسوم الملكي الكريم رقم م/46 وتاريخ 1403/7/14 هـ ولائحته التنفيذية) .

كما نص البند الثالث عشر من عقد البيع والتنازل المبرم بين "ك" وبين شركة "ع" المؤرخ 1426/5/1 هـ الموافق 2005/6/8 م تحت عنوان (حل الخلافات) على أنه : في حال قيام نزاع – لا قدر الله – بين الطرفين بسبب تنفيذ بنود هذا العقد يتم حله بالطرق الودية ، وفي حالة تعذر ذلك ينعقد الاختصاص لهيئات ولجان التحكيم بالمملكة العربية السعودية) . ومن خلال نص المادتين سالفتي الذكر يتبين أن عقد تأسيس الشركة وتعديلاته وأيضاً عقد البيع والتنازل المشار إليهما قد نصا صراحة على طرق تسوية جميع النزاعات الناشئة عنهما أو المتعلقة بهما على سبيل الحصر بالتسوية الودية ، وفي حالة تعذر الحل الودي فإنه يتم تسوية النزاع أو الخلاف أو المطالبة بصورة نهائية بموجب نظام التحكيم ، ونظراً لتعذر الحل الودي مع المدعي فتطلب موكلته تنفيذاً للنصوص سالفة الذكر عدم قبول الدعوى لعدم سلوك المدعي الطريق الصحيح الذي نص عليه في المادتين سالفتي الذكر لتسوية النزاع ، حيث كان يتوجب على المدعي اللجوء أولاً إلى التسوية الودية وفي حالة تعذر الحل الودي لا يحق له اللجوء إلى ديوان المظالم بل كان يجب عليه اللجوء إلى لجان التحكيم وكون المدعي خالف الطريق الصحيح لتسوية النزاع فمن ثم تكون دعواه جديرة بعدم القبول نظراً لعدم اختصاص ديوان المظالم نوعياً بنظر دعواه عملاً بما نصت عليه المادة (7) من نظام التحكيم الصادر بالمرسوم الملكي الكريم رقم (م/46) وتاريخ 1403/7/14 هـ من أنه (إذا كان الخصوم قد اتفقوا على التحكيم قبل قيام النزاع فلا يجوز النظر في موضوع النزاع إلا وفقاً لأحكام هذا النظام) .

وما ذكره وكيل المدعي من أنه يجب المطالبة بالتحكيم قبل الإجابة على النزاع مردود عليه، بأن الدفع بعدم اختصاص ديوان المظالم نوعياً بنظر الدعوى وانعقاد الاختصاص بنظرها إلى لجان التحكيم بالمملكة أو الدفع بعدم قبول الدعوى لعدم سلوك المدعي الطريق الصحيح المنصوص عليه في العقود سالفة الذكر لتسوية النزاع ليس دفعاً شكلياً يجب إبدائه قبل الإجابة على موضوع الدعوى ولكنه دفع تحكم به المحكمة من تلقاء نفسها ويجوز الدفع به في أي مرحلة تكون فيها الدعوى عملاً بما نصت عليه المادة (72) من نظام المرافعات الشرعية، وموكلته في جميع الجلسات السابقة كانت بصدد التسوية الودية طبقاً لتوجيهات الدائرة وأول إجابة لموكلته على الدعوى كانت هي أنه في حالة عدم التسوية الودية تطلب موكلته تسوية النزاع بموجب نظام التحكيم عملاً بنصوص العقد سالفة الذكر، وأضاف وكيل شركة "ع" أن ما ذكره المدعي بأنه لا يحق لموكلته التقدم بهذا الطلب لأنها ليست طرفاً في العقد مردود عليه أيضاً بأن شركة "ع" طرفاً في عقد تأسيس الشركة بموجب التعديلات التي أدخلت عليه وملاحقه والتي تم تدقيقها من إدارة الشركات والمصدق عليها لدى كاتب العدل والتي قرر فيها الشركاء المالكيين للشركة، كما نصت هذه التعديلات على أن تبقى مواد عقد التأسيس التي لم يشملها التعديل في هذا القرار كما هي عليه دون تعديل) والمادة (20) من العقد الخاصة بتسوية النزاع بموجب نظام التحكيم لم يشملها التعديل فإنها تكون واجبة النفاذ، وموكلته شركة "ع" طرفاً في عقد البيع والتنازل المؤرخ 1426/5/1 هـ الموافق 2005/6/8م والذي بموجبه باع وتنازل "ك" لها عن جميع حصص الشركة والمصانع المذكورة في العقد ونص البند الثالث من العقد تحت عنوان حل الخلافات على تسوية النزاع ودياً فإن تعذر ذلك ينعقد الاختصاص لهيئات ولجان التحكيم بالمملكة مما يتضح أن كل ما

ذكره وكيل المدعي في غير محله ومخالف لنصوص العقود وللشرع والنظام ومن ثم يكون جديراً بالرفض ، أما عن مطالبة المدعي بإبطال التصرف الواقع على حصته ورفع يد موكلته عن باقي الحصص واستردادها وفقاً لأحكام الشفعة في الفقه الإسلامي فإن الفقهاء اتفقوا على أن الشفعة حق ضعيف يسقط بأوهى الأسباب ومنها أن يترك الشفيع طلب الشفعة على الفور بمجرد العلم بالبيع عملاً بالحديث النبوي (الشفعة كحل العقال) ولأن ثبوتها على التراخي يلحق الضرر بالمشتري لعدم استقرار ملكه ، والفقهاء اتفقوا أن الشفعة حق لا يقبل التجزئة فإذا تنازل الشفيع عن بعض المشفوع فيه سقط حقه في كل المبيع لأنه لا يملك حق تفريق الصفة على المشتري منعاً من اضراره عملاً بالقاعدة الشرعية التي تقرر أن (الضرر لا يزال بالضرر) كما أنه لا يصح أن تكون الشفعة سبباً لضرر المشتري بتفريق الصفة عليه إذا طلب الشفيع أخذ بعض المبيع فقط وبتطبيق ما سبق على وقائع الدعوى الماثلة وطلبات المدعي فيها يتبين لموكلته أن المدعي أعلن صراحة أنه لا يطالب بالشفعة في جميع الحصص المبيعة لاسيما وأنه قرر عدم المطالبة بالشفعة في حصص والده ومن ثم يسقط حقه في المطالبة بالشفعة في كل الحصص حسبما اتفق عليه الفقهاء من أن الشفعة حق لا يقبل التجزئة لأنه لا يملك حق تفريق الصفة على المشتري وأن الشفعة التي يطالب بها المدعي في بعض المبيع يترتب عليها إلحاق الضرر بموكلته والضرر محرم شرعاً بقول الرسول صلى الله عليه وسلم (لا ضرر ولا ضرار) والقواعد الشرعية التي تقرر أن (الضرر يزال) وأن (الضرر يدفع بقدر الإمكان) ، وأما عن استناد المدعي إلى نص المادة (165) من نظام الشركات فهو في غير محله إذ أن والده لديه وكالة عنه وتصرف الوكيل ملزم للموكل لا سيما وإذا كان الوكيل هو والد المدعي وأن شركة "ع" تعاملت معه بموجب هذه

الوكالة بمبدأ حسن النية وبالقاعدة الشرعية التي تقرر أن (الوكيل مع الأصل كالشخص الواحد) والمدعي لم يقدم ما يثبت أنه قام بإخطار الوكيل والده بفسخ وكالته وعزله والإعلان عن ذلك بالجريدة طبقاً لما ورد بصك فسخ الوكالة الذي استند إليه في دعواه وأما ما ذكره وكيل الشركاء السابقين بشركة "ن" من أن "ك" لم يستخدم الوكالة الممنوحة له من المدعي فإنه مناقض لما أقر به بجلسة 1426/9/12 هـ الموافق 2005/10/15م من أن موكله "ك" قام ببيع حصص جميع أبنائه ، وعملاً بالقواعد الشرعية التي تقرر أنه (لا حجة مع التناقض) وأنه (لا إنكار بعد إقرار) فمن ثم يكون ما ذكره وكيل "ك" غير صحيح وما يؤكد عدم صحته أيضاً إقرار المدعي نفسه بأن والده قام ببيع حصته والمتمثلة في 1% من شركة "ن" دون الرجوع إليه أو إخباره بالبيع بموجب وكالة صادرة من المدعي له وأضاف وكيل شركة "ع" أن الذي يؤكد أن "ك" باع لموكلته جميع حصص الشركة سواء المملوكة له أو لجميع الشركاء بما فيها حصة المدعي هو إقراره الصريح بذلك وبموجب هذا الإقرار الصريح لا يحق له مخالفته عملاً بالقواعد الشرعية التي تقرر (أن المرء مؤاخذ بإقراره) وأن (الإقرار هو سيد الأدلة) وأنه (لا إنكار بعد إقرار) ومن ثم فإن ما يطالب به المدعي مخالف للشرع وللنظام لا سيما وأنه لم يقدم ما يثبت أنه قام بإخطار والده بفسخ وكالته وعزله ومن ثم فإنه ليس له سوى الرجوع على والده لمطالبته بالتعويض عن حصته عملاً بالقاعدة الشرعية التي تقرر (كل من ارتكب خطأ سبب ضرراً للغير يكون ملزماً بالتعويض) وطلب وكيل شركة "ع" في ختام هذه المذكرة بما يلي :- أولاً : أصلياً عدم اختصاص ديوان المظالم بنظر الدعوى وانعقاد الاختصاص بنظرها إلى التحكيم .

ثانياً : احتياطياً رد الدعوى وعدم سماعها بالنسبة لموكلته .

وبجلسة الأحد الموافق 1427/1/27هـ قدم وكيل المدعي مذكرة حاصلها أن العلماء عرفوا الشفعة بأنها انتزاع حصة الشريك المنتقلة عنه من يد من انتقلت إليه قال ابن قدامه – رحمه الله- وهي ثابتة بالسنة والإجماع فالسنة ما روى جابر رضي الله عنه قال : قضى رسول الله صلى الله عليه وسلم بالشفعة فيما لم يقسم فإذا وقعت الحدود وصرفت الطرق فلا شفعة " متفق عليه وروى الإمام مسلم رحمة الله قال قضى رسول الله صلى الله عليه وسلم بالشفعة في كل شرك لم يقسم ريعه أو حائط لا يحل له أن يبيع حتى يستأذن شريكه فإن شاء أخذ وإن شاء ترك فإن باع ولم يستأذنه فهو أحق به ، والإجماع فقال الإمام ابن المنذر أجمع أهل العلم على إثبات الشفعة للشريك الذي لم يقاسم ، فيما بيع من أرض أو دار أو حائط ، قال ابن قدامه ولا نعلم أحد خالف هذا إلا الأصم فإنه قال لا تثبت الشفعة لأنه إضرار بالمالك وهذا ليس بشيء لمخالفته الآثار الثابتة والإجماع وذكر ابن قدامه – رحمه الله – أن من ترك الشفعة لعدم علمه بالثمن الحقيقي أو لعدم علمه بمقدار السهام المبيعه أو نحو ذلك فإن له الشفعة متى علم بالحقيقة، فإنه ترك الشفعة لعذر قد لا يرضاها بالثمن الكثير ويرضاها بالقليل وقد لا يكون معه الكثير فلم تسقط ، وكذلك إن ظهر أن المبيع سهام قليلة فبانة كثيرة ثم قال بهذا قال الشافعي وزفر وأبو حنيفة وصاحباه ، وأضاف رحمه الله وإذا ظهر أنه اشترى إنسان فبان غيره لأنه قد رضي شركة إنسان دون غيره لم تسقط الشفعة بذلك وأما عن طريق تفريق الصفقة : فقال في المغني : وإذا اشترى رجل من رجلين شقصاً فللشفيع أخذ نصيب أحدهما دون الآخر ، وبهذا قال الشافعي وحكى عن القاضي أنه لا يملك ذلك وهو قول أبو حنيفة ومالك لئلا تتبع بعض صفقة المشتري ثم قال ابن قدامه : ولنا (أي الحنابلة) أن عقد الاثنين مع واحد عقدان لأنه مشتر من كل واحد منهما ملكه بثمن منفرد فكان للشفيع أخذه كما لو

أفرده بعقد 0 وأضاف وكيل المدعي بذات المذكرة أن المدعى عليه وكالة قرر أن الشفعة يجب المطالبة بها على الفور أي فور العلم وتناسى أن العلماء قد حددوا لذلك الفور صفات وقرر النظام أن لكل شريك بعد إعلامه برغبة شريكه بالبيع أن يستردها خلال شهر من تاريخ إعلامه ومن هنا وقفات :

أ- لم يتم إعلام موكله لا من قبل الشركاء ولا من قبل المدعى عليها بالبيع ولا بالسعر الذي بيعت به الحصص ، وإنما كان موكله يسمع أخباراً من هنا وهناك أن هناك مفاوضات بين شركة "ع" وبعض الشركاء وكان ينتظر أن يلتزم شركاؤه السابقون بالنظام ويشعروه خطأً برغبتهم في البيع حسبما يقضي به النظام وهذا لم يحدث .

ب- علم موكله بعد فترة بأن شركة "ع" قد اشترت كامل الشركة بما فيها حصته الخاصة به في حين أنه لم يصدر عنه ولا عن وكيل شرعي يمثله أي إيجاب بالبيع ، ولهذا تقدم موكله باعتراضه على ذلك لوزير العدل ولكتاب العدل بوزارة التجارة على الفور وفعلاً تم إيقاف إفراغ حصته لشركة "ع" .

ج- قام موكله بالإعلان في الصحف بعدم موافقته على البيع وأنه يرغب في استرداد كامل الحصص (مع العلم أنه حتى لحظة إعلانه في الصحف) لم يشعر رسمياً من أي شريك ولا حتى من المدعى عليها بالبيع بطريقة نظامية ولم يعلم حتى بقيمة الحصص لأن العلم بقيمة الحصص وسكوت الشريك شرط للقول بإسقاط حقه في الشفعة كما نص على ذلك العلماء ومضي المدة ، فقد يرغب في استردادها بمبلغ معين وقد لا يرغب في الاسترداد إذا زاد ذلك المبلغ ، وحتى يعتبر الشريك مقراً بالبيع ودخول الشريك الجديد وتاركاً لاقتضاء حقه في الشفعة لا بد من إخباره بعدة معطيات أهمها اسم الشريك الجديد ، مقدار ثمن

الحصة وهو ما لم يحدث حتى رفع هذه الدعوى ومن هنا يبطل ما دفع به وكيل شركة "ع" .

د- ذكر وكيل شركة "ع" أنه لا يجوز تفريق الصفقة على المشتري وللجواب على ذلك هو :-

1- أن شفعة موكله في حصص بعض الشركاء بشكل مستقل دون بعض الحصص ليس تفريقاً للصفقة بل إن كل شريك قد باع حصته بصفة مستقلة وإن كان البيع في مجلس واحد أو عقد واحد ، ولهذا لأي شريك أن يسترد هذه الحصة بحسب رغبته وهذا الأمر فصلت فيه بشكل قاطع المادة رقم [165] من نظام الشركات التي أوجبت : على كل شريك أن يعرض حصته على الشركاء الآخرين عن رغبته في البيع ولهم استردادها خلال شهر ، واتفاق شريكين أو أكثر على البيع لطرف واحد لا يلزم الشركاء الآخرين عند رغبتهم في الشفعة أو يشفَعوا في حصص الجميع بل كل حصة مستقلة بذاتها وتفريق الصفقة لا يمكن القول به إلا إذا كان ذلك متعلق برغبة شريك في استرداد جزء من حصة شريكه وترك الباقي ، وقد نص النظام على ذلك كما سبق ونص الفقهاء على جواز ذلك .

2- أن القول بأن مجرد اجتماع عدد من الشركاء على البيع لشخص واحد يلزم الشريك الآخر عند إرادة الشفعة أن يشفع في جميع الحصص هو قول مردود لأن ذلك يؤدي بالضرورة لإسقاط حقوق الشريك في الشفعة وقد قررها الشرع والنظام .

3- أن حق الشفعة هو حق قانوني شرع لرفع الضرر ومن هنا قد يرى الشريك أن الضرر يرتفع عنه باسترداده لحصص بعض الشركاء فقط دون البعض

الأخر وذلك بزيادة حصته في الشركة بالقدر الذي يجعل له أثر على القرار في الشركة أو نحو ذلك .

وبين في ختام هذه المذكرة بأن الطلب النهائي هو البت في طلب موكله بالشفعة في حصص إخوانه البالغة 6% من رأس مال الشركة ، كما وأن وكيل المدعي قدم للدائرة بذات الجلسة مذكرة أخرى عما دفعت به المدعى عليها شركة "ع" فيما يتعلق بعدم اختصاص الديوان تضمنت أنه ومع عدم الإقرار بأن هناك شرط تحكيم بين الطرفين أصلاً فإن من شروط أعمال شرط التحكيم أن لا يخوض المتمسك به في موضوع النزاع وأن يكون دفعه منصباً على التمسك بالتحكيم أما إذا أجاب عن الدعوى أو خاض في موضوع النزاع فإن هذا يعد تنازلاً ضمناً عن شرط التحكيم وعلى هذا المبدأ سار عليه القضاء في الديوان والمحاكم العامة وهو مبدأ مقرر فقهاً وقضاً ومن ذلك ما قرره هيئة التدقيق بالديوان بحكمها رقم 95/ت/4 لعام 1413 هـ من أنه يجب التمسك بشرط التحكيم قبل التكلم في الموضوع وحكم هيئة التدقيق رقم 29/ت/4 لعام 1413 هـ الذي جاء فيه أن عدم التمسك بشرط التحكيم قبل التكلم في الموضوع تنازل ضمني عن هذا الشرط ، وحكم هيئة التدقيق رقم 72/ت/4 لعام 1411 هـ وجاء فيه أن المدعى عليها لم تتمسك بشرط التحكيم إلا بعد التكلم في الموضوع مما يسقط حقها في هذا الدفع وحيث ان شركة "ع" لم تدفع بهذا الدفع إلا في الجلسة الثالثة في حين حضر ممثلوها في الجلسة الأولى وطلبوا مهلة للإجابة وفي الجلسة الثانية أجابوا عن الدعوى بأنهم قد اشتروا الشركة بالكامل بما في ذلك حصة موكله وقدموا أوراقاً رأوا أنها تدعم دفعهم وهذا خوض في موضوع النزاع ، ثم طلبوا من الدائرة مهلة للصلح مع موكله وكان ذلك من أجل ضياع الوقت فقط فلم يتصل أي مسئول من الشركة به أو بموكله لمناقشة الصلح ، وبعد ذلك لجأت

الشركة لهذا الدفع ، ولهذا فهو دفع فات أو انه وهدفه إضاعة الوقت ، وأضاف وكل المدعي بأنه لا يوجد شرط تحكيم أصلاً بين الطرفين فشرط التحكيم الموجود في عقد التأسيس هو خاص بالأطراف الذين وقعوا عليه فقط ولم تكن شركة "ع" طرفاً فيه لا من قبل ولا من بعد فلا يجوز لها الاستناد على هذا الشرط وأن شرط التحكيم الموجود في عقد البيع والتنازل هو خاص بأطرافه الذين أبرموه ولم يكن موكله طرفاً فيه لا أصالة ولا وكالة ، وأضاف وكيل المدعي أن سبب رفع هذه الدعوى هو إبرام هذا العقد بالمخالفة لرغبة موكله ، وممثل المدعي عليها شركة "ع" قد أكد بأن خوضه في موضوع النزاع لا يمنعه من الدفع بعدم الاختصاص وقرر مبدأً جديداً حين ذكر ان الدفع بعدم الاختصاص لوجود شرط التحكيم هو من الدفع بعدم الاختصاص النوعي ولم يفرق بين الاختصاص النوعي والدفع بعدم الاختصاص لشرط التحكيم فالأول هو ما إذا كان القضاء غير مختص أصلاً بنظر المنازعة لخروجها عن اختصاصه النوعي والولائي والثاني ما يكون القضاء مختص أصلاً بنظر المنازعة ولكن يمنعه نظرها وجود شرط التحكيم وتمسك الأطراف أو أحدهم به قبل الخوض في النزاع ، ففي الحالة الأولى لا يجوز أصلاً لجهة القضاء نظر المنازعة سواء كان هناك شرط تحكيم أو لم يكن ويقع قضاءها باطلاً في حال ما إذا قضت في نزاع ليست مختصة بنظر كما لو قضت دائرة تجارية في نزاع إداري أو جزائي أو حتى مدني وهذا هو الذي يجب على الدائرة التصدي له من تلقاء نفسها ويجوز للخصوم إبداءه والدفع به في أي مرحلة من مراحل الدعوى ، أما في الحالة الثانية فإنه لا يجوز التمسك بشرط التحكيم بعد الخوض في موضوع النزاع وهذا مبدأً مقرر ومتفق عليه وما ذكره ممثل المدعي عليها أن شركة "ع" طرفاً في عقد التأسيس بموجب التعديلات التي أدخلت عليه وبالتالي

لها الحق في المطالبة بالتحكيم فموكله يطالبه بتقديم أي نسخة من العقد المعدل موقعة من موكله حتى يلتزم موكله للمدعى عليها بما تشارطا عليه من التحكيم وكذلك عقد البيع والتنازل ، وبعد تزويد كل من "ح" الوكيل عن الشركاء السابقين لشركة "ن" ووكيل شركة "ع" لما قدمه وكيل المدعي أفاد وكيل الشركاء السابقين بشركة "ن" أنه لا يوجد ما يستدعي الإجابة عما ورد فيها بينما طلب وكيل شركة "ع" إمهاله من أجل عرض ذلك على موكلته فامهلته الدائرة إلى جلسة السبت الموافق 1427/2/4 هـ والتي حضرها أطراف الدعوى قدم فيها وكيل شركة "ع" مذكرة جوابية مكونة من صفحتين جاء فيها ، أن موكلته تتمسك بجميع ما أدلى به في المذكرة المؤرخ 1426/11/29 هـ الموافق 2005/12/31م والتي ملخصها وجوب إحالة الخلاف إلى التحكيم لاتفاق الأطراف على التحكيم عملاً بالمادة [20] من عقد تأسيس الشركة ولأن المادة (7) من نظام التحكيم نصت على عدم جواز النظر في موضوع النزاع إلا وفقاً لأحكام نظام التحكيم فيما إذا كان الخصوم قد اتفقوا على التحكيم قبل قيام النزاع والمدعي والمدعى عليه الأول هما طرفان في عقد التأسيس الذي نص على تسوية المنازعات بين الشركاء بواسطة التحكيم كما أن المدعى عليه الثاني أصبح طرفاً بالعقد بعد تعديله ، لذلك فإنه لا يجوز النظر في هذا النزاع إلا بواسطة التحكيم ، والمدعى عليه الأول باع حصصه وحصص جميع الشركاء الآخرين بالأصالة عن نفسه وبالوكالة عن جميع الشركاء الآخرين حسبما هو ثابت بعقد البيع المؤرخ 1426/5/1 هـ الموافق 2005/6/8م ، ولم يثبت أن المدعي أعلم والده بعزله عن الوكالة قبل البيع ولا يحق للمدعى المطالبة بالشفعة لتأخره بالمطالبة بها ولتفريق الصفقة لأنه لم يطالب بجميع الحصص المبيعة بل بجزء منها وأضاف وكيل شركة "ع" بذات المذكرة أن هذه الدعوى يستوجب

ردها وصرف النظر عنها لعل التناقض فالمدعي طلب في عريضة الدعوى استرداد جميع الحصص المبيعة عملاً بالمادة (165) من نظام الشركات وفي الجلسة الأولى بتاريخ 1426/9/12 هـ طلب المدعي تسديد قيمة حصته البالغة 1% من الشركة بالإضافة إلى استخدامه حق الشفعة في حصص إخوانه الستة البالغة 6% من حصص الشركة فطلب المدعي قيمة حصته البالغة 1% هو إقرار ضمني بموافقته على البيع والإقرار ملزم له وطلب شراء حصص إخوانه أصبح مستوجب الرد بعد مطالبته بقيمة حصته ، ومطالبته ببعض الحصص المبيعة وليس بجميع الحصص المبيعة يجعل طلبه مستوجب الرد لتفريق الصفقة ، وإذا كان للمدعي أي حق فيما يطالب به فإن حقه ينحصر بطلب التعويض من المدعي عليه الأول الذي باع حصص المدعي ، وبإطلاع كل من وكيل المدعي و"ح" الوكيل عن بقية الشركاء السابقين بشركة "ن" ما قدمه وكيل شركة "ع" أفاد وكيل المدعي من خلال ما أدلى به في جلسة إصدار هذا الحكم ومن خلال مذكرة جاء فيها أن دعوى موكله هي في مواجهة شركة "ع" والمتمثلة بأحقية موكله في استرداد حصص كل من "ز" و"ر" و"د" و"هـ" و"ي" و"ق" أبناء "ك" في شركة "ن" والتي انتقلت ملكيتها لشركة "ع" مع استعداد موكله بدفع قيمة هذه الحصص المشتراة من قبل شركة "ع" حيث بين وكيل المدعي من خلال المذكرة أن مجموع قيمة الحصص المشفوع فيها 10.500.000 ريال طبقاً لما هو موضح في الجدول المبين بذات المذكرة وموكله مستعد بدفعها فور ثبوت الشفعة وقيام المدعي عليها شركة "ع" بإفراغها لدى كاتب العدل بموجب شيك مصرفي وحصر مطالبة موكلته في إثبات هذه الشفعة والإلزام بها في مواجهة شركة "ع" فيما قرر أطراف النزاع في هذه الدعوى اكتفائهم بما سبق تقديمه من مذكرات ومستندات وما أدلوا به في محاضر الضبط .

حيث إن ما يهدف إليه المدعي من دعواه بطلباته الختامية بإثبات الشفعة لحصص إخوانه "ز" و"ر" و"د" و"هـ" و"ي" و"ق" أبناء "ك" الشركاء السابقين بشركة "ن" والبالغ قدره هذه الحصص بما نسبته 6% من رأس مال هذه الشركة في مواجهة شركة "ع" والتي انتقلت ملكية هذه الحصص المطالب بها للشركة المدعى عليها عن طريق شرائها من قبل أصحابها المذكورين بمبلغ قدره 10.500.000 ريال طبقاً لما هو مبين بعقد البيع مع استعداد المدعي بدفع قيمة هذه الحصص لشركة "ع" المدعى عليها في هذه الدعوى فور ثبوت الشفعة وقيام الشركة بإفراغ الحصص المشفوع فيها لدى كاتب العدل ، وحيث إن دفع المدعى عليها على دعوى المدعي تضمن ما يلي :-

أولاً : الطلب الأصلي عدم اختصاص الديوان بنظر هذه الدعوى لانعقاد الاختصاص بنظرها إلى التحكيم .

ثانياً : الطلب الاحتياطي رد الدعوى وعدم سماعها بالنسبة لها ، وحيث إن المدعى عليها قد استندت بدفعها من حيث عدم الاختصاص بنظر دعوى المدعي لتمسكها بشرط التحكيم الوارد بينود عقد بيع الحصص شركة "ن" الذي أبرم بينها وبين الشركاء السابقين بشركة "ن" وعقد تأسيس شركة "ن" بحجة أن المدعى عليها قد حلت محل الشركاء عند شرائها لحصصهم في هذه الشركة ولما كان النظر فيما تمسكت به المدعى عليها بشرط التحكيم يقتضي أن يكون هناك عقد بينها وبين من أثار نزاع أو خلاف معها وتضمن بنداً من بنود ذلك العقد أن يكون لأطرافه اللجوء للتحكيم حال عدم حل النزاع بالطرق الودية كما أن التمسك بشرط التحكيم يقتضي أيضاً أن يدفع به ابتداءً قبل الخضوع أو التطرق لموضوع النزاع ، وحيث إنه بإطلاع الدائرة على ما دفعت به المدعى

عليها في هذا الجانب وما أجاب به المدعي تبين لها أن عقد بيع حصص شركة "ن" المؤرخ في 1426/5/1 هـ هو محور النزاع في هذه الدعوى فالمدعي يدعي أن الطريقة التي بيعت فيها حصص هذه الشركة وبصفته أحد الشركاء فيها سابقاً وحالياً لم تتم وفقاً للإجراءات السليمة المتبع في هذا الشأن فهو لم يبيع حصصه بهذه الشركة ولم يوكل أحد عنه ولم يشعر وقت البيع في ذلك طبقاً لما نص عليه نظام الشركات وعقد تأسيس الشركة والثابت للدائرة لما أفادت به شركة "ع" والشركاء السابقين بشركة "ن" عدم حضور المدعي وقت إبرام ذلك العقد وعدم قيامه بتوكيل أحد عنه ومن ثم فإن حصص المدعي لم يتم بيعها حيث ضل شريكاً بمقدار حصته التي تعادل ما نسبته 1% من رأس مال هذه الشركة وبالتالي يكون مطالبة المدعي عليها بشرط التحكيم طبقاً لبنود عقد البيع وعقد تأسيس "ن" طلب في غير محله ومن ثم لا يعتد به، ومن جانب آخر أنه على فرض أن ما جاء بينود عقد بيع حصص شركة "ن" وعقد تأسيسها يخول المدعي عليها المطالبة بشرط التحكيم حال حدوث نزاع في ذلك فإن المتعين عليها المطالبة بذلك الشرط ابتداءً قبل التطرق والخوض في موضوع النزاع وبما أن الثابت للدائرة أن الشركة المدعى عليها وبعد سماعها لدعوى المدعي وإعطاء ممثلها مهلة كافية للإجابة عليها تطرقت لموضوع النزاع المائل في هذه الدعوى إذا أنها ذكرت في بداية دفعها على الدعوى بأن قيامها بشراء حصص شركة "ن" كان من أشخاص يملكون بيعها وهذا الدفع بحد ذاته دفع موضوعي مما يعتبر ذلك تنازلاً ضمناً منها عن شرط التحكيم مما يسقط حقها بالمطالبة بالتحكيم وهذا ما استقرت عليه أحكام الديوان في هذه الخصوص.

وبالنسبة لموضوع هذه الدعوى التي حصرها المدعي في مطالبته بإثبات الشفعة في حصص إخوانه "ز" و"ر" و"د" و"هـ" و"ي" و"ق" أبناء "ك" في

شركة "ن" والتي تعادل ما نسبته 6% من رأس مال هذه الشركة والتي آلت ملكيتها للمدعى عليها فإن الثابت للدائرة من وقائع هذه الدعوى وما جاء بأوراقها من أنه سبق لـ "ك" أن قام هو وسبعة من أبنائه بما فيهم المدعى بتأسيس شركة تحمل اسم تجاري هو "شركة ن" أبرم عقد تأسيسها في 1421/1/3 هـ الموافق 2000/4/8م برأس مال قدره واحد وستون مليوناً وستمائة وخمسة وسبعون ألف ريال تم تقسيمها إلى 1.233.500 حصة عينية متساوية تبلغ قيمة الحصة الواحدة خمسين ريال كان نصيب "ك" 1.147.155 حصة تعادل ما نسبته 93% من رأس مال هذه الشركة ولكل واحد من أبنائه السبعة الشركاء في هذه الشركة بما فيهم المدعى 12.335 حصة بما نسبته 1% من رأس مال الشركة ، وحيث إن النزاع في هذه الدعوى قد انبثق من عقد بيع وتنازل لحصص هذه الشركة المبرم في 1426/5/1 هـ الموافق 2005/6/8م حسبما هو مدون في ذات العقد بين "ك" بالأصالة عن نفسه وبولايته عن ابنه "ي" وبوكالته عن أبنائه "ز" و"د" و"ق" وبحضور كل من "م" المدعى في هذه الدعوى و"ر" و"هـ" أبناء "ك" بصفتهم الشركاء في شركة "ن" وبين شركة "ع" المدعى عليها في هذه الدعوى وجاء في تمهيد ذلك العقد أن الطرف الأول وهم الشركاء بشركة "ن" يرغبون في بيع جميع الحصص التي يملكونها في الشركة ومصنع البلاستيك بثمن قدره 175.000.000 ريال ويشمل هذا الثمن كافة موجودات الشركة والمصنع وأصولهما وتراخيصهما وحقوقهما لدى الغير كما هو وارد في ميزانية الأقفال المؤرخة في 2005/5/31م وكذلك حصص الشركة المثبتة برأسمالها والتي مجموعها 1.233.500 حصة وأن الطرف الثاني قد عرض على الطرف الأول شراء الشركة والمصانع المذكورة بالقيمة المذكورة وتضمن ذلك أن الطرف الأول باع للطرف الثاني شركة "ن" وفق القوائم المالية المقدمة

من البائع والموافق عليها من المشتري في 2005/5/31م وتنازل الطرف الأول بموجب ذلك البيع للطرف الثاني عن جميع حصصه التي يملكها بالشركة ومجموعها 1.233.500 حصة بمبلغ قدره 175.000.000 ريال ، وحيث إنه من الإطلاع على مضمون ذلك العقد يفهم منه أن المدعي "م" أحد الشركاء بشركة "ن" السابقين والحاليين كان من ضمن الحضور وقت إبرام عقد بيع حصص شركة "ن" لشركة "ع" والثابت للدائرة مما جاء بإفادة المدعى عليها والشركاء السابقين بشركة "ن" وما جاء بالأوراق أن المدعي لم يكن من ضمن الحضور وقت إبرام هذا العقد ولم يقيم هو أيضاً بتوكيل أحد عنه لبيع حصصه في هذه الشركة وعلى ضوء ذلك التصرف أو التجاوز الذي حدث من أطراف ذلك العقد ببيع حصص المدعي وهم يعلمون بعدم حضوره قد عدّه الفقهاء ببيع الفضولي خاضع لموافقة المدعي من عدمه ومن ثم فإن شراء شركة "ع" لحصص المدعي في شركة "ن" يبقى معلقاً على رضا صاحب هذه الحصص ومتى وافق صاحبها على ذلك البيع وإلا يكون شراء شركة "ع" لهذه الحصص غير نافذ ، ولما كان الثابت أن المدعي لم يكن موافقاً على بيع حصصه بل إنه أصلاً لا يرى وجاهة للطريقة التي اتبعت فيها عند بيع حصص شركة "ن" لمخالفتها هذه الطريقة للمادة [165] من نظام الشركات والمادة الثامنة من عقد تأسيس الشركة وبالتالي فإن المدعي لا يزال شريكاً بشركة "ن" بقدر حصته التي تعادل ما نسبته 1% من رأس مال هذه الشركة وهذا الأمر لم يكن محل منازعة ومن ثم لا يحق للشركة المدعى عليها أن تذكر في دفعها على الدعوى بشرائها لحصص المدعي وهي تعلم أنه لم يكن حاضراً وقت التباعد حسبما جاء بإقرارها بل إنه من خلال إعلانها في صحيفة البلاد اليومية بتاريخ 2005/8/17م المتضمن قرار الشركاء بتعديل عقد تأسيس شركة "ن" أن البند ثالثاً من ذلك القرار قد

تضمن تعديل المادة (6) من عقد تأسيس الخاصة برأس المال جاء ذكر "م" بن "ك" المدعي في هذه الدعوى بصفة شريك يملك ما مقداره 12.335 حصة تعادل ما نسبته 1% من رأس مال هذه الشركة وهذا بحد ذاته إقراراً من المدعي عليها من أن حصص المدعي لم يتم بيعها وظل شريكاً معها بشركة "ن" بمقدار نسبته السابقة ولما كان الأمر كذلك فإن حق المدعي بالشفعة في حصصه لشركائه يبقى قائماً ومتى ما طالب بذلك الحق وكان وفقاً للضوابط التي حددها الفقهاء أجيب إلى طلبه .

ولما كان تعريف الشفعة في الفقه الإسلامي هي استحقاق الشريك انتزاع حصة شريكة ممن انتقلت إليه بعوض مالي ، ومتى انتقلت هذه الحصة إلى شخص آخر غير الشريك فإن لهذا الشريك أن يسترد هذه الحصة وحتى لا يلحق الضرر بالمشتري الذي انتقلت إليه الحصة فإنه من المتعين على ذلك الشريك أن يدفع للمشتري قدر الثمن الذي وقع عليه المبيع فيأخذ الشفيع الشفعة بمثل الثمن الذي استقر عليه العقد ، وأن الفقهاء رحمهم الله جعلوا هناك أموراً يلزم تحققها حتى يحق للشفيع المطالبة بالشفعة وهي علم الشفيع بالمبيع وعلمه بالمشتري ومقدار ثمن المبيع ومتى تحققت هذه الأمور في حق الشريك ورغب في أخذ المبيع فله أن يطالب به على الفور .

وحيث إن المادة الثامنة من عقد تأسيس شركة "ن" أوجبت على أي شريك يرغب بالتنازل عن حصته للغير بعوض أو بغير عوض أن يعرض ذلك على الشركاء ويجوز لهم استرداد تلك الحصص عملاً بما جاء في المادة [165] من نظام الشركات التي نصت على أنه " يجوز للشريك أن يتنازل عن حصته لأحد الشركاء أو للغير وفقاً لشروط عقد الشركة ومع ذلك إذا أراد الشريك التنازل

عن حصته بعوض للغير وجب أن يخطر باقي الشركاء عن طريق مدير الشركة بشروط التنازل وفي هذه الحالة يجوز لكل شريك أن يطلب استرداد الحصة بثمنها الحقيقي فإذا انقضت ثلاثون يوماً من تاريخ الإخطار دون أن يستعمل أحد الشركاء حقه في الاسترداد كان لصاحب الحصة الحق في التصرف فيها..... وإذا استعمل حق الاسترداد أكثر من شريك وكان التنازل يتعلق بجملة حصص قسمت هذه الحصص بين طالبي الاسترداد وبنسبة حصة لكل منهم في رأس المال) ومن خلال تمعن الدائرة بحق الإسترداد المبينة في المادة [165] من نظام الشركات والتي اشير إليها في عقد تأسيس الشركة اتضح لها أن الإجراءات والأحكام التي تتعلق بحق الإسترداد في الشركات ذات المسؤولية المحدودة قريبة إن لم تكن نفس الإجراءات والأحكام المتعلقة بالشفعة في الفقه الإسلامي ، فحق الشفعة رخصة أعطاها الشارع لمن قام فيه سبب هذا الحق ليدفع صاحب الحق نفسه فإذا أراد الإنتفاع بذلك الحق ليدفع صاحب الحق نفسه واستعماله فعليه أن يسلك مسالك معينة تنبئ عن رغبته الأكيدة في التمسك بهذا الحق وفقاً لما يتوقعه من ضرر محتمل لا يزول إلا بأخذ الشفيع بحق الشفعة ،ولما كان الثابت للدائرة من واقعة هذه الدعوى إن قيام الشركاء السابقين بشركة "ن" ببيع حصص الشركة "ع" المدعى عليها في هذه الدعوى باعتبار أن الحصص محل مطالبة المدعي قد انتقلت إليها عن طريق الشراء دون أن يتم إعلام المدعي بصفته أحد الشركاء في شركة "ن" في ذلك البيع مع علمهم أنه أحد الشركاء في هذه الشركة خاصة وأن عقد تأسيس الشركة ونظام الشركات قد أوجبا على الشريك الذي يرغب في التنازل عن حصته أو حصصه للغير أن يشعر شركائه في هذا الأمر وهذا التصرف أو التجاوز الذي حدث عند تنازل الشركاء السابقين بشركة "ن" لخصصهم لشركة "ع" يبقى حق المدعي قائماً

بالمطالبة بالشفعة أو بالإسترداد لحصص الشركاء متى ما علم في ذلك البيع وعلم بالمشتري وعلم بمقدار ثمن المبيع ، وحيث إن الثابت للدائرة من أوراق هذه الدعوى وما أفاد به أطراف النزاع أنه لم يتم إعلام المدعي وقت إبرام عقد بيع حصص شركائه على شركة "ع" وأن المدعي قد علم لاحقاً في هذا الشأن ومن ثم فإنه تقدم للجهات المعنية حالاً فلم يستجاب إلى طلبه باسترداد حصص شركائه السابقين بشركة "ن" وتقدم للديوان مباشرة في هذه الدعوى طلب فيها بأحقية بالشفعة في جميع حصص شركائه التي انتقلت إلى شركة "ع" ثم قصرها بحصص إخوانه الستة والذين يملكون ما مقداره 6% من رأس مال شركة "ن" تلبية لرغبة والده بعدم المطالبة بحصصه ولما كان الأمر كذلك وأن مطالبة المدعي قد جاءت موافقة لما جاءت به النصوص الفقهية فيما يتعلق بحق الشفعة ولنصوص عقد تأسيس شركة "ن" ونظام الشركات فبالتالي يكون المدعي أحق بحصص إخوانه "ز" و"ر" و"د" و"هـ" و"ي" و"ق" أبناء "ك" بشركة "ن" والتي تعادل ما نسبته 6% من رأس مال هذه الشركة من شركة "ع" التي انتقلت ملكية هذه الحصص لها عن طريق الشراء مما يتعين معه على الدائرة والحال كذلك القضاء بانتقال ملكية حصص الشركاء السابقين بشركة "ن" المذكورين للمدعي بالشفعة وإلزامه بدفع قيمتها البالغ قدرها 10.500.000 ريال للمدعي عليها شركة "ع" طبقاً لما جاء بعقد بيع هذه الحصص ، ولا ينال مما تنتهي إليه الدائرة بما ذكرته المدعى عليها من أن مطالبة المدعي لبعض الحصص دون بعضها الآخر يعتبر من تفريق الصفقة ذلك أن تفريق الصفقة التي أشار إليها الفقهاء لا ينطبق على واقعة هذا النزاع فهي تتعلق فيما إذا كان الشفيع طالب بالشفعة بجزء من نصيب أحد الشركاء فقيام الشركاء ببيع نصيبهم على آخر يعتبر هذا البيع بمثابة عقد لكل واحد منهم ، وبما أن المدعي قد طالب

في جميع حصص إخوانه التي تم بيعها على المدعى عليها لا يعتبر ذلك تفريقاً للصفقة ومن ثم لا يعتد بما دفعت به المدعى عليها في هذا الشأن مع أن المادة [165] من نظام الشركات قد أشارت أنه عند قيام أحد الشركاء بالتنازل عن حصته للغير أن يشعر الشركاء وأعطت هذه المادة مهلة بحدود الثلاثين يوماً لأخذ هذه الحصة بقيمتها كما وأن مطالبة المدعى بالشفعة في حصص إخوانه التي انتهت الدائرة إلى انتقالها له لا يعني منه أن هناك ضرر لحق بالمدعى عليها من جراء هذا الأمر فالمدعى قد طالب بحقه الذي أعطاه أياه الشرع والنظام وفقاً للإجراءات المنبثقة في هذا الشأن ولم يرتب ضرراً على المشتري خاصة وأن المدعى عليها تعلم أنها وقت شراء هذه الحصص لم يكن المدعى حاضراً ولم يثبت قيامه ببيع حصصه ولا يخفاها من أحقية الشريك المدعى باسترداد حصص شركائه طبقاً لما قضت به المادة [165] من نظام الشركات السالف ذكرها وما جاء بالمادة الثامنة من عقد تأسيس شركة "ن" خاصة وأن المدعى عليها الشركات الكبرى أما ما ذكرته المدعى عليها من أنه وقت التباعد أبرز والد المدعى "ك" وكالة برقم 257 وتاريخ 1426/3/25 هـ عن ابنه المدعى في هذه الدعوى تخوله حق بيع حصصه فأصلاً هذه الوكالة المرفق صورة منها أعطيت لكل من "ج" و"ل" و"ت" من قبل كل "ك" بالأصالة عن نفسه وعن ابنه القاصر "ي" وبالوكالة عن ابنائه "م" و"ر" و"ق" و"د" بموجب الوكالة رقم 124046 وتاريخ 1420/10/10 هـ بشركة "ن" والتي تم فسخها من قبل المدعى بالوكالة التي أصدرت من كتابة عدل الرياض الثانية برقم 5146 وتاريخ 1423/3/13 هـ وبالتالي لم يعد لوالد المدعى صفة عنه فيما تضمنته الوكالة السابقة فضلاً عن أن هذه الوكالة لم يتم استعمالها عند بيع حصص شركة "ن" فالثابت من ذلك العقد أن "ك" قد أبرم ذلك العقد بالأصالة عن نفسه

وبالوصاية عن أحد أبنائه وبالوكالة عن بعض من أبنائه والمدعي "م" اشير إليه في ذلك العقد أنه من ضمن الحضور والثابت كما سلف بيانه عدم حضوره وقت التباعد وعدم حصول بيع من قبله لحصصه على شركة "ع" ، وعلى فرض أن هناك ضرر لحق بالمدعي عليها فإن لها أن ترجع على من تسبب في حدوث ذلك الضرر .

لذلك كله

حكمت الدائرة :- بانتقال حصص كل من "ز" و"ر" و"د" و"هـ" و"ي" و"ق" أبناء "ك" الشركاء السابقين في شركة "ن" والبالغ قدرها 6% من رأس مال الشركة للمدعي "م" بن "ك" بالشفعة والآلية ملكيتها بالشراء لشركة "ع" مع إلزام المدعي بدفع قيمة هذه الحصص البالغ قدرها 10.500.000 عشرة ملايين وخمسمائة ألف ريال لشركة "ع" لأنظمة التغليف لما هو مبين بالأسباب وبإعلان منطوقه على الطرفين قرر وكيل المدعي قناعته به أما وكيل المدعي عليها فقرر عدم القناعة به وبالله تعالى التوفيق وصلى الله وسلم على نبينا محمد .

رئيس الدائرة

عضو


عضو

أمين السر

"ص" "س" "أ" "ب"

Appendix D to Chapter 5: Insider Trading Case

Insider Trading Case

 لجنة الاستئناف في نزاعات الأوراق المالية Appeal Committee for the Resolution of Securities Conflicts		
ACRSC Endorsement of CRSD Decision		
Case No. with CRSD	CRSD Decision No.	Issue Date
101/28	323/L/D1/2008 of 1429 H.	13/11/1429 H. – 11/11/2008 G.
ACRSC Decision No.	Issue Date	Case Category
148/L.3/2009 of 1430 H.	30/6/1430 H. 23/6/2009 G.	Penal
Case Sub-category		
Manipulation and Fraud in the Exchange		
Facts		
<p>The case facts are summarized as follows: The Capital Market Authority (CMA) approached CRSD with indictment number (***) in which *** and *** were accused of violating the Capital Market Law and its implementing regulations with regard to trading activity based on inside information during the course of trading on the shares of *** Company, whereas they violated Article (50) of the Capital Market Law and Article (5) and Article (6) of the Market Conduct Regulations as follows:</p> <p>First: Offenses committed by the first offender:</p> <ol style="list-style-type: none"> 1. The first offender traded on the share of *** Company by means of purchase on 21/6/2006 G. based on inside information obtained through his position as chairman of the board of that company. <p>On ***, the said offender traded on the shares of *** Company through his investment account when he purchased (28,700) shares after he could as chairman of the board of *** Company obtain an inside information that involves the Company through his position as chairman of the board. The inside information, based on which the offender traded, relates to negotiations conducted by *** for the acquisition of *** Company. The takeover was discussed in several company meetings. In 2006 G. a memorandum of understanding was signed by the two companies in that regard. On *** the board of *** Company assigned to the said offender – in addition to his position as General Manager – the conclusion of negotiations for acquisition. As the offender knew that the deal will be concluded shortly, being one of the persons who are authorized to finalize it, he purchased a quantity of the above-mentioned shares. The company board endorsed in its meeting held on *** the finalization and conclusion of the deal according to the proposal that was forwarded by the company and authorized the said offender to sign the memorandum of agreement. It was announced on *** on Tadawul website that the board of *** Company approved the deal of acquisition of all company's proprietary rights in *** against the total amount of (SR. 273,000,000) two hundred seventy three million Saudi Riyals. The said offender signed the deal in his capacity as company's representative.</p>		

Unofficial English translation. Proper reference should be made to the Arabic version of the summarized decision.



2. The said offender disclosed to his brother the inside information that related to the company and was obtained through the position he held as chairman of company's board.

Facts:

The said offender disclosed an inside information that relates to *** Company and which he was able to obtain through his position as chairman of the board to his brother *** (the second offender) before the same was announced to public investors on Tadawul website. The inside information relates to negotiations conducted by *** Company for the acquisition of *** Company. The said offender knew about the imminent completion of the deal as well as the imminent announcement of the deal to public investors being the person authorized by the company to sign the memorandum of agreement. The second offender (his brother) traded on the share of the company during a period that was close to the announcement of the news on Tadawul website based on the inside information that he obtained from the said offender.

Second: The second offender traded on the share of *** Company on *** and *** based on inside information that relates to the company and could be obtained from an informed person (his brother, the first offender).

Facts:

The said offender purchased on *** and *** a large quantity of shares of *** Company which amounted to (264,502) shares after he obtained an inside information that relates to the company and his awareness of the imminent approval thereof as well as the time of announcement of that information to public investors. The obtained inside information based on which he executed his trading activity involves negotiations conducted by *** Company for the acquisition of *** Company. The said offender obtained that information from his brother (the first offender) who was informed on this news being the chairman of the board of *** Company and the person authorized to sign the aforementioned deal as it was announced on Tadawul website on *** that the board of *** Company had endorsed the deal of acquisition of full proprietary rights in *** by the company for a total amount of (SR. 273,000,000) and that the first offender was the one who signed the deal in his capacity as company's representative.

The investigations with the first offender revealed that he had held the position of chairman of Company's board for eight years and that none of his relatives works for the company and that the negotiations for the merging of *** with *** Company had started before January commencing from the date of signature of memorandum of understanding on **/**/2006 G. The merger had not been finally agreed upon waiting for the fair evaluation of share. The agreed item was the agreement of deal conclusion and not the final agreement. He denied that he had traded on the share of *** Company through the purchase of (28,700) shares on *** based on inside information that relates to the acquisition of *** by *** Company. He also denied that he disclosed this information to ***, who purchased (264,722) shares. He justified this denial by stating that the acquisition was never confirmed since originally it was not endorsed and the same was subject to the approval of *** Company and the board of *** Company. He added that he issued a letter on *** corresponding to *** in which he rejected the conditions of *** Company and expressed his regret that he will not be able to proceed in that deal. As such, the negotiations were not finalized before the date of trading. Moreover, the number of purchased shares was so little which could be in higher quantities if the activity was based on inside information. He confirmed that the inside information was not the motive of his trading business on *** since he knew that the provisional memorandum will not influence the share of the company and that the same does not serve as an announcement of the acquisition itself. He also knows that legal procedures which could take from six months to one year have to be processed before the conclusion of the deal. The reason of his trading on the share of *** Company on ***

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was his employment for the company. He also confirmed that the executives in *** Company and *** Company know about the acquisition deal meaning that the information is non-confidential and cannot be controlled and those executives were contacted by the media.

Through investigations with the second accused person, he stated that he is an investor in the Exchange since 1421 H. and that he maintains a portfolio with *** Bank, the entire assets of which he transferred to his self-managed portfolio with *** Bank. Being a long term investor, he concentrated his selling and purchasing activities on the share of *** Company due to its positive investment trend and the development of company's sectors as well as transforming the losing companies into profitable ones. He denied that he traded on the share of any market listed company based on inside information that was disclosed to him. He added that he has been trading on the share of *** Company since he started his business in the market in 1421 H. as he tends to preserve the share for long periods and then sells it when he needs cash for other businesses or due to a change in market conditions. He also denied that his brother the chairman of *** Company's board had disclosed to him inside information since he started his trading business due to bad relations with his brother. The biggest proof of this is the heavy loss incurred by the company in 2006 G. since he would not have preserved the shares of the company in his portfolio if he already knew about that information. The information that he obtained from the internet is that the company will take over a group of companies which he did not know about until the time of announcement thereof. He denied the charge of trading on the shares of *** Company based on inside information obtained from his brother, the chairman of the board. He justified his denial by the continuous trading activity on the shares of the company since he started his business in 1421 H.

The investigations were concluded with charging the two accused persons for violating Article (50) of the Capital Market Law and Article (5) and Article (6) of the Market Conduct Regulations when they traded on the share of *** Company based on inside information due to the following evidence and presumptions:

First: as for the first accused person:

1. His testimony which included that he is one of the persons who represent *** Company in the negotiations with *** which started on **/**/2006 G.
2. The illogical statement that he made when the reason of trading on the share of *** Company on *** was questioned since he stated that the reason is merely his existence in the company.
3. Being the chairman of the board of *** Company and one of the representatives of the company that were authorized by the board to conclude the negotiations with *** Company.
4. The minutes of company meetings held on ***, ***, *** and *** in which the acquisition of *** by the company was discussed as well as the meeting held on *** in which the board approved the conclusion of acquisition deal.
5. The memorandum of understanding between the company and owners signed on ***.
6. The absence of trading activity on the share of *** Company in terms of purchase during the first half of 2006 G. and then the trading activity that was executed during a period close to deal conclusion, endorsement and announcement which reveals that his trading activity was based on the inside information he possessed.
7. The report of Market Surveillance Division number (***) dated 8/7/1427 H.

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8. The letter of *** Company which indicated that the orders associated to the investment account of the accused person during the month of *** were all entered online by the said offender.
9. The investment portfolio of the said offender confirms that he traded on the share of *** Company through the purchase of (28,700) shares on *** after he obtained the information that was not announced to public investors yet.
10. The activity record of trading on the share of *** Company on ***.
11. The announcement of *** Company on Tadawul website on *** which indicated the endorsement of the company's acquisition of the entire proprietary rights of *** Company.

Second: As for the second accused person:

1. The statements of the said offender with regard to the grounds of his investments contradicted each other as he mentioned at the beginning of the investigations that he depended on companies' results and financial statements while he justified his trading activity during a period that is close to the announcement of acquisition deal endorsement that he obtained the information from an internet forum thus was urged to trade on the share of the company during that period.
2. The trading activity on the share of *** Company in large quantities during the period that was very close to company's announcement of the endorsement of acquisition deal by the board confirms that the trading business relied on the developments and negotiations of acquisition deal, conclusion of which was delegated to his brother the chairman of the board.
3. The family relationship between him and the first offender who was chairman of the board of *** Company and one of company's representatives authorized to conclude negotiations with *** Company.
4. The letter of *** Bank which indicated that the said offender processes all purchase and sale operations through his investment account personally.
5. The investment portfolio of the said offender which confirms that he traded on the share of *** Company through the purchase of (93,804) shares on *** and (170,698) shares on *** after he obtained the information that was not yet announced to public investors.
6. The activity record of trading on the share of *** Company on *** and ***.
7. The minutes of company meetings in which the acquisition of *** by the company was discussed as well as the meeting in which the board endorsed the conclusion of acquisition deal, all of which were chaired by his brother (the first offender).
8. The company's announcement on Tadawul website dated *** which indicated the endorsement of the acquisition deal of the entire proprietary rights in *** Company.

CMA added that considering the above explanations of offenses committed by the two said offenders violating the Capital Market Law and its implementing regulations, it confirms the danger and harm of the acts that were carried out by them to the market, listed companies and the traders/investors. The said offender had executed a trading business based on inside information obtained by the first offender through the position he holds and by the second offender through the family relations that connect him to the first offender prior to announcement thereof to public investors. The first offender

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who occupies the position of chairman of the board is expected to observe transparency rather than utilize the information that was entrusted to him through his position and then disclosing the same to a relative in order to achieve material gains. The imposition of deterrent sanctions may stop them from repeating such breaches.

As for the first offender, CMA claimed in its indictment for:

- a) The imposition of precautionary seizure of the first offender's accounts including cash balances and shares maintained in his bank, investment and portfolios accounts pursuant to Article (59/a/7) of the Capital Market Law equivalent to (SR. 665,000).
- b) Conviction of the said offender for the violation of Article (50) of the Capital Market Law and Article (5/a) and Article (6/a) of the Market Conduct Regulations and the imposition of the following sanctions:
 - i) Imprisonment as per law and pursuant to Article (57/c) of the Capital Market Law.
 - ii) Obliging him to refund the gains that resulted from these offenses to the account of CMA pursuant to Article (59/a/4) of the Capital Market Law which amounted to (SR. 465,500).
 - iii) A financial penalty of (SR. 200,000) pursuant to Article (59/b) of the Capital Market Law.
 - iv) Prohibition from employment at companies whose shares are traded in the Exchange for three years pursuant to Article (59/a/9) of the Capital Market Law.

As for the second offender, CMA claimed in its indictment for:

- a) The imposition of precautionary seizure of the first offender's accounts including cash balances and shares maintained in his bank, investment accounts and portfolios accounts pursuant to Article (59/a/7) of the Capital Market Law equivalent to (SR. 1,624,757).
- b) Conviction of the said offender for the violation of Article (50) of the Capital Market Law and Article (6/a) of the Market Conduct Regulations and the imposition of the following sanctions:
 - i) Imprisonment as per law and pursuant to Article (57/c) of the Capital Market Law.
 - ii) Obliging him to refund the gains that resulted from these offenses to the account of CMA pursuant to Article (59/a/4) of the Capital Market Law which amounted to (SR. 1,524,757).
 - iii) A financial penalty of (SR. 100,000) pursuant to Article (59/b) of the Capital Market Law.
 - iv) Prohibition from employment at companies whose shares are traded in the Exchange for three years pursuant to Article (59/a/9) of the Capital Market Law.

CRSD held a session and issued its provisional decision No. (***) for 1428 H. to seize the properties of the second accused person equivalent the amount of (SR. 96,229), without prejudice to the right of this person to submit his request for lifting such provisional seizure.

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The first accused person and second accused person were provided with copies of indictment with the request of response within at least two weeks prior to the time of the scheduled session. The fixed period of time passed without receipt of any response from any of them.

A session was held for case consideration attended by prosecution representative of CMA and the lawyer of the two accused persons.

In the session, the committee emphasized to the lawyer the necessity of personal attendance of the two accused persons who have the right of seeking help from any lawyers or experts they choose. Since the two accused persons were previously provided with copies of indictment and that it was confirmed to them through the notification letter that they have the right of access to CRSD's offices during official hours in order to review case file and make copies of relevant documents. Therefore, the committee asked the lawyer to state his defense. The lawyer expressed his desire to have additional time since this task had been assigned to him recently, thus he needs to compile documents that support the position of his two clients. Moreover, his two clients are discussing with the Bank the possibility of getting a number of documents. On asking the representative of prosecution if he wishes to add further statements, he said that he adheres to the indictment and the claims stated therein. As such, the committee determined to grant the accused persons a final time limit in order to conclude their statements and submit a defense memo as an answer to the indictment. It was confirmed to the lawyer of the accused persons that he and his clients are given access to CRSD's offices any time during the official office hours in order to review case file and make copies of relevant documents. It also emphasized the need of personal attendance of the two accused persons.

CRSD received a defense memo from the lawyer of the two accused persons in which it was indicated that the claim for case dismissal and the ruling of acquittal of his clients from attributed charges considering that the evidence and presumptions presented by CMA are not sufficient for the conviction of the his clients for violating Article (50) of the Capital Market Law and Article (5) and Article (6) of the Market Conduct Regulations as they are not up to the degree of evidence of proof which could condemn the accused and builds up the judgment, and the lawyer listed the following reasons: CMA accused his first client *** of:

1. Trading on the share of *** Company by purchasing (28,700) shares on *** whereas the correct statement is what was mentioned in case facts being trading on *** based on inside information which he obtained through the position he held as chairman of the board. The case facts also stated that the inside information which was obtained by his client involves negotiations between the company and *** Company in relation to an acquisition deal. Case facts as relayed by CMA stated that the accused person – being aware of the imminent conclusion of the deal as he was one of the persons authorized to handle this issue – purchased the above quantity of shares. This statement is challenged as follows:
 - a) CMA acknowledged through case facts that what happened between the dates of *** and *** were mere negotiations that could be cancelled by either party should the negotiators fail to conclude an agreement. The memorandum of understanding signed on *** stated under item (4) that "In case the conclusion of the deal was not agreed upon, each party will return any information that relates to the other party. Hence, the principle of cancellation is probable and the agreement is not binding to parties."
 - b) CMA confirmed that his client was aware of the imminent conclusion of the deal and the agreement, being a statement that is incorrect since *** Company sent a letter with no number, dated *** (copy enclosed) indicating its approval under the conditions stated in a previous letter as *** Company answered that letter (copy enclosed) expressing its regret for being unable to continue the negotiations and the rejection of the conditions as stated

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in the said company's letter. This shows that his client was not trading based on inside information. His client traded on *** while the letter on deal cancellation was dated ***. On *** an agreement was signed concerning the conditions that were disputed by *** Company in its aforementioned letter. These conditions were later amended as stated in the agreement (copy enclosed). The said agreement stated under item (First), paragraph (3) "Refrain from conclusion of purchase based on the results of the test that eliminates ignorance". The same phrase was also mentioned in item (Second), paragraph (5) of this agreement. It is understood that initial agreements do not affect the value of company's share for reasons explained above.

2. The act of disclosure of inside information that relates to *** Company and obtained through the position he holds as *chairman of the board* to his brother. This accusation could be challenged as follows: CMA did not present a single evidence of this act since the methods of evidence according to Sharia are well known to your esteemed committee being testimonies of witnesses, acknowledgement and oath. CMA did not present evidence that could support its accusation except conjecture which cannot substitute actual matters in any way. His client mentioned while questioned that he did not disclose this information to his brother and he is ready to confirm the non-disclosure under oath, not to mention the Hadeeth of Prophet Muhammad (PBUH) which provides that the plaintiff should give evidence while the defendant may deny under oath.

Third: CMA accused his client of offense commitment being the trading on the share of *** Company through making purchases on *** and *** and gave facts and supporting evidence. The said evidence could be challenged as follows:

- 1) CMA mentioned that the statements of his clients contradict each other in relation to the grounds based on which he takes his decisions for investment in the Exchange. At the beginning of questioning, he stated that such grounds depend on the results and financial statements of companies whereas in other places he says that the reason of trading during a period that is close to the announcement of endorsement of acquisition deal is his awareness of the news from an internet forum during that period. Response: When his client was questioned, he was asked this question "What are the grounds based on which you took your investment decisions? He answered "I build all my decisions for investment in some companies on the results and financial results of those companies, not all companies." The other question was "What do you know about the news of acquisition deal, when did you know about it and who told him this news? His answer was "I received the news of the deal from some internet sites taking into consideration that I preserve shares for long periods without depending on news. The said news stated that the company is acquiring group of companies but the name of the company was not defined until it was revealed in the announcement on official sites. The news was known after announcement thereof". From the above, it is clear that the impression of CMA in terms of contradictory statements of his client is incorrect since the context of the question as well as the answer is clear to the esteemed committee.
- 2) The second evidence of CMA which indicates that his client traded on the share of *** Company in large quantities during a period that was close to the announcement, could be challenged as follows:
 - a) His client traded on the shares of *** Company during 2005 G. and 2006 G. in large quantities. He enclosed a list of some of his client's trading operations relating to the share of *** Company to prove that his client trades on the said share almost permanently.

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- b) CMA stated in the report prepared by the Market Surveillance Division that "Some forums were involved in gossips dealing with capital increase of the company starting ***). This is what his client mentioned when he was asked about how he obtained the information and the reason behind his trading activity during this period. The strength of gossips as well as the rise in share price largely motivated trading on company's share in large quantities during that period.
- c) CMA included in the report prepared by the Market Surveillance Division a letter in which questions were raised by the Disclosure Department dated ***. In this letter, it stated that "It was noticed that the share price during the previous trading days had increased. Kindly check if any basic information had not been published on Tadawul's website in which investors may be interested." This reveals that CMA noticed the rise in share price whereas the investor is better expected to observe such rise and consequently trade on it in large quantities. This statement is further supported by material published in internet forums which create credibility of information for the investor. This is exactly what happened to his client.
- d) CMA listed in the report prepared by the Market Surveillance Division the most active investors in terms of selling and purchasing the company's share during the period from *** to ***. This list reveals that the investment of his client in company's share was among the smallest ones during that period. The question here, did CMA question the most active investors during that period about the source of information and whether they traded on company's share during the first half of 2006 G. only as it specified with his client, or the matching of names was behind CMA's accusation of his client only.
- 3) The third evidence of CMA which refers to the family relationship between the accused persons, this evidence is challenged by the fact that CMA did not present any evidence to support the allegation of disclosure of this information by the first accused person to the second accused person other than the trading activity of the second accused person (i.e.; only the confirmation of trading incident). It is well known to CRSD that CMA did not present any evidence that matches Shari'ah including testimonies of witnesses, acknowledgement of accused persons or oath. The question here about the range of confidentiality of this information as he listed a number of persons who were aware of it such as: (a) board members of *** Company (b) ***, Establishment (c), *** Factory (d), *** Company (e), *** Company (f), *** Project (g), *** Office (h), and *** Company.
- 4) The fourth, fifth, sixth, seventh and eighth evidence of CMA prove that the second accused person traded on the share of *** Company personally and for his own account. His client did not deny this statement whereas the disputed issue was the obtaining of the information.

Fourth: I would like to draw your attention to the method of calculation of the value of offenses (taking into consideration that neither of his clients admitted that he violated the Capital Market Law or market regulations) as CMA relied on Article (59/a/4) of the Capital Market Law which provides for the achieved gains not the anticipated ones since there is difference between the achieved gains and the anticipated ones that were considered by CMA thus contradicting the provision of the said article. All gains calculated by CMA were done comprehensively considering both the achieved and the unachieved gains which resulted from the assumption of sale of shares that remained in the possession of the offender at the end of trading activities priced based on the closing rate by the end of the day. Instead, CMA was supposed to stick to the law and calculate only the gains which the offender made from the commitment of his offenses. It is noted here that none of the Capital Market Law or its implementing regulations provided for the confiscation of anticipate (non-achieved) profits. For the above as well as other reasons, the lawyer requests CRSD to:

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First: Rule the acquittal of both defendants from the attributed charges.

Second: Lift the precautionary seizure of banking and investment accounts.

Third: Rule the right of his clients to be compensated for the material and moral losses that they incurred due to this accusation.

CRSD provided CMA with a copy of the memo of the two accused person's lawyer with a demand for response. The answering memo of CMA indicated as follows:

First: The lawyer of the accused persons referred in the first item of his above answering memo to some Shari'ah rules and principles claiming that suspicion is in favor of the accused person who is originally an innocent person. CRSD knows well that the criminal system that relates to the offenses of Exchange and its implementing regulations are of special nature since some of the offenses happen completely once the act is committed or refrained from doing regardless of the criminal intent. For the sake of general good as assessed by the legislator, it is imperative to impose punishment on the one who commits or refrains from committing an offending act though the criminal intent is not a precondition, the will of the commission of the offense was available in the case of the two accused persons since they knew that the purchase of company's shares when they possess inside information is an explicit violation of law. The evidence and presumptions displayed in the indictment shows clearly and conclusively that all offense aspects and elements were satisfied through the following acts that were committed by the two offenders:

- a) Assumed Aspect: Since the first accused person is an informed person pursuant to Article (4/b) of the Market Conduct Regulations, and the materialization of this legal condition is considered as an assumption that the trading activity of this informed person was based on an essential inside information which he obtained by means of his direct awareness of the essential developments and results of company's activity. Similarly, the second accused person is considered as an informed person pursuant to Article (50/a) of the Market Conduct Regulations which described specifically such a person as the one who obtains through family relationship from an informed person an inside information. This meaning is further confirmed by Article (4/b/2) of the Market Conduct Regulations which provides specifically that the informed person is one of the following: "A person who obtains inside information through a family relationship, including from any person related to the person who obtains the information." As such, the information was available to the chairman of the board (the first accused person) who disclosed it to his brother (the second accused person).
- b) Material Aspect: As the first accused person had conducted an explicit material activity that confirms the constitution of this aspect. This activity is represented in the conclusion of a transaction for the purchase of securities that relate to the inside information in terms of acquisition and related negotiations when he purchased (28,700) shares on *** prior to company's announcement on *** that it is being involved in these negotiations, thus such news is an essential inside information pursuant to features contained in Article (4/c) of the Market Conduct Regulations. The second accused person executed transactions for the purchase of company's share on *** and *** which amounted to (264,502) shares after the same had obtained inside information that relates to the company and further had known of imminent endorsement and announcement thereof to public investors.
- c) Moral Aspect: This offense is a deliberate one, the responsibility for the commitment of which is constituted through the availability of general criminal intent, meaning that the individual knows that the information he obtained or traded based on it is an inside one that has not yet been announced to the public rightfully.

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Second: The defendants' lawyer mentioned under paragraph (1), item (Second) of his answering memo that CMA acknowledges while listing the facts that what happened on *** and *** was mere negotiations between the two companies *** etc. This statement is incurred since *** Company sent a letter to *** Company indicating its approval under the conditions contained in the letter dated ***. Since the company has answered that letter through its letter dated *** and expressed its sorrow for being unable to continue the negotiations or agree on the conditions, obviously his client did not trade relying on inside information. We would like to demonstrate here that through the review of the record of the first accused person's portfolio, we found that the said person was not involved in trading activity on company's share during the first half of 2006 G. except on *** being the period that is very close to the board meeting where the acquisition deal was endorsed. Additionally, the first accused person is the one authorized by the board of *** to complete merger negotiations with *** Company. This reveals that the inside information he obtained through his position in relation to acquisition deal was the reason behind his trading activity. It constitutes also a conclusive presumption that proves the utilization of the inside information. The knowledge of such information secures to the possessor an advantage that is greater than others' which would enable him to approach the proper evaluation of share's market value expected in the near future. Pursuant to the text and aim of Article (50) of the Capital Market Law, the person who possesses information that relates to company's shares and essentially affects the market value thereof is prevented from the utilization of that information.

Third: The lawyer of the two accused persons mentioned under paragraph (2), item (Second) of his answering memo that CMA did not present a single evidence of disclosure of information by the first accused person to his brother (the second accused person) and that the his client (the first accused person) mentioned while questioned that he did not disclose that information to his brother. We challenge this allegation that CMA did not present a single evidence of disclosure by the first accused person to his brother (the second accused person) of the inside information which relates to the company and confirms that the same is incorrect and contradicts reality. The evidence and presumptions as stated in the indictment show clearly the occurrence of this charge while the legislator in this regard did not give way to interpretations and jurisprudence, but instead emphasized the protection of that information. Furthermore, the legislator considered the one who obtains inside information through family relations as an informed person. Reviewing the record of the investment portfolio of the second accused person during the period that preceded the occurrence of the offense, we find that the purchase of company's share was in small quantities compared to the size of the trading activity which took place during the close period that preceded the announcement of the news on Tadawul website. The two accused persons denial and non-confession of the charge is not credible when evidence and presumptions that support the commitment of offenses are presented.

Fourth: The lawyer of the two accused persons stated that CMA alleges that the second accused person traded on company's share after he had obtained an inside information and insists that he obtained such information through a family relationship while CMA could not support this allegation with a true Shari'ah evidence except conjecture. We challenge this statement by the fact that the second accused person is considered as an informed person according to Article (4) of the Market Conduct Regulations which defined him as "A director, a senior executive or an employee of the issuer of a security related to inside information [...]; A person who obtains inside information through a family relationship, including from any person related to the person who obtains the information". We also clarified in the previous item that the legislator had extended legal protection for the information itself and thus considered whoever obtains the same through a family relationship and trades based on it as an informed person in order to achieve justice and equality in access to information. As we have previously proved in the indictment through evidence and presumptions that the trading activity of the second accused person when he purchased the disputed shares depended on inside information and that the large size of the purchase quantities during a period that was close to the announcement proves that such activity was based on inside information. We would

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like to confirm to the esteemed committee that the entire elements of the offense described in the indictment had been satisfied in terms of commitment of acts by the accused persons which explicitly violated Article (50) of Capital Market Law.

Fifth: The lawyer of the accused persons mentioned under item (4) of his answering memo that the calculation method adopted by CMA in the assessment of value of offenses considered both the achieved and the anticipated gains contrary to Article (59) of the Capital Market Law which provided for the achieved gains not the anticipated ones since there is difference between the two types. The statement which reads (Gains Achieved) as provided in Article (59) is considered in accordance with the rules of legal elicitation as a general text and statement. According to general rules, the general text maintains its feature of generality as long as no evidence of customization is provided while the absolute matter remains so as long as no evidence of restriction is provided. Based on this rule, the term (Gains Achieved) is applicable to all subordinate items that come under this term, thus the gain earned by the offender includes all the returns and benefits of his investment portfolio including the achieved return in the form of growth of portfolio's value or in the form of cash that resulted from the direct sale of these shares. This is fully consistent with the financial concepts that determine what is and what is not to be considered as part of the gains of investment portfolio. The growth of value of investment portfolio is a return on investment which is the gain that is in excess of the portfolio's invested capital while the sale operation is technically a mere conversion of that gain or return or amount of assets growth into cash amount. As such, the growth of market value of offender's portfolio is a return on the value of the invested asset, thus it is considered in accordance of laws as achieved gain. The term (gains) differs from that of (profits) though the first is more general as it includes all the collected or gained items that resulted from a certain action whether that gain was a profit or otherwise. This is the general meaning that is concluded from the text, as profit is more specific than gain. This reveals the confusion of the lawyer that resulted from his failure to understand that term and his attempt to restrict the same to a certain form of gains and exclude the rest. As such, we request the esteemed committee to convict the accused persons of the charges that were attributed to them and impose the punishments as claimed for in the indictment number (10-17-2007).

The accused persons were provided with a copy of CMA's answer. The lawyer of the accused persons sent a response indicating as follows:

First: The indictment did not state the evidence on which CMA based the decision to convict his clients. The confirmation of conviction should be based on one of the means of proof which could be a physical and explicit one in writing or a legal confession or a testimony of eligible witness or under oath which CMA did not refer to in the reasons based on which it addressed its accusations. CMA mentioned under item (First) that the criminal system and its implementing regulations related to the offenses of the Exchange have a special nature where CMA ignored to mention the source from which that nature was acquired. This statement was justified in amazing way when CMA stated that some of the offenses happen completely once the act is committed or refrained from doing it. CMA also believes that it is imperative to punish those who commit or refrain from the commitment of the offending act. CMA did not define the offenses that have special nature in order that he may know if the offense of his client has that nature or not. CMA mentioned the term "some offenses" while the meaning of the offense indicates the existence of some offenses that are not covered by this special nature.

Second: As for the content of paragraph (a) under item (First) titled the *Assumed Aspect* and paragraph (b) titled the *Material Aspect*, it is challenged as follows:

- a) CMA acknowledged through the narration of case facts that what happened between *** and *** was mere negotiations between *** Company and *** Company. It is well known that

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negotiations are cancellable by either party in case of failure to conclude an agreement as it was indicated in the memorandum of understanding signed on *** under clause (Fourth) that "In case the conclusion of the deal was not agreed upon, each party will return any information that relates to the other party. Hence, the principle of cancellation is probable and the agreement is not binding to parties."

- b) CMA confirmed that his first client knew about the imminent conclusion of the deal and the agreement, this statement is incorrect since *** Company sent a letter with no number, dated *** (copy enclosed) indicating its approval under the conditions stated in a previous letter as *** Company answered that letter (copy enclosed) expressing its regret for being unable to continue the negotiations and the rejection of the conditions as stated in the said company's letter. This shows that his client was not trading based on inside information. His client traded on *** while the letter on deal cancellation was dated ***. On *** an agreement was signed concerning the conditions that were disputed by *** Company in its aforementioned letter. These conditions were later amended as stated in the agreement (copy provided earlier). The said agreement stated under item (First), paragraph (3) "Refrain from conclusion of purchase based on the results of the test that eliminates ignorance". The same phrase was also mentioned in item (Second), paragraph (5) of this agreement. It is understood that initial agreements do not affect the value of company's share for reasons explained above.
- c) As for the act of disclosure of inside information to his brother (the second accused person) by the first accused person who obtained it through his position as chairman of the board of *** Company, this statement is challenged by the answer he gave in his first memorandum which indicated that CMA did not present a single evidence of this allegation.
- d) As for the trading activity of the second accused person on the share of *** Company, he enclosed a list of some of his client's trading operations relating to the share of *** Company in larger quantities during 2005 G. and 2006 G. to prove that his client trades on the said share almost permanently. He also emphasized the statements made in paragraphs (b) and (c) under the third reason of acquittal of his clients in his previous memo that CMA stated in the report prepared by the Market Surveillance Division that "Some forums were involved in gossips dealing with capital increase of *** Company starting ***). This is what his client mentioned when he was asked about how he obtained the information and the reason behind his trading activity during this period. The strength of gossips as well as the rise in share price largely motivated trading on company's share in large quantities during that period. CMA included in the report prepared by the Market Surveillance Division a letter in which questions were raised by the Disclosure Department dated ***. In this letter it was stated that "It was noticed that the share price during the previous trading days had increased. Kindly, check if any basic information had not been published on Tadawul website in which investors may be interested." This reveals that CMA noticed the rise in share price whereas the investor is better expected to observe such rise and consequently trade on it in large quantities. This statement is further supported by material published in internet forums which create credibility of information for the investor. This is exactly what happened to his client.

Third: As for the content of paragraph (c), item (First) titled *Moral Aspect*, the same is challenged as follows:

- a) There is contradiction between the indictment and the content of this paragraph in relation to the second accused person since CMA limited the accusation in the obtaining of inside information from his brother but then released it in the answering memo when it considered the offense as a deliberate one, the responsibility for the commitment of which is constituted through the availability of general criminal intent, meaning that the individual knows that the

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information he obtained or traded based on it is an inside one that has not yet been announced to the public rightfully.

- b) CMA listed in the report prepared by the Market Surveillance Division the most active investors in terms of selling and purchasing the company's share during the period from *** to ***. This list reveals that the investment of his client in company's share was among the smallest ones during that period. The question here, did CMA question the most active investors during that period about the source of information and whether they traded on company's share only during the first half of 2006 G. as CMA specified it with his client, and whether this accusation was addressed to them because they traded on the shares relying on inside information that has not yet been announced rightfully.

Fourth: As for the statement of CMA under paragraph (five), it is challenged as follows: CMA interpreted the term gains as it includes all the returns and benefits on the investment portfolio. This statement is not disputed whereas the dispute involves the term "achieved". Did the accused person achieve these gains or not since CMA stated when it defined the word "gains" that (gains differ from profits though the first is more general than the second and that gains include all gained items that result from a certain act whether that was in a form of profits or otherwise) and avoided the usage of word "loss" instead of "otherwise" so that it will not face the demand of interpretation of what it tried to avoid.

For these and other reasons mentioned earlier he adheres to his previous claims including: 1) acquittal of both defendants from the attributed charges; 2) lifting of precautionary seizure of banking and investment accounts; 3) the right of his clients to be compensated for the material and moral losses that they incurred due to this accusation.

CRSD provided CMA with a copy of defendants' lawyer as an enclosure of its letter number (***), dated *** corresponding to ***. The committee received the letter of CMA chairman number (***), dated *** indicating as follows:

First: The prosecution adheres to the entire content of indictment which confirmed the occurrence of offenses attributed to the accused persons since the same was supported by evidence and presumptions.

Second: There was nothing new in the lawyer's memorandum that differs from the text of previous memos.

Third: Lawyer's memo included a number of allegations and fallacies on which we comment as follows:

1. The Capital Market Law was issued following to endorsement thereof by the legislative authority by means of the Royal Decree No. (M/30) dated 20/8/1425 H. corresponding to 4/10/2004 G. The procedures and concluded results by CMA were in accordance with laws and their implementing regulations. We cannot understand the basis of lawyer's allegations that we violated the first and seven articles of Governance Basic Law. The lawyer of the defendants alleged that means of proof in Shari'ah are limited to testimony, acknowledgement or oath, thus ignored the presumptions stipulated by scholars in their books as one of the means of proof, even most of rulings of Shari'ah courts in our country are based on presumptions. The means of proof for securities offenses are undoubtedly not limited to these three elements as Article (25/i) of the Capital Market Law demonstrated those elements when it provided that "Evidence in Securities cases shall be admissible in all forms including electronic or computer data, telephone recordings, facsimile messages and electronic mail." As such the lawyer's statement that means of proof are limited is incorrect. The defendants'

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lawyer rejected our statement that securities offenses are of special nature that had been established in all rules. Furthermore, he did not display our alleged mistake or bothered to refer to the Capital Market Law or its implementing regulations or the specialized books in order to verify the fact he had denied. We here repeat our previous statement with regard to the special nature of the criminal system related to securities offenses such as the provisions of the Capital Market Law or its implementing regulations provided for – for example but not limited to, or through inclusion; meaning that they are limited to the stated acts – the provision of Article (49/c/1) which condemned certain behaviors of securities trading business which states that "To perform any act or practice aiming at creating a false or misleading impression of an existing active trading in a Security as may be contrary to the reality. These acts and practices shall include, but not be limited to the following, and Article (3/a) of the Market Conduct Regulations which provides that "The following actions shall be among those considered as manipulative or deceptive acts or practices". This clearly shows that the criminal nature of securities offenses is of a special type through which they are distinguished from other criminal cases. The defendants' lawyer rejects our statement that the occurrence of some offenses is considered as complete once the offensive act was carried out or abstained from, meaning that the physical act or behavior is enough for the constitution of the offense, such as the offense of non-disclosure of percentage of ownership set in Article (25) of the Listing Rules which is considered as complete once the disclosure was not made. The constitution of the offense does not require any further aspect or element. As for the second item of the answering memo of the defendants' lawyer which indicated that CMA did not present a single evidence of disclosure of information by the first accused person to his brother (the second accused person), we ask him to refer to the second and third items of our previous answering memo in order to avoid prolonging and repetition. We would like to demonstrate that the negotiations between *** and *** companies are among the essential information even if they were in the stage of negotiation, thus they were announced by the company. Otherwise, the company would not announce such information. This means that negotiations were considered as important development which could influence the price of company's share should it have been announced to the public, not to mention that the announcement of deal endorsement. We listed in the indictment the evidence that prove the trading activity that was conducted by the accused persons based on inside information.

2. The defendants' lawyers mentioned under paragraph (a), item (Third) of his answering memo that there is contradiction between the indictment and the content of paragraph (c) titled the "Moral Aspect" under item (First) of our answering memo since CMA limited the satisfaction of this element to obtaining of inside information through his brother while release the same in the answering memo. This statement is challenged by the fact that we demonstrated in the indictment the source of the essential information based on which he executed his trading business. The source of that information was his brother, ***, who occupies the position of chairman of the board and the senior official responsible for the negotiations of acquisition. The said person utilized that information and traded based on it. The text of our previous memo was an explanation of how in general the offense could be committed. To determine the commitment of the offense, it is enough to show that the one who obtained the information knows that such information which he obtained and traded based on it is an inside information that had not yet been disclosed rightfully, not to mention the information that was disclosed by *** who holds the position of chairman of the board and the senior official responsible for the negotiations of acquisition to his brother, ***, who traded based on it.
3. As for questions raised by defendants' lawyer about the largest investors who traded on the share of the company during the relative period and if their trading activity was based on inside information or not if those investors were accused of the same charge, these questions

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have nothing to do with the defense in any way unless the accused persons had disclosed the information to other persons who traded based on it. CMA is the authority which determines the procedures through which facts can be revealed. As for the fourth item of defendants' lawyer regarding gains, we would like to demonstrate that the statement which reads "Gains Achieved" as stated in Article (59) is considered in accordance with the rules of legal elicitation as a general text and statement. According to general rules, the general text maintains its feature of generality as long as no evidence of customization is provided while the absolute matter remains so as long as no evidence of restriction is provided. Based on this rule, the term "Gains Achieved" is applicable to all subordinate items that come under this term, thus the gain earned by the offender includes all the returns and benefits of his investment portfolio including the achieved return in the form of growth of portfolio's value or in the form of cash that resulted from the direct sale of these shares. This is fully consistent with the financial concepts that determine what is and what is not to be considered as part of the gains of investment portfolio. Based on the above, we request the esteemed committee to convict the accused persons of the charges attributed to them and impose the sanctions included in the indictment.

CRSD provided the defendants' lawyer with a copy of CMA's answering memo. The lawyer's answer indicated that:

1. CMA stated that the Capital Market Law was issued following to endorsement thereof by the legislative authority by means of the Royal Decree No. (M/30) dated 20/8/1425 H. corresponding to 4/10/2004 G. and that the procedures and concluded results by CMA were in accordance with law and implementing regulations. We cannot understand the basis of lawyer's allegations that we violated the Article First and Article Seven of the Governance Basic Law. The lawyer argued that he has no problem with the statement that the Capital Market Law was issued following the endorsement thereof by the legislative authority, but on the other hand we argue that we object to the procedures and conclusions of CMA due to lack of means of proof. The main point of difference with CMA involves the means of proof which match Shari'ah commandments. The scholars gave the two following famous sayings concerning the limitation of means of proof. The first saying, endorsed by most scholars, states that the means of proof is limited to certain group of evidence, some of which were agreed upon by scholars while different opinions were given for the rest. The agreed items include *testimony, confession and oath*. The Different opinions ranged between expansion and limitation with regard to *retreat from giving testimony under oath, writing statement, group oath, knowledge of the judge, presumption, tracking and casting a lot*. The other saying stipulates that the means of proof are not limited according to Ibn Alqayem and Ibn Farhoon Almalki. The dispute with CMA concerns the obtaining of the information by the second accused person who according to CMA obtained it through a family relationship of which it did not give single true evidence that matches Shari'ah principles except conjecture. On the other hand, the indictment lacks the reference to the evidence based on which CMA made the accusation. CMA should mention the means of proof on which it made the claim for imposition of sanctions since the proof of conviction should be based on any of means of proof which could be a physical presumption that is frank and in writing or a confession according to Shari'ah or testimony of eligible witness or oath. This requirement was not referred to in the reasons of accusation.
2. As for CMA's allegations that I limited the means of proof to testimony, confession and oath and ignored the presumptions, these allegations are challenged by the fact that CMA ignored that these are the evidence which the scholar agreed upon. The theme is that the means of proof which lead to the revealing of truth deserve all support while those which prevent the conclusion of this result and the resolution of disputes deserve criticism. The CMA's reported

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presumptions do not amount to evidence of proof. As for CMA's statement that the means of proof are not limited to testimony, confession, oath and presumptions, Article (25/i) of the Capital Market Law which provides that "Evidence in Securities cases shall be admissible in all forms including electronic or computer data, telephone recordings, facsimile messages and electronic mail". These allegations are challenged by the fact that CMA had mentioned the means of proof stipulated in the laws but did not present any of them as evidence. Did CMA provide any electronic data or a telephone recording or fax or email correspondence to prove that the chairman of the board (the accused person, ***) had disclosed to his brother, ***, inside information. In fact, what CMA presented is the proof of only the occurrence of the trading incident which was not denied by his client. On the other hand, no evidence was provided to support the conclusions of CMA.

3. As for the statement of CMA that the criminal system that relates to the securities offenses is of a special nature such as the provision of Article (49/c/1) of the Capital Market Law and the provision of Article (3/a) of the Market Conduct Regulations, these offenses were not committed by my clients and not covered by the indictment thus should be excluded from the area of dispute and inference through them shall be irrelevant.
4. As for the allegations of CMA that some offenses occur complete one the offensive act is carried out or abstained from and demonstrated that it is imperative to punish the one who commits or abstains from the execution of the offensive act and then gave the offense of non-disclosure of percentage of ownership as an example in accordance with Article (25) of the Listing Rules, this statement is challenged by the fact that these offenses were not committed by any of my clients and not covered under the indictment thus should be excluded from the area of dispute and inference through them shall be irrelevant. Our condemnation was concentrated on the phrase which reads "Some offenses occur complete one the offending act had been carried out or abstained from", since the non-disclosure is naturally preceded by the share purchase process of the investor. Non-disclosure cannot be expected without the execution of purchase process first.
5. As for the argument of CMA with regard to comment on the contradiction between the content of the indictment and the content of paragraph (c) of the answering memo that relates to the second accused person, the *Moral Aspect*, CMA restricted it in the indictment to the obtaining of information from his brother then released it in the answering memo when it considered the offense as deliberate, the responsibility for the commitment of which by the offender is the availability of general intent meaning that the person knows that the information he had obtained or traded or initiated trading based on it is an inside one which had not yet been disclosed to the public in a regular way. Since the most active investors had traded on the share before the announcement was made and that CMA mentioned that it is enough for the constitution of the offense that the person knows that the information he had obtained and traded or initiated trading based on it is inside information which had not been disclosed in a regular way then commented saying "Not to mention the information which was disclosed by *** to his brother *** who traded based on it". He leaves this issue to the fair judgment of the committee.
6. As for CMA's argument with regard to the calculation of achieved gains, it is challenged by the provision of Article (59/a/4) of the Capital Market Law left the term as general without any limitation or explanation. However, CMA calculated the offenses based on a general principle adopted by CMA itself. CMA indicated that the calculation of achieved gains matches the financial principles but did not indicate the financial references so that the same could be consulted and the correctness of calculations could be verified. From an accounting point of view, the financial accounts puts the condition of actual achievement of gains that

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results from the trading on the securities. For these and other reasons mentioned earlier, he adheres to his previous claims including:

First: acquittal of both defendants from the attributed charges;

Second: lifting of precautionary seizure of banking and investment accounts;

Third: the right of his clients to be compensated for the material and moral losses that they incurred due to this accusation.

CRSD decided to conclude the statement of parties and close pleading for study and deliberation in preparation for issuance of decision.

Reasons

CMA aims from lodging this lawsuit for the punishment of the two accused persons through the imposition of sanctions set in Article (57/c) and Article (59) of the Capital Market Law for the violation of the provisions of para (a) and para (b) of Article (50) of the Capital Market Law and Article (5) and Article (6) of the Market Conduct Regulations, this case is therefore within the jurisdiction of CRSD pursuant to the Capital Market Law issued by Royal Decree No. M/30 dated 2/6/1424 H.

In terms of subject, through listening to the statements made by CMA's General Prosecutor while sufficient time limits were granted to the accused persons who were, along with their lawyer, given access to case file and allowed to make copies of relevant documents and further enough time was granted for the preparation of defenses and replies;

Through examining case documents and the investigations which were conducted so far, CRSD noted that on *** a memorandum of understanding between *** Company and *** Company was signed. The said memo authenticated the willingness and the approval of the two parties to conduct a study on a deal for the acquisition of all proprietary rights of *** Company by *** Company as well as the entering into related negotiations and the completion of procedures of deal conclusion provided that a final approval was concluded on all deal-related issues. The news that relates to the signature of memorandum of understanding on *** was announced on Tadawul website. On ***, the board of the company instructed the first accused person and the General Manager of the company to complete negotiations. On *** the first accused person traded on the shares of *** Company through his investment portfolio when he purchased (28,700) shares. On the same date, the second accused person traded on the share of *** Company through his investment portfolio when he purchased (93,804) shares. On *** the second accused person purchased additional (170,914) shares of the same company. On *** the board of *** Company endorsed the decision to complete negotiation and conclude the deal with *** Company in accordance with the proposal of *** Company. The first accused person was authorized by the company to sign the memorandum of agreement. At ***, *** Company announced on Tadawul website that the board had endorsed the deal of acquisition of entire proprietary rights of *** Company against the total amount of (SR. 273,000,000) whereas the first accused person signed the deal on behalf of *** Company.

In light of the above incidents and the provision of evidence of actual commitment as well as the correct attribution and sound reasoning thereof in relation to the commitment of acts by the first accused person and second accused person according to conducted investigations and the results of memorandum of understanding between *** Company and *** Company and the record of their investment portfolios and the record of activity of *** Company and the letter of *** in relation to

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the first accused person and of *** Bank in relation to the second accused person and the minutes of meetings of *** Company.

The investigations conducted with the first accused person confirmed that he has held the position of chairman of the board of *** Company for eight years and that none of his relatives work for *** Company and the merger negotiations between *** and *** Company had started before January effective the signature of memorandum of understanding on ***. A final agreement on the merger could not be concluded awaiting the fair evaluation of share price.

It was noted from the memorandum of understanding signed on *** corresponding to *** between *** Company and *** Company that *** Company was willing to acquire all proprietary rights of *** Company and that the memorandum was signed to authenticate the intents of both parties and for the entering into related negotiations and the completion of procedures of deal conclusion as well as agreement on all deal-related issues.

It was noted from the record of investment portfolios of the first accused person and second accused person as well as the activity record of *** Company that the first accused person had purchased (28,700) shares of *** Company on ***, whereas the second accused person had purchased (93,804) shares of the same company on *** and later (170,914) shares of the same company on ***.

It was noted from the letter of *** Company number (***) dated *** that the orders executed on the investment account of the first accused person during the month of *** were all entered by him online. It was also noted from the letter of *** Bank number (***) dated *** that the second accused person was the one who personally executed all purchase and sale operations through his investment account.

It was noted from the minutes of meeting of *** Company board number (***) held on *** corresponding to ***, in item (4), that the board had approved the memorandum of understanding with *** Company and authorized company's management to complete discussion and inform the board on the results. It was also noted from the minutes of *** Company board number (***) held on ***, in item (3), that the board was briefed on the review of Company's manager relating the developments of the study of the project of *** Company and that it provided the company's financial advisor with all the financial statements and documents required for the conclusion of evaluation process who will display the results of the study once completed. It was also noted from minutes of board meeting number (192) held on *** corresponding to ***, in item (2), that the board had taken decision number (***) which indicated adherence to the proposal of value prepared by the financial advisor of the company amounting to two hundred seven million Saudi Riyals and the definition of a time limit not exceeding ten days from the date of notifying *** Company on the proposal in order to prepare a final answer. It also indicated that the chairman of the board (the first accused person) as well as company's manager were authorized to complete negotiations with *** Company and inform the board on the results. It was also noted from minutes of board meeting number (***) held on *** corresponding to ***, in item (2), that the board had taken the decision to endorse unanimously the completion and endorsement of the deal with *** Company and authorize the chairman of the board (the first accused person) to sign the memorandum of initial understanding and agreement with *** Company.

As for the first charge attributed to the first accused person described according to indictment as trading on the share of *** Company in terms of purchase on *** based on inside information that he obtained through the position he held being chairman of company's board, it is necessary for the attribution to the first of accused person the charge of violating Article (50/i) of the Law which provides that "Any person who obtains, through family, business or contractual relationship, inside information (hereinafter an "insider") is prohibited from directly or indirectly trading in the Security related to such information, or to disclose such information to another person with the expectation

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that such person will trade in such Security", and Article (6/a) of the Market Conduct Regulations which provides that "An informed person is prohibited from trading based on inside information" person who is not insider is prohibited from engaging in insider trading if he obtains the inside information", is to prove the legal structure as set in the provisions of the said article in terms of satisfaction of the assumed condition and the material and moral aspects of the offense. The assumed condition is represented in the special feature of the accused person being an informed person who obtains inside information through the position he holds or a family relationship while an inside information that satisfies the following legal conditions; should not be available to the public, not announced yet, the ordinary person considering the content and nature of information realizes that the announcement or availability thereof will influence the price and the value of the securities that relates to this information and the informed person knows that it is not generally available and that if it would be available, it will influence the price and value of the securities considerably. The material aspect of the offense is represented in the trading on the securities that relates to the inside information by the accused person whether it was through purchase or sale regardless of the result of such sale or purchase and whether that trading was performed by the accused person directly or indirectly. The moral aspect of the offense is represented in the realization of the accused person that he possesses an inside information that had not been announced yet and that he intends to utilize that information for purchase or sale purposes prior to availability or announcement of the same to the public. It is also necessary to provide evidence of actual commitment of the offense as well as the correct attribution and sound reasoning thereof in relation to the commitment of acts by the accused person. Since it is confirmed through incidents and evidence of actual commitment and correct attribution and sound reasoning of the offense in relation to the first accused person that he holds the position of chairman of the board of *** Company and was authorized by the board through its resolution dated *** to complete negotiations with *** Company for the conclusion of the deal and that the acquisition deal of all the proprietary rights of *** Company by *** Company had been endorsed by the board on *** and later announced on Tadawul website on ***. As such the elements of the assumed condition had been satisfied in this offense in terms of the first accused person being an informed person and the deal of acquisition of all proprietary rights of *** Company by *** Company is an inside information legal conditions of which were satisfied as set in Article (50/a) of the Capital Market Law and Article (4) of the Market Conduct Regulations; and

Since it is noted from the incidents and provided evidence that at (10:08:18) a.m. until (10:16:04) a.m. on *** the first accused person traded on the share of *** Company through his investment portfolio as he purchased (28,700) shares, thus the material aspect of the offense was satisfied through the act that was committed by the first accused person; and

Since it is confirmed through the acts and practices of the said accused person in relation to the share of *** Company during the period of the offense and the surrounding circumstances of the incident that he was authorized by the board of the Company to negotiate with *** Company and sign the memorandum of understanding; and

In the absence of a logical and acceptable justification of the act of purchase during a time that closely preceded the board meeting and the announcement of the information to the public investors as well as the absence of any purchase activity during the first half of 2006 G. through his investment portfolio, thus revealing the awareness of the said accused person that he possesses an inside information that had not been announced the period which extends from the time he was assigned the task of completion of negotiation with *** Company for deal conclusion until the time of announcement thereof. He was also willing to utilize that information in terms of purchase of shares during a period that closely preceded the announcement thereof to public investors;

As such, CRSD concludes that the moral aspect of the offense was satisfied through the acts of the said accused person as well as his criminal responsibility for this charge.

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As for the second charge attributed to the first accused person and the charge attributed to the second accused person described according to indictment as disclosure by the first accused person to his brother (the second accused person) of an inside information that relates to *** Company which he obtained through his position as chairman of the board of the company and the trading by the second accused person on the share of *** Company in terms of purchase of shares on *** and *** based on inside information that relates to the company and obtained from an informed person (his brother, the first accused person), it is necessary to attribute the charge to the first accused person and second accused person for the violation of Article (50/a) of the Capital Market Law which provides that "Any person who obtains, through family, business or contractual relationship, inside information (hereinafter an 'insider') is prohibited from directly or indirectly trading in the Security related to such information, or to disclose such information to another person with the expectation that such person will trade in such Security", and Article (5/a) of the Market Conduct Regulations which provides that "An insider is prohibited from disclosing any inside information to any other person when he knows or should have known that it is possible that such other person may trade in the security related to the inside information", it is necessary to prove the legal structure as set in the said article in terms of satisfaction of the assumed condition and the material and moral aspects of the offense. The assumed condition is represented in the special feature of the accused person being an informed person who obtains inside information through the position he holds or a family relationship while an inside information that satisfies the following legal conditions: should not be available to the public, not announced yet, the ordinary person considering the content and nature of information realizes that the announcement or availability thereof will influence the price and the value of the securities that relates to this information and the informed person knows that it is not generally available and that if it would be available, it will influence the price and value of the securities considerably. The material aspect of the offense is represented in the accused person's disclosure or transfer of inside information to another person and the execution of trading business by the accused person on the securities that relates to the inside information whether it was through purchase or sale regardless of the result of such sale or purchase and whether that trading was performed by the accused person directly or indirectly. The moral aspect of the offense is represented in the realization of the accused person that he discloses or transfers an inside information to another person and that he possesses an inside information that had not been announced yet and that he intends to utilize that information for purchase or sale purposes prior to availability or announcement of the same to the public. It is also necessary to provide evidence of actual commitment of the offense as well as the correct attribution and sound reasoning thereof in relation to the commitment of acts by the accused person. Since it is confirmed through incidents and evidence of actual commitment and correct attribution and sound reasoning of the offense in relation to the first accused person that he holds the position of chairman of the board of *** Company and was authorized by the board through its resolution dated *** to complete negotiations with *** Company for the conclusion of the deal and that the acquisition deal of all the proprietary rights of *** Company by *** Company had been endorsed by the board on *** and later announced on Tadawul website on the date of ***.

It was also confirmed from investigations that the second accused person is the brother of the first accused person. As such the elements of the assumed condition had been satisfied in this offense in terms of the first accused person being an informed person and the deal of acquisition of all proprietary rights of *** Company by *** Company is an inside information, legal conditions of which were satisfied as set in Article (50/a) of the Capital Market Law and Article (4) of the Market Conduct Regulations.

It was not confirmed to CRSD through sufficient reassuring evidence that the first accused person had disclosed to the second accused person inside information in relation to the deal of acquisition of *** Company by *** Company. Further, it was not confirmed to CRSD that the trading by the second accused person on *** and *** was based on inside information obtained from his brother

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(the first accused person). Additionally, the trading of the second accused person in terms of purchase of shares of *** Company cannot be affirmed that he obtained inside information from his brother (the first accused person) due to probabilities that weaken the evidence of accusation in relation to the disclosure to the second accused person by the first accused person or the trading of the second accused person based on the disclosure of information by the first accused person. Those probabilities are based on the fact that the price of share of *** Company rose on *** by (5.66%), and on Saturday *** rose by (7.59%) and on *** rose by (7.47%) which would urge investors to trade on that share due to this remarkable rising of share price. We conclude that news in relation to that company spread among investors during that period. Additionally, the statement of account of the accused person's portfolio during the period from *** to *** indicates that he trades on the share of *** Company in terms of purchase and sale continuously and permanently in varying quantities which could increase or decrease. The quantities of traded shares of the accused person increased remarkably in the mid of ***; i.e. before the announcement, and similarly increased remarkably after the announcement from the beginning of the month of ***.

Since CRSD is fully empowered to review and discuss the case facts and the provided evidence and conclude results that match those facts; and while exercising its authority in this assessment, the committee would consider items that in its view are reasonable while excluding other items even they were probable, and since the provided evidence are not sufficient for the conviction of the accused persons of the attributed charges, CRSD therefore believes that the offense of the first accused person is not confirmed in terms of disclosure to his brother (second accused person) of inside information that relates to the company and could be obtained through his position as chairman of the board. Similarly, the offense of the second accused person is not confirmed in terms of trading on the share of *** Company through purchase of shares on *** and *** based on inside information that relates to the company and could be obtained from an informed person (his brother, the first accused person).

As for the argument of defendants' lawyer in which he denied the charge of trading by the first accused person based on inside information justifying that what took place during the period from **/**/2006 G. till **/**/2006 G. was mere negotiations between two companies which can be cancelled by either party in case of disagreement. He also indicated that the principle of cancellation is certified and that the agreement is not binding to either party while *** Company sent a letter to *** stating that the conclusion of the agreement shall depend on the satisfaction of conditions set in earlier letter dated ***. Since *** Company replied to that letter indicating its regret for not being able to continue the negotiations and the non-acceptance of the conditions contained in the letter of *** Company. This reveals that his client did not trade based on inside information. The statements of the lawyer are challenged by the fact that the material and moral supporting evidence that reassured the committee in the attribution of the charge to the first accused person were sufficient for the rejection of the argument of his lawyer. Additionally, the time range of protection of inside information in this case extends from the time of assignment of the first accused person to complete the negotiations with *** Company for the conclusion of the deal until the time of announcement thereof. Thus he is prohibited from trading based on the information which he obtains through his position in the company for the sake of justice and equality among all investors and informed persons in the making of investment decision.

As for the argument of CMA in relation to the accusation of the first accused person of disclosure to his brother (the second accused person) of inside information that relates to *** Company, and the trading activity of the second accused person based on this inside information, the evidence and presumptions contained in the indictment show clearly that he purchased shares of the said company in large quantities at the time when he was in possession of inside information that relates to the company and obtained from the first accused person (his brother) who holds the position of chairman of the board of the company. The regulator did not leave the explanation of this act to interpretations

Unofficial English translation. Proper reference should be made to the Arabic version of the summarized decision.



or jurisprudence but imposed the protection of the inside information when he regarded the one who obtains that information through a family relationship as an informed person. On tracking the record of the investment portfolio of the second accused person during the period that preceded the occurrence of the offense, we notice that his trading activity on the share of the company was in small quantities compared to the traded quantities during the close period that preceded the announcement of the news on Tadawul website. It is judicially established that when evidence and presumptions are subject to suspicion and probability, the inference based on these evidence and presumptions become insufficient for conviction since suspicion is in the interest of the accused person. Since it is confirmed through case facts and the evidence contained in the indictment for the accusation of the first accused person of disclosure of information, and the second accused person of trading based on that information, and those evidence are limited to: 1) The family relationship between the first accused person and second accused person neither proves the occurrence of disclosure nor constitutes evidence of accusation unless it is supported by other presumptions based on which the validity of inference could be proved; 2) The trading activity of the second accused person on the share of *** Company during the period that preceded the announcement of acquisition deal is also insufficient for the proving of the occurrence of trading that is based on disclosure of inside information due to probabilities that weaken such evidence such as the rise of share price during the period the preceded the announcement of acquisition deal or because the second accused person is a continuous and permanent trader on company's shares.

Since CRSD is empowered to prove using all methods of proof pursuant to the Article (25/i) of the Capital Market Law which provides that "Evidence in Securities cases shall be admissible in all forms including electronic or computer data, telephone recordings, facsimile messages and electronic mail", therefore the means of proof were secured to the committee that confirm the occurrence of the offense of the first accused person and sufficient evidence were provided in connection with trading based on inside information that he obtained through his position as chairman of the board of the company and authorized person to complete negotiations with *** Company for the conclusion of acquisition deal; and

CRSD is empowered to practice its jurisdiction on the facts of this case and assess the appropriate sanction for the one who participated, participates or initiated acts and practices that violate any of the Capital Market Law, regulations or rules issued by CMA or market regulations in a way that is deemed to achieve the goals and targets of the system.

Among CRSD's delegated powers is to assess the mitigating and aggravating circumstance of sanctions considering case facts and surrounding circumstances and its right to practice those delegated powers for the protection of citizens and investors in securities against the unfair and improper practices and the achievement of justice, efficiency and transparency in the processes of securities pursuant to rules and regulations.

Among the sanctions set in Article (57) of the Capital Market Law, under paragraph (c), is the imposition of sanction of imprisonment on the ones who violate Article (49) and Article (50) of this Law for a period no more than five years; and

Among the sanctions set in Article (59/a/4) is to oblige the offender to refund the gains that he earned from the offense to CMA's account, and under Article (59/a/9) is to prohibit the offender from working at companies shares of which are being traded on in the market, and Article (59/b) is to impose on the offender a financial penalty no less than (SR. 10,000) ten thousand Saudi Riyals and no more than (SR. 100,000) one hundred thousand Saudi Riyals per offense.

As for CMA's claim set in the indictment for imprisonment of the accused persons pursuant to Article (57/c) of the Capital Market Law in relation to the first accused person, CRSD is fully empowered to assess the suitable punishment considering case facts and circumstances and believes

Unofficial English translation. Proper reference should be made to the Arabic version of the summarized decision.



that the ruled punishment is appropriate for his case. As for the second accused person, his offending act was not proved as explained earlier in reasons.

As for *** claim set in the indictment for obliging the accused persons to refund the gains they made from the offense assessed by the indictment for (SR. 665,500) six hundred sixty five thousand five hundred Saudi Riyals for the first accused person and (SR. 1,624,757) one million six hundred twenty four thousand seven hundred fifty seven Saudi Riyals for the second accused person, in the case of the first accused person CRSD is fully empowered and has full authorities pursuant to Article (25/a) of the Capital Market Law to comprehend the facts of this case and assess the gains that resulted from the offense. While exercising these powers, the committee is entitled to consider what deemed appropriate since the assessment of the collected gains is CRSD's authority. On reviewing the record of trading movement of the first accused person on the shares of the said company and the documents attached to indictment, the availability of achieved gains was not confirmed to the committee since the person concerned made losses during the period from *** being the date when he started the offending acts and practices until *** being the date when the actual disposal of shares was made through sale considering the difference between the total purchase value of (SR. 1,572,200) and the value of actual disposal of shares of (SR. 1,228,647). The final outcome represents a loss of (SR. 343,553). As for the second accused person, his offense was not confirmed to the committee as explained earlier in reasons.

As for CMA's claim set in the indictment for the punishment of the accused persons by prohibiting them from employment at companies shares of which are being traded on in the market, concerning the first accused person the law did not contain a definition of the period of prohibition, thus CRSD is empowered to assess the period that is deemed fair and sufficient for the protection of market and traders. As for the second accused person, his offense was not confirmed to the committee as stated earlier in the reasons.

As for CMA's claim set in indictment for the punishment of the first accused person through the imposition of a financial penalty of (SR. 200,000) two hundred thousand Saudi Riyals and the punishment of the second accused person through the imposition of a financial penalty of (SR. 100,000) one hundred thousand Saudi Riyals, the offending activity of the first accused person was limited to trading on the shares of a single company. The committee concluded from his acts and practices and the results thereof that those acts belong to a single offense which necessitates the imposition of the maximum limit of the penalty for (SR. 100,000). As for the second accused person, the offense and the criminal responsibility for the attributed charge were not confirmed to the committee.

Ruling

First: It was confirmed that the first accused person had violated Article (50/a) of the Capital Market Law and Article (6) of the Market Conduct Regulations in relation to the charge of trading on the share of *** Company through a purchase process executed on *** based on inside information that was obtained through the position he held as chairman of the board of *** Company. Therefore, the following penalties are imposed upon him:

- a) Imposition of a financial penalty at (SR. 100,000) for this offense.
- b) Prohibition from working at companies the shares of which are being traded on in the market for three years

Second: The offenses of the following accused persons were not confirmed:

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- a) Violation of Article (50/a) of the Capital Market Law and Article (5) of the Market Conduct Regulations by the first accused person, ***, in relation to the charge of disclosure to his brother (the second accused person) of inside information that relates to *** Company and obtained through his position as chairman of the board of the company.
- b) Violation of Article (50/a) of the Capital Market Law and Article (5) of the Market Conduct Regulations by the second accused person, ***, in relation to the charge of trading on the share of *** Company through purchase on *** and *** based on inside information that relates to the company and obtained from an informed person (his brother, the first accused person).

Third: To lift the precautionary seizure that was imposed through CRSD's decision from the banking and investment accounts of the second accused person.

ACRSC Decision No.	Issue Date
148/L.S/2009 of 1430 H.	30/6/1430 H – 23/6/2009 G.

ACRSD Endorsement of CRSD Decision

ACRSD decided to uphold CRSD decision No. 323/L/D1/2008 G. of 1429 H. as for its conclusion considering reasons thereof.

Unofficial English translation. Proper reference should be made to the Arabic version of the summarized decision.

Appendix A to Chapter 6: Relevant Laws Cited

§6.1 The Saudi M&A Regulation Article 6(b)

A. Article 6: Announcements and Takeover Timetable

(b) When a Public Announcement is Required

A public announcement is required:

1) When a company is considering a potential takeover and an approach to a potential offeree company has been made and the parties have reached an understanding (including the relevant conditions) that an offer will be made;

2) When a firm intention to make an offer (the making of which is not, or has ceased to be, subject to any pre-condition) is notified to the board of the offeree company from a serious source, irrespective of the attitude of the board to the offer;

3) Immediately upon an acquisition of shares by that person which gives rise to an obligation to make an offer under Article 12 or a permission to make an offer under Article 13. The announcement should not be delayed while full information is being obtained; additional information can be the subject of a later supplementary announcement;

4) When, following a bid approach, a company's shares are the subject of rumour and speculation or where there is a price movement of 20% or more above the lowest share price since the time of the approach or a price movement of 10% or more in a single day;

5) When, before a bid approach has been made, the offeree company is the subject of rumour and speculation or where there is a price movement of 10% or more in a single day and

there are reasonable grounds for concluding that it is the potential offeror's actions which have led to the situation;

6) When negotiations or discussions are about to be extended to include more than a very restricted number of people (outside those who need to know in the companies concerned and their immediate advisers); or

7) When a purchaser is being sought for a holding, or aggregate holdings, of shares listed on the Exchange carrying 30% or more of the voting rights of a company or when the board of a listed company is seeking one or more potential offerors; and

i. The company is the subject of rumour and speculation or there is a price movement of 20% or more above the lowest share price since the time of the approach or a price movement of 10% or more in a single day; or

ii. The number of potential purchasers or offerors approached is about to be increased to include more than a very restricted number of people.

§6.2 Mergers and Acquisitions Regulation, Article 6(c)(4)

A. Article 6: Announcements and Takeover Timetable

(c) Responsibilities of Offeror and the Offeree Company

4) The responsibility to make an announcement under Article 6 (b)(1) is a joint responsibility of the potential offeror and offeree company.

§6.3 Mergers and Acquisitions Regulation, Article 8(a)(b)

A. Article 8: Prohibitions and Restrictions on Dealings

(a) Prohibited dealings by persons other than the offeror

1) No dealings of any kind in securities or shareholding control of securities of the offeree company by any person, not being the offeror, who is privy to confidential price-sensitive information concerning an offer or contemplated offer may take place between the time when there is reason to suppose that an approach or an offer is contemplated and the announcement of the approach or offer or of the termination of the discussions. This prohibition includes dealings in securities of the offeror unless the offer is sufficiently small in the context of the business of the offeror that the fact of the proposed offer, if it were made public, would not have a significant impact on the market price of the securities of the offeror.

2) No person who is privy to confidential price-sensitive information concerning an offer or contemplated offer may make any recommendation to any other person as to dealing in the relevant securities.

(b) Restriction on dealings by the offeror and concert parties

During an offer period, the offeror and persons acting in concert with it must not sell any securities in the offeree company except with the prior consent of the Authority.

Sales below the value of the offer will not be permitted.

(c) Gathering of irrevocable commitments

Any person proposing to contact a private individual with a view to seeking an irrevocable commitment to accept or refrain from accepting an offer or contemplated offer must consult the Authority in advance.

(d) Dealings in offeree company's securities by certain persons

During the offer period, no financial adviser (or any Affiliate or Subsidiary of such adviser) to an offeree company (or any other person in its group, or any person acting in concert with it) shall:

1) Either for its own account or on behalf of discretionary account, purchase offeree company shares or deal in derivatives referenced to such shares;

2) Make any loan to a person to assist him in making any such purchases or carrying out any such dealings referred to in sub-paragraph (d)(1) above save for lending in the ordinary course of business and on normal commercial terms to persons with which they have an established client relationship and in accordance with Article 44 of the Authorised Persons Regulations; or

3) Enter into any indemnity or option arrangement or any arrangement, agreement or understanding, formal or informal, of whatever nature, which may be an inducement for a person to retain, deal or refrain from dealing in relevant securities of the offeree company.

§6.4 Mergers and Acquisitions Regulation, Article 12(a)

A. Article 12: The Mandatory Offer

(a) Where a person or a group of persons acting in concert increase ownership of shares in a given company through a restricted purchase of shares or a restricted offer for shares so that such person or those with whom such person is acting in concert become the owner of 50% or more of a given class of voting shares listed on the Exchange, the Board shall have the right to exercise its power in accordance with Article 54 of the Capital Market Law to order such person to offer to purchase the shares of the same class it does not own on the terms set out in this Article 12 and in accordance with the other relevant provisions of these Regulations.

§6.5 Mergers and Acquisitions Regulation, Article 12(d)

A. Article 12: The Mandatory Offer

(d) Payment to be Offered

1) An offer made under this 12 must, in respect of each class of share capital involved, be in cash or be accompanied by a cash alternative at not less than the highest price paid by the offeror or any person acting in concert with it for shares of that class during the offer period and within 12 months prior to its commencement. The Authority should be consulted where there is more than one class of share capital involved.

2) If the offeror considers that the highest price as specified in sub-paragraph (d)(1) above should not apply in a particular case, the offeror should approach the Authority which has discretion to agree an adjusted price.

3) In no case will the offeror be compelled under this Article 12 to offer to purchase the remaining shares at a price exceeding the highest price he or a party acting in concert with him paid to purchase any of the shares of that company during the (a) of this Article 12.

12 months preceding the date of the board order in accordance with paragraph

§6.6 The Mergers and Acquisitions Regulation, Article 6(f)(2)

A. Article 6: Announcements and Takeover Timetable

(f) The Announcement of a Firm Intention to Make an Offer

1) The announcement of a firm intention to make an offer should be made only when an offeror has every reason to believe that it can and will continue to be able to implement the offer.

Responsibility for advising the offeror in this connection rests on the financial adviser to the offeror.

2) When a firm intention to make an offer is announced, the announcement must contain:

i. The terms of the offer;

ii. The identity of the offeror;

iii. Details of any existing holding in the offeree company:

(a) Which the offeror owns or over which it has shareholding control;

(b) Which is owned or where the shareholding is controlled by any person acting in concert with the offeror;

(c) In respect of which the offeror has received an irrevocable commitment to accept the offer;

(d) In respect of which the offeror or any person acting in concert with it holds an option to purchase;

iv. All conditions (including any conditions relating to acceptances, listing and increase of capital and any consent required by law) to which the offer or the publication of the offer document is subject; and

v. Details of any indemnity arrangement involving the offeror, the offeree company or any person acting in concert with the offeror or the offeree company in relation to relevant securities.

3) The announcement of an offer under Article 12 or 13 should include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer. The party confirming that resources are available must act responsibly in accordance with Article 3(d) and Article 26(d) and take all reasonable steps to assure itself that resources are available.

§6.7 M&A Regulation Article 26

A. Article 26: Offer Documents

(a) Financial and other Information on the Offeror, the Offeree Company and the Offer

1) The offer document (including, where relevant, any revised offer document) must include:

- i. A heading stating that an independent financial adviser authorised by the
- ii. The date when the document is published, the name and address of the offeror
- iii. Details of the securities for which the offer is made, including whether they will
Authority must be consulted if there is any doubt about the offer; and, if any, of the person making the offer on behalf of the offeror; be transferred with or without any dividend;
- iv. The total payment proffered;
- v. Particulars of all documents required, and procedures to be followed, for acceptance of the offer;
- vi. The closing market price for the securities to be acquired, and (in the case of a securities exchange offer) securities offered, for the first day in each of the six months immediately before the date of the publication of the offer document, for the last day before the

commencement of the offer period and for the latest available date before the publication of the offer document (quotations stated in respect of securities listed on the Exchange should be taken from the official list and, if any of the securities are not so listed, any information available as to the number and price of transactions which have taken place during the preceding six months should be stated together with the source, or an appropriate negative statement);

vii. In the case of a securities exchange offer, particulars of the first dividend or interest payment in which the new securities will participate and how the securities will rank for dividends or interest, capital and redemption and a statement indicating the effect of acceptance on the capital and income position of the offeree company's shareholders. If the new securities are not to be identical with an existing security listed on the Exchange, full particulars of the rights attaching to the securities must also be included together with a statement of whether an application for listing has been or will be made to the Authority; and

viii. In the case of a securities exchange offer, the effect of full acceptance of the offer upon the offeror's assets, profits and business which may be significant for a proper appraisal of the offer.

2) The offer document must contain a prominent disclaimer in the form set out below: "The Capital Market Authority and the Saudi Stock Exchange do not take any responsibility for the contents of this offer document, do not make any representation as to its accuracy or completeness, and expressly disclaim any liability whatsoever for any loss arising from, or incurred in reliance upon, any part of this offer document."

3) Where the payment includes securities and the offeror is a company whose shares are not listed on the Exchange, the offer document must contain:

- i. For the last 3 financial years for which the information has been published, turnover, net profit or loss before and after taxation or Zakat, the charge for tax or Zakat, extraordinary items, minority interests, the amount absorbed by dividends and earnings and dividends per share;
- ii. A statement of the assets and liabilities shown in the last published audited accounts;
- iii. A cash flow statement if provided in the last published audited accounts;
- iv. All material changes in the financial or trading position of the company subsequent
- v. Details relating to items referred to in sub-paragraph (i) above in respect of any to the last published audited accounts or a statement that there are no known material changes; interim statement or preliminary announcement made since the last published audited accounts;
- vi. Inflation-adjusted information if any of the above has been published in that form;
- vii. Significant accounting policies together with any points from the notes to the accounts which are of major relevance to an appreciation of the figures, including those relating to inflation-adjusted information; where, because of a change in accounting policy, figures are not comparable, this should be disclosed and the approximate amount of the resultant variation should be stated;
- viii. The names of the offeror's directors;
- ix. The nature of its business and its financial and trading prospects; and
- x. A summary of the principal contents of each material contract (not being a contract entered into in the ordinary course of business) entered into by the offeror or any of its subsidiaries during the period beginning two years before the commencement of the offer period,

including particulars of dates, parties, terms and conditions and any payment passing to or from the offeror or any of its subsidiaries.

4) The offer document must contain information on the offeree company on the same basis as set out in sub-paragraphs (a)(3)(i) to (vii) of this Article.

5) All offer documents must contain a description of how the offer is to be financed and the source of the finance. The principal lenders or arrangers of such finance must be named. Where the offeror intends that the payment of interest on, repayment of or security for any liability (contingent or otherwise) will depend to any significant extent on the business of the offeree company, a description of the arrangements contemplated will be required. Where this is not the case, a negative statement to this effect must be made.

6) Where the payment includes securities which are to be admitted to trading on the Exchange, or includes securities issued by a company whose shares are listed on the Exchange, a prospectus in respect of the new securities must be prepared in accordance with the Listing Rules.

7) If any document issued to shareholders of the offeree company in connection with an offer includes a recommendation or an opinion of a financial adviser for or against acceptance of the offer, the document must, unless issued by the financial adviser in question, include a statement that the financial adviser has given and not withdrawn his consent to the issue of the document with the inclusion of his recommendation or opinion in the form and context in which it is included.

8) Where, in order to complete the proposed offer, the offeror is a company and intends to increase the amount of its share capital, the board of the offeror must make a presentation to

the shareholders, during the General Assembly Meeting to approve the offer, of the following issues:

i. A transaction overview, including a description of the following:

(a) The transaction structure;

(b) The valuation of the offeree and method of payment proposed;

(c) The company name (if new);

(d) Any approval required;

(e) The expected date of closing;

(f) Employee consideration, if any;

(g) Any proposed new management; and

(h) Any proposed new board representative;

ii. The offeror's rationale for the proposed takeover, especially:

(a) A strength, weakness, opportunities and threats analysis; and

(b) A description of any synergies believed to be realisable by virtue of the

iii. An overview of the offeree company and the industry of which it forms a part, including a description of the following:

(a) Products;

(b) Location; takeover;

(c) History;

(d) Sales;

(e) Market share; and

(f) Combination;

iv. Financial highlights:

(a) Of the offeree company (revenues, net income, asset and dividends) for the

(b) Of the offeror (revenues, net income, asset and dividends) for the past three

(c) Contribution analysis;

(d) Earning per share analysis of the offeree (to the extent known); and

(e) Accretion & dilution analysis, to the extent known; and v. growth outlook and

9) Such presentation must have been disclosed to, and approved by, the Authority in advance of such presentation.

(b) Shareholdings and Dealings

1) The offer document must state:

i. The shareholdings, and the size of any controlled shareholding, of the offeror in

ii. The shareholdings, and the size of any controlled shareholding, in the offeror (in past three financial years; financial years; next steps.

iii. The shareholdings, and the size of any controlled shareholding, in the offeror (in

iv. The shareholdings, and the size of any controlled shareholding, in the offeror the offeree company; the case of a securities exchange offer only) and in the offeree company in

which directors of the offeror are interested; the case of a securities exchange offer only) and in the offeree company which any persons acting in concert with the offeror own or have shareholding control of (with the names of such persons acting in concert); (in the case of a securities exchange offer only) and in the offeree company owned or shareholding controlled by any persons who, prior to the publication of the offer document, have irrevocably committed themselves to accept the offer, together with the names of such persons; and

v. The shareholdings, and the size of any controlled shareholding, in the offeror (in the case of a securities exchange offer only) and in the offeree company owned or shareholding controlled by a person with whom the offeror or any person acting in concert with the offeror has an arrangement of the kind referred to in Article 8(d)(3).

2) If in any of the above categories there are no shareholdings, this fact should be stated in the offer document. This will not apply to categories described in (iv) and (v) of subparagraph (b)(1) if there are no such irrevocable commitments or arrangements.

3) If any party whose shareholdings are required by this Article 26 to be disclosed (whether there is an existing holding or not) has dealt for value in the shares in question during the period beginning 12 months prior to the offer period and ending with the latest day prior to the publication of the offer document, the details, including dates and prices, must be stated in the offer document. If no such dealings have taken place, this fact should be stated in the offer document.

(c) Special Arrangements

The offer document must contain a statement as to whether or not any agreement, arrangement or understanding (including any compensation arrangement) exists between the

offeror or any person acting in concert with it and any of the current directors or shareholders or any person who had been a director or shareholder of the offeree company within the last 12 months prior to the date of publication of the offer document, and full particulars of any such agreement, arrangement or understanding.

(d) Cash Confirmation

When the offer is for cash or includes cash, the offer document must contain a bank guarantee issued by a local bank guaranteeing the offeror's ability to satisfy full acceptance of the cash offer.

(e) Ultimate Owner of Securities Acquired

The offer document must contain a statement as to whether or not any securities acquired in pursuance of the offer will be transferred to any other persons, together with the names of the parties to any such agreement, arrangement or understanding and particulars of all securities in the offeree company held by such persons, or a statement that no such securities are held.

(f) Estimated Value of Unlisted Securities Payment When the offer involves the issue of unlisted securities which are intended to remain unlisted, the offer document and any subsequent circular from the offeror must contain an estimate of the value of such securities by a financial adviser.

§6.8 The Mergers and Acquisitions Regulation, Article 6(d)(1) and (2)

A. Article 6: Announcements and Takeover Timetable

(d) Takeover Timetable

1) By no later than the date of the announcement required under Article 6 (b)(2) or (3), the offeror must approach the Authority for the purpose of establishing the takeover timetable. The Authority will adopt the takeover timetable in accordance with the provisions of these Regulations, including, without limitation, the timing for the following:

- i. The delivery of the final offer document to the Authority for approval;
- ii. The publication of the offer document approved by the Authority and the sending out of the same to the board of the offeree company;
- iii. The publication of the board of the offeree company board circular;
- iv. Shareholders approval (if required);
- v. The earliest permitted first closing date of the offer;
- vi. The last date on which the offeree company may announce profit or dividend forecasts, asset valuations or proposals for dividend payments;
- vii. The withdrawal of acceptances if the offer has not become unconditional as to acceptances;
- viii. The publication of “no increase” in the offer statements;
- ix. The last date on which the offer can be declared unconditional as to acceptances;
- x. The last date for satisfaction of all other conditions;
- xi. The last date for money or other consideration to be provided to the offeree shareholders; and

2) All Parties related to the offer must comply with the takeover timetable as specified in 6(d)(1).

§6.1. Mergers and Acquisitions Regulation, Article 3(k)

A. Article 3: General Principles

(k) Directors of an offeror and the offeree company must always, in advising their shareholders, act only in their capacity as directors and not have regard to their personal or family shareholdings or to their personal relationships with the offeror or offeree company, as applicable, and must at all times have regard to advice given in accordance with Article 7. It is the shareholders' interests taken as a whole, together with those of employees and creditors, which should be considered when the directors are giving advice to shareholders. Directors of the offeree company should give careful consideration before they enter into any commitment with an offeror (or anyone else) which would restrict their freedom to advise their shareholders in the future.

§6.2. Mergers and Acquisitions Regulation, Article 3(m)

A. Article 3: General Principles

(m) A director shall not vote at a meeting of directors or of a committee of directors or a general assembly meeting on any resolution concerning an offer made under these Regulations or any other relevant matter where the director or any relative of his has a conflict of interest. In this context such a conflict of interest would arise if he had, directly or indirectly, an interest (including his shareholding in the offeree company, if the director is a director of the offeror company, or his shareholding in the offeror company, if the director is a director of the offeree company) or duty (including where the director of the offeror company holds a position of a

director or a manager of the offeree company, and where the director of the offeree company holds a position as a director or a manager of the offeror company) which is material and which conflicts or may conflict with the interests of the company.

§6.3. Mergers and Acquisitions Regulation, Article 3(j)

A. Article 3: General Principles

(j) Where there are related parties to a transaction to which these Regulations apply, there must be full disclosure of the related party's interest in the transaction to the affected shareholders prior to completion of the transaction. Any such transaction must be on arm's length terms.

§6.4. Mergers and Acquisitions Regulation, Article 6(f)

A. Article 6: Announcements and Takeover Timetable

(f) The Announcement of a Firm Intention to Make an Offer

1) The announcement of a firm intention to make an offer should be made only when an offeror has every reason to believe that it can and will continue to be able to implement the offer. Responsibility for advising the offeror in this connection rests on the financial adviser to the offeror.

2) When a firm intention to make an offer is announced, the announcement must contain:

- i. The terms of the offer;
- ii. The identity of the offeror;
- iii. Details of any existing holding in the offeree company:

(a) Which the offeror owns or over which it has shareholding control;

(b) Which is owned or where the shareholding is controlled by any person acting in concert with the offeror;

(c) In respect of which the offeror has received an irrevocable commitment to accept the offer;

(d) In respect of which the offeror or any person acting in concert with it holds an option to purchase;

iv. All conditions (including any conditions relating to acceptances, listing and increase of capital and any consent required by law) to which the offer or the publication of the offer document is subject; and

v. Details of any indemnity arrangement involving the offeror, the offeree company or any person acting in concert with the offeror or the offeree company in relation to relevant securities.

3) The announcement of an offer under Article 12 or 13 should include confirmation by the financial adviser or by another appropriate third party that resources are available to the offeror sufficient to satisfy full acceptance of the offer. The party confirming that resources are available must act responsibly in accordance with Article 3(d) and Article 26(d) and take all reasonable steps to assure itself that resources are available.

§6.5. Merger and Acquisition Regulation, Article 34(b)

A. Article 34: Right of Withdrawal

A person who has accepted an offer must be entitled to withdraw his acceptance from the time prescribed in the takeover timetable adopted by the Authority under Article 6(d).

§6.6. Mergers and Acquisitions Regulation, Article 24(b)(1)

A. Article 24: Restrictions on Frustrating Action

(b) Break-up Fees

1) For the purposes of these Regulations a break-up fee is an arrangement which may be entered into between an offeror or a potential offeror and the offeree company pursuant to which a cash sum will be payable by the offeree company if certain specified events occur which have the effect of preventing the offer from proceeding or causing it to fail, including, without limitation, a recommendation by the offeree company board of a higher competing offer.

§6.7. Mergers and Acquisitions Regulation, Article 24(b)

A. Article 24: Restrictions on Frustrating Action

(a) Shareholders' Consent in the General Assembly

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, except in pursuance of a contract entered into earlier, without the approval of the shareholders in general assembly:

- 1) Issue any authorised but unissued shares;
- 2) Issue or grant options in respect of any unissued shares;
- 3) Create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;
- 4) Sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or

5) Enter into contracts otherwise than in the ordinary course of business.

The notice convening such a general assembly of shareholders must include information about the offer or anticipated offer.

(b) Break-up Fees

1) For the purposes of these Regulations a break-up fee is an arrangement which may be entered into between an offeror or a potential offeror and the offeree company pursuant to which a cash sum will be payable by the offeree company if certain specified events occur which have the effect of preventing the offer from proceeding or causing it to fail, including, without limitation, a recommendation by the offeree company board of a higher competing offer.

2) Any break-up fee that is proposed must be of a minimal size (no more than 1% of the offer value) and the offeree company board and its financial adviser must confirm to the Authority in writing that the fee to be in the best interests of shareholders.

Any break-up fee arrangement must be fully disclosed in the announcement made under Article 6 (f) and in the offer document.

3) The Authority should be consulted prior to all cases where a break-up fee or any similar arrangement is proposed.

§6.8. The Mergers and Acquisitions Regulation, Article (24)(b)(3)

A. Article 24: Restrictions on Frustrating Action

(b) Break-up Fees

3) The Authority should be consulted prior to all cases where a break-up fee or any similar arrangement is proposed.

§6.9. M&A Regulation, Article 16(b)

A. Article 16: Compliance of the Offer with Competition Law

(b) Requirement for Appropriate Term in Offer

Where an offer would, if completed, be subject to the Competition Law, it must be a term of the offer that it will lapse if the Council of Competition Protection notifies the offeror or the offeree company in writing that it objects to the deal or has placed it under study and review as specified in the Competition Law.

§6.10. M&A Regulation, Article 16(c)

A. Article 16: Compliance of the Offer with Competition Law

(c) Offer Period Ceases During Competition Reference Period

When an offer or possible offer is objected to by the Council of Competition Protection, placed under study or forms the subject of proceedings or inquiries pursuant to paragraph (b), the offer period will end. Any new offer must be announced within 21 days after the announcement of a final decision made that the transaction is permissible under the Competition Law. A new offer period will be deemed to begin on the date on which a final decision made that the transaction is permissible under the Competition Law. If there is no announcement of a new offer within 21 days after the announcement of a final decision made that the transaction is permissible under the Competition Law, this offer period will last until either the expiry of the 21 day period or the announcement by all relevant offerors (affected by the decision that the transaction is permissible under the Competition Law) that they do not intend to make an offer, whichever is earlier.

§6.11. M&A Regulation, Article 3(i)

A. Article 3: General Principles

(i) At no time after the board of the offeree company has reason to believe that a bona fide offer might be imminent may any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general assembly, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.

§6.12. M&A Regulation, Article 24(a)

A. Article 24: Restrictions on Frustrating Action

(a) Shareholders' Consent in the General Assembly

During the course of an offer, or even before the date of the offer if the board of the offeree company has reason to believe that a bona fide offer might be imminent, the board must not, except in pursuance of a contract entered into earlier, without the approval of the shareholders in general assembly:

- 1) Issue any authorised but unissued shares;
- 2) Issue or grant options in respect of any unissued shares;
- 3) Create or issue, or permit the creation or issue of, any securities carrying rights of conversion into or subscription for shares;
- 4) Sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount; or
- 5) Enter into contracts otherwise than in the ordinary course of business.

The notice convening such a general assembly of shareholders must include information about the offer or anticipated offer.

§6.13. M&A Regulation, Article 3(i)

A. Article 3: General Principles

(i) At no time after the board of the offeree company has reason to believe that a bona fide offer might be imminent may any action be taken by the board of the offeree company in relation to the affairs of the company, without the approval of the shareholders in general assembly, which could effectively result in any bona fide offer being frustrated or in the shareholders being denied an opportunity to decide on its merits.

§6.14. M&A Regulation, Article 8(c)

A. Article 8: Prohibitions and Restrictions on Dealings

(c) Gathering of irrevocable commitments

Any person proposing to contact a private individual with a view to seeking an irrevocable commitment to accept or refrain from accepting an offer or contemplated offer must consult the Authority in advance.

§6.15. M&A Regulation, Article 11(c)

A. Article 11: Disclosure of Dealings During the Offer Period, Indemnity and other

(c) Dealings by 1% shareholders or more

1) A person who (alone or with any person acting in concert with it), during an offer period, owns 1% or more of any class of relevant securities of an offeror or of the offeree company or as a result of any transaction will own 1% or more, has a reportable interest.

2) Any reportable interest, and any change in the level of any reportable interest, must be reported to the Authority at the end of each trading day.

3) Reports made under this Article 11 may be made public by the Authority.

Arrangements

§6.16. The Listing Rules, Article 45(a)(1)

A. Article 45: Notification Related to Substantial Holdings in Shares or Convertible Debt Instruments

(a) Where a person is subject to one or more of the following events, the person must notify the issuer and the Authority at the end of the trading day of the occurrence of the relevant event:

1) becoming the owner of, or interested in, 5% or more of any class of voting shares or convertible debt instrument of the issuer;


§6.17. The Listing Rules, Article 45(a)(2)

A. Article 45: Notification Related to Substantial Holdings in Shares or Convertible Debt Instruments

(a) Where a person is subject to one or more of the following events, the person must notify the issuer and the Authority at the end of the trading day of the occurrence of the relevant event:

2) the ownership or interest of the person referred to in sub-paragraph (1) of paragraph (a) of this Article increasing or decreasing by 1% or more of the shares, or convertible debt instruments of the issuer;

Appendix B to Chapter 6: Disclosure Form of Notice of Ownership



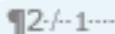
Disclosure Form 7 (A)
Notice of Ownership

Instructions for filling the form:

- The person shall fill in the form when any of the following cases applies thereto as per Article (45) of the Listing and Registration Rules.
- The person shall assume full responsibility for the accurate information stated herein.
- The form shall be sent at the close of trading, in any of the cases above to:
 - The Capital Market Authority --- Capital Market Institutions Supervision --- Fax: 01-279-7287, email: Ownership.Investment@cma.org.sa, then shall be sent by registered mail to: P. O. Box 220022, Riyadh-11311, CMA.
 - A copy of the form shall be sent to the company in which the person invests.

1	Name of person			
	Identity/ commercial registration No.			
	Capacity of person	<input type="checkbox"/> Member of the board of directors	<input type="checkbox"/> Top executive	<input type="checkbox"/> Owner or stakeholder having interest in a 5% stake minimum
2	Name of the listed company acquired			
3. Ownership				
	Number and category of the shares/convertible debt instruments held	-	Percentage	-
4. Interest				
A	Are there any shares/ convertible debt instruments owned or controlled by the person's relatives?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
B	Are there any shares/ convertible debt instruments owned or controlled by a company controlled by the person?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	
C	Are there any shares/ convertible debt instruments owned or controlled by the third parties who act upon agreement with the person to get an interest or exercise voting rights in the issuer's convertible shares/ debt instruments?	<input type="checkbox"/> Yes	<input type="checkbox"/> No	

In case the answer is 'Yes' to any of the questions above, the following table shall be filled in:




Disclosure Form 7(A)
 Notice of Ownership

هيئة السوق المالية
 Capital Market Authority



S	Name	Identity/Commercial-Registry No.	Nature of relationship (interest)	Number of shares/convertible debt-instruments	Percentage
1					
2					
3					

.....Section Break (Next Page)

Disclosure Form 7(A)
Notice of Ownership




4					
5					
6					
	Number and category of the shares/convertible debt instruments in which the person has interest		Per cent		
5	Total percentage of shares/convertible debt instruments owned thereby or in which the owner has interest total (3+4)				

8	Purpose of acquisition	<input type="checkbox"/> Short-term (less than one year)	<input type="checkbox"/> Long-term (more than one year)
7	Source of funding	<input type="checkbox"/> Personal	<input type="checkbox"/> Miscellaneous

8 Contact Details	
Name of person	
Date of notice	
Telephone number	
Mobile number	
Fax	
Mail address	
Email	
Signature	

Appendix C to Chapter 6: Disclosure Form of Notice Relating to a Change in the Percentage of Ownership



هيئة السوق المالية
Capital Market Authority

Disclosure Form 7(B)
Notice Relating to a Change in the Percentage of Ownership Purpose of Ownership

Instructions for filling the form:

1. The person shall fill in the form when an increase or a decrease is found in the person's ownership or interest, or when a change is found in the ownership purpose as per Article (45) of the Listing and Registration Rules.
2. The person shall assume full responsibility for the accurate information stated herein.
3. The form shall be sent at the close of trading, in any of the cases above to:
 - The Capital Market Authority - Capital Market Institutions Supervision - Fax: 01-279-7287, email: Ownership.Investment@cma.org.sa, then shall be sent by registered mail to: P. O. Box 220022, Riyadh-11311, CMA.
 - A copy of the form shall be sent to the company in which the person invests.

1	Name of person			
	Identity/ commercial registry No.			
	Capacity of person	<input type="checkbox"/> Member of the board of directors	<input type="checkbox"/> Top executive	<input type="checkbox"/> Owner or stakeholder having interest in a 5% stake minimum
2	Name of the listed company acquired			

3. Ownership			
	Number and class of the shares/ convertible debt instruments owned before change		Percentage before change
	Number and class of the shares/ convertible debt instruments owned after change		Percentage after change
1. Interest			
A.	Is there any change in the number and class of the shares/ convertible debt instruments owned or controlled by the person's relatives?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
B.	Is there any change in the number and class of the shares/ convertible debt instruments owned or controlled by a company controlled by the person?	<input type="checkbox"/> Yes	<input type="checkbox"/> No
C.	Is there any change in the number and class of the shares/ convertible debt instruments owned or controlled by the third parties who act upon agreement with the person to get an interest or exercise voting rights in the issuer's shares/ convertible debt instruments?	<input type="checkbox"/> Yes	<input type="checkbox"/> No

Disclosure Form 7(B)

Notice Relating to a Change in the Percentage of

Purpose of Ownership

In case the answer is 'Yes' to any of the questions above, the following table shall be filled in:

5	Name	Identity/Commercial Registry No.	Nature of relationship (interest)	Number of shares before change	Percentage	Number of shares after change	Percentage
1							
2							
3							
4							
5							
6							
Number and class of the shares/ convertible debt instruments in which the person has interest before change					Percentage before change		
Number and class of the shares/ convertible debt instruments in which the person has interest after change					Percentage after change		
5	The total percentage of shares/ convertible debt instruments owned by the person or in which the person has interest before change total (4+3)						
	The total percentage of shares/ convertible debt instruments owned by the person or in which the person has interest after change total (4+3)						

6. Purpose of acquisition	<input type="checkbox"/> Short-term (less than one year)	<input type="checkbox"/> Long-term (more than one year)
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Fill in the table in case the purpose of ownership is changed:
 Change in the purpose of ownership: From long-term to short-term
 From short-term to long-term

7. Contact Details
Name of person
Date of notice
Telephone number
Mobile number
Fax
Mail address
Email
Signature

Appendix to Chapter 7: Relevant Law Cited

Saudi Income Tax Law Articles 2, 3, 4, 5 and 6

A. Article 2: Persons subject to taxation

- a. a resident capital company with respect to shares of non-Saudi partners.
- b. a resident non-Saudi natural person who conducts business in the Kingdom.
- c. a non-resident who conducts business in the Kingdom through a permanent establishment.
- d. a non-resident with other taxable income from sources within the Kingdom.
- e. a person engaged in the field of natural gas investment.
- f. a person engaged in the field of oil and hydrocarbons production.

B. Article 3: Concept of Residency

(a) A natural person is considered a resident in the Kingdom for a taxable year if he meets any of the following conditions:

1. He has a permanent place of residence in the Kingdom and resides in the Kingdom for a total period of not less than thirty (30) days in the taxable year;
2. He resides in the Kingdom for a period of not less than one hundred eighty-three (183) days in the taxable year.

For the purpose of this paragraph, residence in the Kingdom for part of a day is considered residence for the whole day, except in the case of a person in transit between two points outside the Kingdom.

(b) A company is considered resident in the Kingdom during the taxable year if it meets any of the following conditions:

1. It is formed in accordance with the Companies Law;
2. Its central management is located in the Kingdom.

C. Article 4: Permanent Establishment

(a) A permanent establishment of a non-resident in the Kingdom, unless otherwise stated in this Article, consists of the permanent place of the non-resident's activity through which it carries out business, in full or in part, including business carried out through its agent.

(b) The following are considered a permanent establishment:

1. construction sites, assembly facilities, and the exercise of supervisory activities connected therewith;
2. installations or sites used for surveying for natural resources, drilling equipment, or ships used for surveying for natural resources, as well as the exercise of supervisory activities connected therewith;
3. a fixed base where a non-resident natural person carries out business;
4. a branch of a non-resident company licensed to carry out business in the Kingdom.

(c) A place is not considered a permanent establishment of a non-resident in the Kingdom if it is used in the Kingdom only for the following purposes:

1. storing, displaying, or delivering goods or products belonging to the non-resident;

2. keeping a stock of goods or products belonging to the non-resident for the purpose of processing by another person;
3. purchasing goods or products for the sole purpose of collection of information for the non-resident;
4. carrying out other activities of preparatory or auxiliary nature for the interests of the non-resident;
5. drafting contracts for signature in connection with loans, delivery of goods, or activities of technical services;
6. performing any series of activities stated in subparagraphs 1 to 5 of this paragraph.

(d) A non-resident partner in a resident partnership is considered an owner of a permanent establishment in the Kingdom in the form of an interest in a partnership.

D. Article 5: Source of Income

(a) Income is considered accrued in the Kingdom in any of the following cases:

1. If it is derived from an activity which occurs in the Kingdom.
2. If it is derived from immovable property located in the Kingdom, including gains from the disposal of a share in such immovable properties and from the disposal of shares, stocks or partnership in a company the property of which consists mainly, directly or indirectly of shares in immovable properties in the Kingdom.
3. If it is derived from the disposal of shares or a partnership in a resident company.
4. If it is derived from the lease of movable properties used in the Kingdom;

5. If it is derived from the sale or license for use of industrial or intellectual properties used in the Kingdom.
6. Dividends, management or directors' fees paid by a resident company.
7. Amounts paid against services rendered by a resident company to the company's head office or to an affiliated company.
8. Amounts paid by a resident for services performed in whole or in part in the Kingdom.
9. Amounts for exploitation of a natural resource in the Kingdom.
10. If the income is attributable to a permanent establishment of a non-resident located in the Kingdom, including income from sales in the Kingdom of goods of the same or similar kind as those sold through such a permanent establishment, and income from rendering services or carrying out another activity in the Kingdom of the same or similar nature as an activity performed through such a permanent establishment.

(b) The place of payment of the income shall not be taken into account in determining its source.

(c) For purposes of this Article, a payment made by a permanent establishment of a non-resident in the Kingdom is considered as if paid by a resident company.

E. Article 6: Tax Base

(a) The tax base of a resident capital company is the shares of non-Saudi partners in its taxable income from any activity from sources within the Kingdom, minus expenses permitted under this Law.

(b) The tax base of a resident non-Saudi natural person is his taxable income from any activity from sources within the Kingdom, minus expenses permitted under this Law.

(c) The tax base of a non-resident who performs an activity within the Kingdom through a permanent establishment is his taxable income arising from or related to the activity of such establishment, minus expenses permitted under this Law.

(d) The tax base of each natural person is determined separately.

(e) The tax base of a capital company is determined separately of its shareholders or partners.

F. Article 8: Income Subject To Tax

Taxable income is the gross income including all revenues, profits, and gains of any type and of any form of payment resulted from carrying out an activity, including capital gains and any incidental revenues, minus exempted income.