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Corporate Governance Enforcement in the Middle East and North Africa: Evidence and Priorities

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Approved by Adrian Blundell-Wignall, OECD Directorate for Financial and Enterprise Affairs

JEL Classification: G38, K22 and K42

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Corporate governance enforcement in the Middle East and North Africa: evidence and priorities

by
Alissa Amico, OECD

Abstract

Corporate governance frameworks in the Middle East and North Africa region have undergone a substantial evolution in the past decade. Better enforcement of corporate governance rules and regulations has in the past three years emerged as both a policy challenge and a priority for the region. This emphasis on better enforcement reflects a number of trends including political changes in some countries of the region, the global call for better surveillance of the adoption of governance rules as well as low investor engagement in the region.

This paper examines key developments in public and private corporate governance enforcement in the region. It highlights the growing level of public enforcement as expertise within the securities regulators is growing. The paper provides policy recommendations on specific aspects of governance frameworks such as the treatment of related party transactions and board member responsibilities which - if better regulated - could result in more effective governance enforcement in the region.

Approved by Adrian Blundell-Wignall, Director, OECD Directorate for Financial and Enterprise Affairs

JEL codes: G38, K22, K42

Keywords: Corporate governance, Middle East and North Africa, enforcement, investor engagement, shareholder rights, commercial courts, redress, minority shareholder, board appointment, securities regulator, stock exchange, companies law, listing requirements.

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Summary of recommendations[1]

- The various sources of corporate governance-related rules, laws and recommendations should be reviewed with a view to ensure coherence among them. Experience from several MENA countries demonstrates that the requirements contained in the national corporate governance code and in the companies law are at times inconsistent, leading to confusion among listed companies as to the applicable governance standards.

- Corporate governance codes in the region, most of which were introduced prior to the financial crisis, should be reviewed to ensure that the relevant lessons learned are incorporated and that the requirements reflect other national and regional developments. Securities regulators and stock exchanges are recommended to assess the levels of company compliance with existing codes in order to identify areas of weakness and potential progress.

- The regulatory, oversight and enforcement responsibilities of regulators, stock exchanges, ministries of commerce and central banks should be documented and co-ordinated. Certain offences in particular such as market manipulation and insider trading often require the collaboration of exchanges and securities regulators in order to detect and enforce.

- Securities regulators should be endowed with the necessary independence and should be insulated from company pressure or any other type of influence to ensure that they operate impartially and are perceived as being transparent and accountable. To that end, the introduction of guidelines on governance and ethics for regulators and exchanges is recommended and has already been done in a number of MENA countries.

- The accountability of regulators, including with regards to their enforcement capacity, can be facilitated by greater budgetary transparency. Furthermore, the enforcement decisions taken by regulators should be transparently published on their website and communicated through other relevant means. Enforcement actions, including penalties, should also be publicly available.

- Securities regulators should be given the necessary enforcement tools and powers, such as the right to subpoena documents. They should also have the necessary technical capacity to investigate public complaints related to the conduct of listed companies or any of their governance organs. The palette of sanctions, criminal and administrative, should be clearly defined in the securities law or equivalent legislation.

- In addition to supervision and enforcement departments established within securities regulators, high-level disciplinary committees might be useful to review and decide on important and potentially

[1] The following recommendations, contained throughout the body of this Working Paper, are a result of a regional consultation process with the securities regulators, stock exchanges and market participants. They do not necessarily reflect the OECD's official position or the OECD Corporate Governance Committee's evaluation of the enforcement frameworks and practices in the region.

visible cases. Such structures are already in place in a number of jurisdictions and enjoy the powers necessary to ensure their effectiveness.

- The courts system should facilitate enforcement activity where necessary. To this end, specialised financial courts have proven useful in adjudicating corporate governance and securities law breaches. Some financial centers in the region have established a parallel court system to rule on cases in companies in their jurisdiction.

- In order to facilitate private enforcement, regulators might wish to consider whether the burden of proof placed on minority investors is appropriate. In addition, they should consider whether and under what circumstances regulatory intervention, such as their support of derivative or class action suits might be useful to protect the rights of minority shareholders. The ability of regulators to intervene directly such as by cancelling illegitimate transactions should also be considered.

- Director duties and responsibilities, notably fiduciary duty and duty of loyalty are not well described in the body of corporate law or codes in the region and warrant additional attention. The definition of director duties should take into account the presence of controlling shareholders and holding/group companies in the region.

- Measures to further protect the rights of minority shareholders such as cumulative voting might also be useful to consider. In addition, the longstanding practice in the region requiring directors to also be shareholders, might be detrimental to board independence and should be reviewed.

- Further review of laws and regulations dealing with oversight, approval and disclosure of related party transactions is needed in a number of countries to align existing standards with IAS24. The definition of related parties should be designed in a way as to capture all kinds of transactions that present a risk of potential abuse. Furthermore, additional mechanisms to assure these transactions are not detrimental to minority shareholders, such as the explicit involvement of independent directors and auditors in the approval process would be useful.

- Regulators should consider prohibiting specific types of RPTs such as loans to directors that are unlikely to generate any economic value for the company. Particularly risky RPTs, as indicated by their materiality, recurrence or other factors, should be subjected to regulatory oversight as already required in some jurisdictions. These transactions should be disclosed to the market in a transparent and timely fashion.

Introduction

As an echo of the last financial crisis, the two themes that have arguably dominated the corporate governance debate globally in recent years are investor activism and corporate governance enforcement. Indeed, these two themes can be essentially seen as two sides of the same coin: whereas investor activism may lead to action by shareholders and potentially to private enforcement, public enforcement is meant to protect the interest of shareholders and the wider public. The first is usually concerned with ex-ante engagement with boards and management to influence change, while the second is traditionally concerned with ex-post rectification of corporate governance and other failures though regulatory action.

Recent years have seen by all accounts the highest rates of institutional investor activism on a range of issues such as executive remuneration, non-financial disclosure and board composition, and at the same time, increased oversight and enforcement, resulting in ever greater regulatory and legal burden on listed companies. This is occurring, in part, as a response to the assessment that institutional investors have failed to act as "guardians at the gate" of their investee companies. Greater investor engagement is not surprising considering the size of assets under management by institutional investors, especially in developed markets.[2] On the other hand, given the dispersion of ownership in assets held by some institutional investors, their interest in monitoring the governance of their investee companies may be limited in practice.[3]

Stewardship-oriented initiatives and rigorous enforcement activity by securities but also banking sector regulators have seen a level of heightened interest in Europe and North America, and to a lesser extent in Asia and in the Middle East. Globally, following the example set by the United Kingdom's Stewardship Code, Italy, Japan, South Africa and other countries have followed suit, introducing further guidance to investors and asset managers concerning their responsibilities as owners in the capital markets. The International Corporate Governance Network (ICGN), an umbrella organisation for institutional investors worldwide, has prepared Global Governance Principles for investors and boards and the European Fund and Asset Managers Association has also published Principles for the exercise of ownership rights in investee companies in 2011. Further discussions on how to motivate or even oblige institutional investors to exercise their ownership responsibilities are ongoing in many countries.

At the same time, enforcement of corporate governance rules and regulations is growing, although at a slower pace, with the introduction of additional governance requirements by national securities regulators and supranational bodies such as the European Commission, which is an important source of governance requirements in its member states. This is occurring in part in response to corporate governance transgressions in both developed and emerging markets, conclusions regarding governance failures witnessed during the financial crisis, and also as a result of uneven application of existing rules.

[2] As of 2011, the combined holdings of institutional investors worldwide represented $84.8 trillion USD, of which 38% ($32 trillion USD) was held in public equity (Celik and Isaksson, 2013).

[3] For instance, CalPERS, the largest US public pensions fund, owned shares in almost 10,000 different listed companies using, in addition to internal managers, almost 40 external equity managers and 296 brokerage firms as of 2012 (Celik and Isaksson, 2013).

Notably, there is a variance in the compliance with the comply-or-explain type corporate governance codes, as highlighted for example in the European Commission's detailed Study on Monitoring and Enforcement Practices in Corporate Governance in the Member States (2009).[4]

On the other side of the Atlantic, the Dodd Frank Act in the United States, in spirit of the American rules-based approach, has created approximately 2300 pages of new legislation, in addition to thousands of pages of secondary regulations. Although its primary objective was to ensure financial stability in the American banking sector and in capital markets, the Act also mandated a number of specific corporate governance requirements, notably introducing the right of shareholders to propose board members in their proxies, a non-binding "say-on-pay" for executive officers, and "clawback" provisions on executive remuneration. By virtue of this Act, the Securities and Exchange Commission is now empowered to enact shareholder access to company proxy.

Against this global background, this paper seeks to address whether and how this plethora of new requirements in Europe and North America - which have historically been the source of inspiration of legal and regulatory frameworks in the MENA region[5] - have been integrated in Arab countries. In particular, the paper seeks to focus on private and public enforcement of corporate governance rules, which are of priority to ensure the effectiveness of corporate governance practices in the region. Corporate governance enforcement is a topic which has not so far been subject to research in the Middle East and North Africa, owing to the absence of public information, but one which is of growing interest to the regulators, boardrooms, executive suites, and investors in the region. The effectiveness of corporate governance enforcement in the region is important not only for domestic, largely retail investors which dominate most markets, but is also of growing relevance to the global investment community as the region emerges as a key destination for their portfolio allocations.

[4] As a result of its observations regarding the shortcomings of the comply-or-explain approach, the Commission has more recently suggested in its draft legislation to subject companies to more rigorous disclosure mechanisms, in particular in relation to any explanations of non-compliance.

[5] Specifically, the legal regimes of North African countries (and to some extent Lebanon and Egypt) reflect the French civil law tradition, whereas the Gulf countries' legal regimes reflect a more Anglo-Saxon legal approach with vestiges of both American and British models. This paper aims to cover all Arab countries with a special focus on the largest capital markets.

Financial sector development in the region

Historically, the financial systems of the MENA region have been dominated by bank-based lending and capital markets were slow to develop, with the exception of markets in Egypt, Lebanon, Morocco and Tunisia where stock exchanges are time-honoured (but not necessarily flourishing) institutions. Most other stock exchanges in the region, including the largest bourses of the region located in the Gulf Cooperation Council (GCC) countries (e.g. Saudi Tadawul, Qatar Exchange, Bahrain Bourse, etc.), are relative newcomers to the global capital markets scene and some are only recent members of the World Federation of Exchanges.

Considering that capital markets development is one of the key objectives of governments in the region, a number of which are seeking to establish themselves as financial centers, the development of MENA bourses has been relatively rapid and the region is currently home to 18 stock exchanges and approximately 1400 listed companies, of variable size. Although by global standards, the markets in the region (with the exception of Saudi Arabia) are relatively small and illiquid, their growth in recent years has been impressive, despite the 2006 Gulf market crash and the stagnation in listing and trading activity that has characterised Arab exchanges following the latest financial crisis.

Capital markets in the region, especially in Egypt, Morocco and Tunisia have particularly benefitted from the significant privatisation activity in 1980-1990s and from the growth of a few large listed companies in the region such as SABIC and Industries Qatar, whose large capitalisation essentially dwarfs that of most other listed companies.[6] More recently, greater interest in the region by international investors and the long awaited MSCI upgrade of Qatar and the United Arab Emirates (UAE) to the emerging market status has created high valuations in the market: the Dubai Financial Market was for instance the second highest performing market worldwide in 2013.

While so far not the epicentre of capital accumulation and investment in the region, which is focused in sovereign wealth entities, family-owned unlisted enterprises (i.e. family offices) and generally also unlisted state-owned enterprises, MENA listed companies are economically important because they offer a key vehicle for disintermediation of savings in the region, an opportunity for foreign investment in the region - and eventually and under the right conditions - an opportunity for development of small and medium size enterprises (SMEs). The stock exchanges, on which they are listed, are also important national institutions, which are at the forefront of developing national financial centers. As a result, and owing also to the tradition of generally heavy state involvement in most economies of the region, the vast majority of exchanges in the region remain state-owned, as highlighted in the overview Table 1 below.

[6] For instance, the market capitalisation, excluding top ten companies, to total market capitalisation is estimated to be approximately 30% in Jordan and Morocco and over 50% in Egypt (World Bank Development Indicators, 2011). In addition, the value of stock trading in large listed companies is much higher than in smaller firms. For example, the value of trading in top 10 listed firms out of the total market turnover in Saudi Arabia was close to 70% according to the latest available data (2011).

Table 1. Overview of MENA Stock Exchanges

Country	Stock Exchange	Date of establishment	Market capitalisation (in billion USD)	Number of listed companies[1]	Ownership Structure[2]
Algeria	Bourse D'Alger	1993	Less than 1	3	State-owned
Bahrain	Bahrain Stock Exchange	1987	53	48	State-owned
Egypt	Egyptian Exchange[3]	1883	69	233	Public institution
Iraq	Iraq Stock Exchange	2004	10	86	Mutualised
Jordan	Amman Stock Exchange	1999	28	235	Public institution
Kuwait	Kuwait Stock Exchange	1984	118	208	Public institution
Lebanon	Beirut Stock Exchange	1920	13	12	Public institution
Libya	Libyan Stock Market	2007	3	10	State-owned
Morocco	Bourse de Casablanca	1929	58	76	Mutualised
Oman	Muscat Securities Market	1988	24	116	State-owned
Palestinian Authority	Palestine Exchange	1995	3	49	Privately held
Qatar	Qatar Exchange	1997	198	42	State-owned
Saudi Arabia	Tadawul	1984	515	164	State-owned
Syria	Damascus Securities Exchange	2009	Less than 1	22	Public institution
Tunisia	Bourse de Tunis	1969	9	75	Mutualised
United Arab Emirates	Dubai Financial Market	2000	98	55	State-owned
	Abu Dhabi Securities Exchange	2000	133	50	State-owned
	Nasdaq Dubai [4]	2005	23	6	State-owned

Source: Zawya, accessed 15 April 2014. Market capitalisation figures provided as of 15 April, 2014, except for Libyan Stock Exchange and the Palestine Exchange for which data was accessed directly from the exchanges. The market capitalisation figures for the Iraqi, Palestinian and Algerian stock exchanges were extracted from Thompson One database as of 15 April 2014.

Notes: 1. Number of listed companies includes only companies with publicly listed equity, including foreign companies. It does not include companies traded in OTC markets, privately traded firms, REITs or funds. 2. A "state-owned exchange" connotes a corporatised stock exchange majority-owned by the national government, whereas a "public institution" indicates that the exchange operates as a public, uncorporatised entity. 3. Previously Cairo and Alexandria exchanges. 4. Nasdaq Dubai is majority-owned by the Dubai Financial Market.

The majority of companies listed on MENA bourses, indeed as other companies in the region, are characterised by the presence of controlling shareholders in the form of government investors (SWFs, public pension funds, security funds, etc.) or other founding shareholders, typically families. They are also relatively concentrated in terms of their sectoral composition, with the banking sector accounting for half of MENA markets capitalisation[7], in part due to its high contribution to the GDP of MENA countries, in part due to mandatory listings of banks in some jurisdictions.

Free float in the region tends to be very low, despite standards for IPOs that require companies to list a minimum of 40% of their equity (e.g. in Oman) and over 55% of their equity in the UAE[8]. The free float available to foreign investors is even lower due to restrictions on foreign portfolio investment in GCC. That said, for the largest 400 listed companies, the average free float oscillated between 45 and 48% in the past five years (MSCI, 2014). Only in Kuwait, Tunisia and the UAE, does free float exceed 50% of market capitalisation (World Bank, 2011). The efforts to diversify capital markets in the region in terms of their sectoral composition and to attract smaller capitalised enterprises have not, so far, been marked by success, even in countries where specialised SME markets/tiers have been introduced (NILEX in Egypt and SME tiers in Dubai and Qatar).

Likewise, the diversification of ownership in listed companies to institutional investors has also been a challenge and markets remain dominated by speculative retail investors. In the GCC capital markets in particular, retail investors continue to account for as much as 90% of market turnover in Saudi Arabia and slightly less in Qatar and the United Arab Emirates (UAE), though their underlying ownership is substantially less. For instance, in the UAE, retail investors account for approximately half of all investors in the market in terms of their ownership of the market capitalisation. With the inclusion of some markets such as the UAE and Qatar in the emerging market category of the MSCI and taking into account the growth prospects of pension and insurance companies as well as mutual funds in the region, institutional investment in the region is expected to increase significantly in the next few years.

However, promises of substantial portfolio investment are fundamentally contingent on the ongoing improvements in corporate governance practices. A key governance weakness that has perhaps the most tangible impact on attracting investment lies in disclosure practices in the region, which are widely perceived as being insufficient despite the general comparability in disclosure requirements between MENA and other emerging markets (OECD, 2013b). Although disclosure requirements have evolved significantly in recent years, with IFRS or the domestic equivalent standard being a common requirement for listed companies[9], with the introduction of electronic disclosure platforms (e.g. in Saudi Arabia [10]) and

[7] The weight of banks among listed companies is higher in the MENA than any other region except for Africa (World Bank, 2011).

[8] The high free float requirement in a number of countries (e.g. the UAE) is commonly cited as an important deterrent for firms to access public equity markets. However, exchanges appear to have been flexible, making some exceptions in free float and other requirements for state-controlled companies, as the recent exemption of Emaar Malls Groups highlights.

[9] IFRS is required as a relevant reporting standard in almost all jurisdictions in the region except for a few countries such as Saudi Arabia and Tunisia where listed companies can still use the local accounting standard.

with the growing spread of XBRL reporting (e.g. in the UAE), the reality of disclosure practices have not followed suit.

For instance, the Institutional Shareholder Services (ISS), the largest proxy advisor globally, notes that only 15% and 12% of companies in the UAE and Qatar respectively disclosed their corporate governance report, and only about 82% and 84% of the companies respectively, their annual report in a timely fashion (ISS, 2014). Against the background of general improvement, similar weaknesses of disclosure practices were noted by other studies: for example, a recent review of disclosure practices in Egypt noted that 40 out of 52 items in the International Standard of Accounting and Reporting are disclosed by less than half of the largest 30 Egyptian listed companies (Shehata and Dahawy, 2013). Discussions with foreign investors in the region confirm concerns related to inadequate disclosure practices, some of which may be due to the lack of availability of reporting in languages other than Arabic.

Capital markets supervision framework

Institutional arrangements

A number of securities regulators are young institutions, some of them such as the Kuwaiti, the Syrian and the Lebanese capital market authorities, having only been introduced in the past five years. Despite being young institutions, most capital market supervisory authorities, especially in the Gulf but also in other counties of the region such as in Morocco and Egypt have rather extensive regulatory responsibilities and powers and a number of them have established formal investigation and enforcement capabilities, which are used to a variable extent. The following Table presents the landscape of securities regulators in the region, including how they exercise their enforcement responsibilities.

In all countries of the region except for Bahrain[11], the regulation and oversight of listed companies is predominantly with the securities regulators (commonly referred to Capital Market Authorities, CMAs). Most of the securities regulators in the region are in principle independent, but in practice often report to the Ministry of Finance or an equivalent and do not possess budgetary independence. Unlike their counterparts in countries such as Brazil or Canada, most MENA regulators do not principally derive their funding from licencing fees and even much less from penalties imposed on market participants or listed companies.[12] As a result of the current funding structure, securities regulators in the region do not face

[10] In Saudi Arabia, the electronic disclosure platform is operated by the Saudi stock exchange, Tadawul and is available for all filings of listing companies. In Egypt on the other hand, annual financial statements for most active stocks are available for a limited time on the website of the exchange.

[11] Bahrain has a single regulator model and hence capital market regulation and supervision activities are undertaken by the Central Bank of Bahrain and the Ministry of Industry and Commerce. No dedicated securities regulator has been established.

[12] Indeed, the majority of regulators in OECD member countries are funded fully (35%) or partly (24%) by the fees from regulated entities, while 25% of regulators are financed via the government budget (OECD, 2014). These figures include 9 non-OECD countries which have participated in the survey.

conflicts of interest that might arise from pressures to generate revenues from market related activities and enforcement functions.

Table 2. Overview of Securities Regulators in the MENA region

Country	Securities regulator	Date of establishment	Enforcement function in CMA
Algeria	Commission d'organisation et de surveillance des opérations de bourse (COSOB)	1993	Direction for Development and Market Surveillance, Disciplinary Chamber
Bahrain	Central Bank of Bahrain (CBB)	2006	Capital Markets Supervision Directorate
Egypt	Egyptian Financial Supervisory Authority (EFSA)[1]	2009	Central Department for Enforcement
Iraq	Iraq Securities Commission (ISC)	2004	Inspection Department
Jordan	Jordan Securities Commission (JSC)	1997	Legal and Enforcement Department
Kuwait	Capital Market Authority	2010	Supervision sector
Lebanon	Capital Market Authority	2011	Not yet developed
Libya	Capital Market Authority	2013	Not yet developed
Morocco	Le Conseil Déontologique des Valeurs Mobilières (CDVM)	1993	Inquiries and Surveillance (and Examinations Joint Committee)
Oman	Capital Markets Authority (CMA)	1998	Department of Investigation and Enforcement
Palestinian Authority	Palestine Capital Market Authority	2004	N/A
Qatar	Qatar Financial Markets Authority	2005	Surveillance Department, Disciplinary Committee, Appeals Committee
Saudi Arabia	Capital Markets Authority (CMA)	2003	Enforcement Division
Syria	Syrian Commission on Financial Markets and Securities (SCFMS)	2005	Enforcement Division
Tunisia	Conseil du marché financier (CMF)	1994	Department of Market Surveillance Enforcement Department
United Arab Emirates	Dubai Financial Services Authority	2004	Enforcement Committee
	Emirates Securities and Commodities Authority (ESCA)	2000	Licensing, Supervision and Enforcement Department

Note: Previously Capital Market Authority established in 1979.

Source: Websites of MENA securities regulators and their annual reports.

However, this implies that most securities regulators in the region rely on government funding, either directly or indirectly.[13] There are some exceptions to this, notably the Tunisian CMA, where the regulator's budget is mainly derived from licencing fees and fees from market activity. Likewise, financial sector regulators such as the Dubai Financial Services Authority (DFSA) or the Qatar Financial Center Regulatory Authority (QFCRA) possess greater independence though their funding is also primarily governmental.[14] The Turkish CMA, which is predominantly self-funded, derives its income from a fee it levies on all issuers and other institutions regulated by the CMB. In principle, this or similar revenue structures might encourage budgetary independence of MENA securities regulators from the government, however the dependence on governmental or market sources of revenue (either in the form of fees and/or enforcement activity) entails complex policy trade-offs.

A number of countries in the region have addressed the issue of budgetary and political independence of regulators by creating a formal governing body (e.g. system of Commissioners in Kuwait and Saudi Arabia). This is indeed similar to structures present in OECD member countries where securities regulators are governed at the highest level by a board, a council or a commission, with size anywhere from 3 to 17 members who are appointed for fixed terms ranging between 5 and 8 years (OECD, 2014). At the same time, governing organs of the securities regulators in the region often include political appointees who sometimes have dual mandates. For example, in Morocco, the Chairman of the Board of the securities regulator (CDVM) is the Minister of Economy and Finance. In Lebanon, the Chairman of the securities regulator is by law the Governor of the Central Bank.

The political dependence of regulators in the region does not stem only from their appointment process but is also intricately linked to their mandate for promoting national financial centers.[15] On the one hand, this dual mandate might align the regulatory objectives with broader financial development goals (e.g. regulations on new financial instruments). On the other hand, this dual mandate might negatively affect their independence and their incentives to enforce the relevant laws and regulations. Overall, recent developments in the region appear to confirm the status of securities regulators as independent entities: Egypt's 2014 Constitution has, for example, recognised the status of its CMA (EFSA) as an independent entity.

Further steps to render the decision-making processes and the financial structure of MENA securities regulators transparent warrant consideration.[16] Specifically, further transparency around the appointment process of commissioners and budgeting is important to reinforce market integrity. A number of regulators in the region do not publish any information on their budget and expenditures. For

[13] An example of such an indirect funding structure exists in Morocco, where the fines are collected by the Treasury (Ministry of Finance) rather than by the CDVM (Moroccan securities regulator) directly.

[14] In addition, the CEO of the QFMA is also considered to be independent and by law reports directly to the Cabinet.

[15] Existing financial centers include: The Dubai International Financial Center, the Casablanca Finance City, the Qatar Financial Center, the Bahrain Financial Harbour, the King Abdullah Financial Center - and the last center launched in the region - the Abu Dhabi Global Markets Initiative.

[16] Indeed, good governance of regulators is frequently considered as an important precondition for improving the governance of the listed entities in the region.

example, in its recent review of Saudi Arabia's capital market, the IMF had noted that "there are some transparency and procedural improvements that need to be made relating to how the CMA funds its operations, disciplines, and communicates with members and balances its potential conflicts of interest" (IMF, 2012). Subjecting securities regulators to public oversight by the state auditor or equivalent as it is already done in Turkey might be a useful mechanism to further strengthen their transparency but also efficiency. [17]

Alongside securities regulators, stock exchanges have in most countries of the region been involved in the development of national corporate governance codes or recommendations. The powers of stock exchanges relative to corporate governance oversight and enforcement are much more limited than those of the securities regulators. One notable exception to this is the Muscat Securities Market that has the responsibility for monitoring companies' compliance with the code by virtue of a circular by the securities regulator endowing it with this capacity (OECD, 2012a). The Egyptian Exchange has also played an important role in promoting good governance practices by integrating some governance requirements in its listing rules. Apart from these relatively isolated examples, most Arab stock exchanges play a limited role in the oversight of governance arrangements of listed companies.

Although in some countries, exchanges have the prerogative to accept listings and to de-list non-compliant issuers, any prospectus has to be approved by the securities regulator before listing and the latter is often consulted if the exchange wishes to de-list a security or apply any other sanction. Within this overall framework, a number of exchanges, including the Beirut Stock Exchange, the Amman Stock Exchange, the Qatar Exchange and the Egyptian Exchange have some regulatory powers intended to complement the powers of the securities regulator, but few can be considered as a self-regulatory organisation (SRO) (OECD, 2012). In general, the listing and de-listing authority in the region rests with the securities regulators (e.g. Kuwait, UAE, Oman, etc.)

The sanctioning power of regional bourses varies widely: exchanges with greater powers to establish listing rules and make listing decisions also enjoy greater powers to sanction issuers and market participants. Interestingly, some regional bourses which have limited decision-making powers to accept securities for listing, have greater powers when it comes to sanctioning issuers. As a recent survey of MENA stock exchanges highlighted, the Egyptian, Syrian, Kuwaiti, Tunisian, Moroccan, Lebanese, Qatari, and Emirati stock exchanges consider to have the necessary regulatory powers to impose sanctions on issuers, including through de-listing and financial penalties (OECD, 2012a).

Although the region has recently seen some voluntary de-listings, forced de-listings have been rare with the exception of the Egyptian and Kuwaiti markets, and to a lesser extent in Lebanon and Morocco. The Egyptian case is unique in the region in this regard: the number of listed firms on the Egyptian Exchange (EGX) has decreased dramatically from 740 companies in 2005 to around 350 in 2008. In 2010, approximately 100 listed companies were again de-listed from the exchange, mostly for failure to comply with disclosure and free float requirements. Most exchanges in the region have the right to suspend trading in a given stock if a violation is detected. Some exchanges such as the EGX has more powers than

[17] The Turkish securities regulator (CMB) budget and expenditures are audited by the Turkish Court of Public Accounts (OECD, 2013a).

for instance exchanges in the Gulf, and can issue regulatory decisions, issue fines on listed companies, cancel transactions if relevant laws or regulations are violated, and revoke licences of broker dealers.[18]

Another important category of supervisory entities with the power to oversee governance arrangements in listed companies are the Central Banks, a number of which issued separate guidelines for banks, that had often pre-dated the issuance of corporate governance codes for listed companies. As a result, listed banks often have to satisfy the requirements of the corporate governance code and additional – and often more detailed and prescriptive - Central Bank regulations and governance requirements specific to the banking sector.[19] In fact, considering that the development of the banking sector preceded the development of capital markets in most countries of the region, corporate governance rules and regulations originated in central banks and indeed the expertise migrated to the securities regulators when they were established in the 1980-2010 period.[20]

In some countries of the region, notably in the Gulf, Ministries of Commerce, Industry (MOIC) or the equivalent also have some authority in relation to the establishment and enforcement of governance rules. For instance, in Bahrain, the MOIC is responsible for administering the Company Law, the Corporate Governance Code and the Audit Law. While this is effectively a unique arrangement in the region, MOICs in other countries of the region also have important responsibilities related to corporate governance enforcement. In the recently amended Companies Law of Kuwait, investors can not only request to see the company's articles of association and minutes of AGMs at the MOIC, but the MOIC also has a responsibility to ensure companies (and not only listed firms) compliance with the Law, including through appointing the external auditors or calling an AGM to redress any breaches. [21]

While the important role played by the MOICs is not unique to the region, the regulatory responsibilities of these Ministries and national securities regulators have not been defined clearly in a number of countries, resulting in inconsistencies between the difference sources of corporate governance

[18] For instance, the Egyptain exchange cancelled 2728 trades--worth a total of 15.29 million Egyptian Pounds ($2.2 million USD) on Agwaa Food Industries. The company was subsequently fined for breach of various capital market regulations related to a planned IPO and agreed to pay 20 million Egyptian Pounds ($2.8 USD million) to the securities regulator (EFSA).

[19] This excludes the UAE where the on shore securities regulator (ESCA) has excluded banks and state-owned companies from the application of its corporate governance requirements issued in 2009. The DFSA corporate governance regime which applies to companies listed on NASDAQ Dubai and DIFC domiciled entities does not provide such exemptions. However, the DFSA has introduced an Exempt Offeror Regime which allows it to render exemptions to the application of rules for governmental or supranational issuers.

[20] For instance, in Lebanon, the Central Bank of Lebanon has issued detailed governance standards for banks and the Banking Control Unit of the CB monitors their application, whereas listed companies are not subject to any specific standards due to the small nature of the capital market in Lebanon and the recent establishment of the securities regulator.

[21] The corporate governance framework in Kuwait is unique in the region since the Kuwaiti CMA was established in 2011 (more than 30 years after the establishment of the KSE) with a goal to improve the orderliness of markets in Kuwait, which were affected by major instability in early 1980s and then in mid-2000. The CMA has prepared a corporate governance code for release in 2013, however the adoption of the code has been postponed, while the Companies Law introduced in 2012 is already in force.

requirements or recommendations. This situation has led to confusion in boards and management of listed companies arising from conflicting recommendations contained in the corporate governance code and the company law, the latter usually being more dated and not necessarily reflecting emerging good governance practices.[22] In instances where the corporate governance code was released in the same time period as the companies law - as is the case of Kuwait where the new Companies Law was issued in 2012 and the code just a year later - these types of differences are naturally easier to avoid.

Laws, regulations and codes

As implied in the foregoing section, corporate governance frameworks in the region are comprised of the body of corporate law which generally stipulates the basic structure of the governance organs of the company, the securities law which contains regulations relating to market abuse and disclosure requirements, as well as corporate governance codes, which now exist in all but one country of the region, as per the Table 3 below. The development of corporate governance codes in the region followed quickly the introduction of such recommendations in the developed markets. Prior to 2000, only a few jurisdictions globally such as the UK, Netherlands, Italy and France had already introduced a governance code. The development of corporate governance codes in the region also started around at the beginning of the decade when Oman introduced its governance code, the first in the region, in 2002. Since then, codes have been developed all over the region, the latest of which as recently as 2013 in Kuwait.

[22] For instance, in Saudi Arabia, the Companies Law allows for the roles of the Chairman and the CEO not to be separated while the Corporate Governance Regulations of the CMA recommend the opposite. This is due to the fact that the Companies Law in Saudi dates to 1950s whereas the code was developed half a century later. It is widely expected that the new Saudi Companies Law will be issued shortly.

Table 3. Corporate Governance Codes and Recommendations

Country	General Corporate Governance Code	Issuing Entity	Date of issuance	Comply or explain	Other Codes or Guidelines
Algeria	Yes	Corporate governance institute	2009	No	SOE code under development
Bahrain	Yes	Central bank	2010	Yes	Guidelines for banks Guidelines for directors on SOE boards
United Arab Emirates	Yes	Capital market authority	2007	Yes Yes	Code for banks Code for real estate companies Code for SMEs DIFC Markets Law DFSA Market Rules
Egypt	Yes	Corporate governance taskforce	2005, revised 2011, under revision	No	Code for state-owned enterprises Code for banks Rules for governance of securities companies Principles and guidelines for hospitals
Jordan	Yes	Corporate governance taskforce	2008	Yes	Code for banks
Kuwait	Yes	Capital market authority	2013	N/A [1]	Guidelines for banks
Lebanon	Yes	Transparency association	2008	No	Code for small and medium-size enterprises Guidelines for banks
Morocco	Yes	Corporate governance taskforce	2008	No[2]	Code for small and medium-size enterprises Code for state-owned enterprises Code for banks/credit institutions
Tunisia	Yes	Corporate governance institute	2008	No	SOE code under development Guidelines for banks/credit institutions
Saudi Arabia	Yes	Capital market authority	2006, amended 2009	Yes [3]	Guidelines for banks
Oman	Yes	Capital market authority	2002, under revision	Yes	Guidelines for banks Code for insurance companies
Qatar	Yes	Capital market authority	2009	Yes	Guidelines for banks and financial institutions QFCRA Guide for QFC authorised firms
Syria	Yes	Capital market authority	2008	No	Corporate governance guidelines for traditional and Islamic banks Corporate governance act for insurance companies
Yemen	Yes	Corporate governance taskforce	2010	No	Code for banks
Palestinian Authority	Yes	Corporate governance taskforce	2009	No	Code for banks
Libya	Yes	Stock exchange	2007	No	-
Iraq	No	-	-	-	-

Notes:

1. Code has not yet come into force.
2. Companies are recommended to comply-or-explain, but this is still voluntary.

3. The code applies on a comply-or-explain basis, however some articles have been made mandatory.

A significant number of governance codes in the region were developed by the securities regulators, with a few exceptions such as Libya where the code was developed by the stock exchange. In Morocco, Tunisia, Algeria, and Lebanon, codes were developed as a result of a multi-stakeholder consultation process, in the cases of the latter three, clearly private sector or NGO-driven. Generally speaking, in countries where codes where not developed by the securities regulators or stock exchanges, their nature tends to be voluntary as opposed to comply-or-explain. The guidelines for banks developed by Central Banks often apply in addition to the requirements of the corporate governance code, with the exception of the UAE where the corporate governance code expressly excludes listed banks and SOEs from its remit of application.

In recent years, some countries such as Saudi Arabia, Egypt and Oman, have begun to review and revise corporate governance codes/guidelines in order to gradually raise the standards further, and - in the case of Saudi Arabia - to mandate certain articles which the regulator considers crucial.[23] Over the years, the Saudi CMA has been rendering some articles of its Corporate Governance Code applicable on a mandatory basis, whereas the remainder of the code continues to apply on a comply-or-explain basis. In Egypt, where the corporate governance code is voluntary, the stock exchange has taken an alternative route of integrating certain articles in its listing requirements. In addition, the Egyptian Exchange updated listing rules issued in 2012 require all listed firms to disclose certain financial and non-financial information on the company website in Arabic.[24]

Unlike markets such as the United States, where listing requirements include a number of key governance provisions concerning for instance board independence requirements[25], listing requirements in the region are not a major source of corporate governance recommendations. That said, significant differences can be noted in terms of IPO requirements regarding quality of due diligence to be provided, sponsorship requirements, risk management systems and processes (Amico, 2013). In addition, the free float requirements vary quite widely from 10% in Egypt to 40% in Oman to 55% in the United Arab Emirates[26], which does not affect corporate practices directly but certainly affects the ownership context in which they are exercised.

[23] For additional information on the mandatory corporate governance articles, please refer to: http://www.cma.org.sa/En/Documents/CORPORATE%20GOVERNANCE.pdf.

[24] The EGX reports that as of June 2014, 75% of companies complied with this rule and disclose all the required information.

[25] It bears to note that the United States does not have a national corporate governance code though corporate governance related recommendations have been developed by professional bodies including the American Law Institute, the National Institute of Corporate Directors and the Business Roundtable. Individual exchanges set listing rules, including on governance structures of listed companies and federal law is also an important source of governance requirements.

[26] This very high free float requirement for IPOs is widely believed to have a negative impact on the IPO environment in the country and is reported to be under review by the government.

While in the Gulf countries and also in Jordan, corporate governance codes encompass fundamental requirements regarding the composition of the board, the conduct of AGMs, the reporting to shareholders and other dimensions, in other countries of the region where codes remain voluntary such as in Egypt, the companies and securities laws and regulations are the primary source of governance requirements. In part, this is due to the fact that before securities legislation, regulations and governance codes emerged in the region, the company law was the primary source of corporate governance requirements although now there is some overlap in the matters addressed by them.

Private and public enforcement

Institutional constraints and developments

Against the background of these increasingly developed corporate frameworks in the region, the focus of the corporate governance debate in the region over the past 3-5 years has been on the implementation and enforcement of these requirements. While policymakers and practitioners claim to avoid the pitfalls of the so-called "box-ticking" approach to governance, the discussion has nonetheless veered towards what is commonly termed in the region "corporate governance compliance", perceived as frequently lacking. This termination begs a number of questions, including whether the incentives provided to listed companies in the MENA region are sufficient to improve corporate governance practices and if the threat of enforcement action is credible. So far, research in the region has not addressed this question, which is crucial to the future integrity and visibility of MENA capital markets.

Effective enforcement relies on a number of factors including the efficiency of courts, the presence of rules to help determine ex-post violations, the capacity of the securities regulators and the ability of minority shareholders to exercise their ownership rights efficiently, all addressed in the OECD Principles of Corporate Governance. Supervision and enforcement aspects of the corporate governance framework can be carried out through private action as well as through actions of the public supervisory entity, most commonly securities regulators, public prosecutors and stock exchanges, Central Banks as well as MOICs. A combination of private and public supervision and enforcement of listed companies is required to detect possible instances of abuse of laws and regulations. In some instances, such as in class action or in derivative actions, the lines between private and public enforcement are blurred insofar as public entities may be involved to support private action by shareholders, either on their own behalf, or -in the case of derivative actions - on behalf of the company.

The effectiveness of private oversight and enforcement by individual investors or potentially by shareholder associations is contingent on enabling provisions being incorporated in the legal framework such as the right for shareholders to question and reverse abusive transactions, to call for extraordinary shareholder meetings, as well as to resort to the legal system. In terms of less formal monitoring and enforcement, the interest of investors to engage with their investee companies is important and translated into practical engagement when shareholders perceive the cost of monitoring as being lower than the cost of divestment. The effectiveness of public enforcement, on the other hand, depends on how empowered are the relevant public entities and whether they possess the requisite capacity and resources to undertake the investigations and pursue cases through the legal system. The experience of OECD member countries demonstrates that these challenges effectively limit public enforcement.

Assuring the effectiveness of systems of private and public corporate governance enforcement has proven a challenging task worldwide (OECD, 2013a; EU, 2009). Complications in public enforcement actions typically stem from the lack of financial resources at the disposal of the securities regulator, inadequate independence of securities regulators, or reliance on less formal approaches such as notice letters and information requests. Low level of private enforcement is likely a reflection of the difficulties faced by shareholders to bring about legal action against executives or board members and also the

increasing frequency of engagement which does not necessarily lead to legal action. One of the most detailed cross country reports on corporate governance enforcement undertaken by the European Commission noted that in most member countries, especially those not characterised by dispersed ownership, there are significant financial barriers to start private enforcement actions (EU, 2009).[27]

While the economic and ownership landscape in the MENA region is quite different from most OECD and EU jurisdictions[28], the challenges in public and private enforcement of corporate governance are, in fact, not substantially dissimilar. As will be explored in the following sections, an overview of enforcement activity by securities regulators reveals both the scarcity of public information on enforcement actions and a limited number of cases pursued by the regulators. The current low level of enforcement activity in the region is a reflection of a number of factors including the emerging capacity of securities regulators to investigate and prosecute such cases, legal issues related to the definition of certain offences such as insider trading, and last but not least, the culture of corporate secrecy which does not facilitate public disclosure of enforcement actions. The corollary of this is that the power of "naming and shaming" in the region is quite high and regulators are only now starting to take an advantage of it.[29]

Capacity of regulators

In principle, securities regulators in the region have a wide range of powers and can initiate legal action against listed companies, arguably more so than MOICs, stock exchanges or other regulatory and self-regulatory bodies. Over the years, the size of regulators in the region has grown and some of them have grown to be larger than many of their counterparts globally. For instance, the Saudi Capital Market Authority employs approximately 400 professional staff to supervise approximately 150 listed companies and 84 authorised persons (Saudi CMA, 2013). It would be fair to say that the enforcement capacity of securities regulators has been growing and all regulators now have established a formal enforcement function (see Table 2), with a reporting relationship to the President or the Secretary General of the entity. [30]

Discussions with securities regulators in the region reveal that the capacity of staff dealing with enforcement matters is growing. Some may not have the requisite legal or financial expertise to detect abuses related to insider trading which tend to be more complex to detect and investigate than a company's failure to file its financial statements on time. In fact, the capability of securities regulators to

[27] The specific reasons for this vary by jurisdiction but include difficulty to prove causal relationship between breaches of disclosure duties and suffered damages; the unavailability of class action suits; and inexperience of national courts in hearing such cases (EU, 2009).

[28] A number of EU member countries are also members of the OECD.

[29] For instance, in Egypt, the Egyptian Exchange has taken a decision to publish all violations of listed companies on its website and through the trading terminals as of July 2014.

[30] For instance, in the Saudi CMA, the Surveillance and the Corporate Governance departments are located within the Market Supervision Division which whose head reports directly to the Chairman. In Egypt, the Central Department for Enforcement is directly under the Deputy Chairman of the Egyptian Financial Services Authority. In Tunisia, the department of Surveillance reports directly to the Secretary General, who in turn reports to the President.

monitor integrity and good governance of listed companies and market intermediaries has received significant attention and, on some occasions, criticism in the media.

This has brought to the fore a debate on governance of the governance organs, which is not illegitimate because almost all regulators have both market development and oversight functions and as mentioned earlier, are dependent on the state by way of their budget. A few securities regulators and stock exchanges have adopted governance and/or ethics codes and initiatives aimed to raise standards internally. For instance, the Casablanca stock exchange and Tadawul (the Saudi stock exchange) have adopted codes of ethics, and the Palestine Exchange has adopted the national corporate governance code by virtue of its self-listing. [31]

More recently, the Saudi CMA has moved to apply governance standards internally by establishing a number of specialised committees and charters for them. The Egyptian securities regulator and the EGX have also adopted codes of ethics. The Dubai Financial Services Authority (DFSA), the regulator of the Dubai Financial Center-domiciled entities, has also adopted a Code of Values and Ethics for the members of its Board, Committees and Tribunals which is publicly available.[32] These initiatives are important for promoting integrity in Arab markets since listed companies often have the expectation that their regulators obey by the same standard they impose on the market. To address this expectation, a number of regulators such as Kuwaiti and Saudi Arabian CMAs have introduced changes to their own governance organs.

While securities regulators may face an array of potential conflicts of interest, some interesting models have been established in the region to ensure the separation of corporate from regulatory functions. While "cooling off" periods for staff have been introduced in some jurisdictions, the Turkish Capital Market Authority has gone a step further by recruiting all but its very senior staff directly from universities through a rigorous evaluation process in order to avoid any perception of conflicts of interest of staff being impartial to one of the large families which control the local economy. The Turkish CMA and other regulators in the region seek to develop their human resources through professional training, secondments and also by funding graduate and post-graduate studies for their staff.

While in principle, the capacity of regulators to enforce existing governance and market integrity rules and regulations have been growing, their enforcement activity is often not reflected in the information available in the public domain. Generally speaking, it remains rare for regulators to disclose details of completed enforcement cases and some of them have only started to do so recently. Very few regulators in the region such as the Moroccan CDVM and the DFSA systematically publish details of their enforcement decisions publicly or require sanctioned companies to post these decisions on their website. Some regulators such as the Qatar Financial Markets Authority (QFMA), which has the responsibility for supervising companies listed on Qatar Exchange, does not publish information on its enforcement activities elsewhere and has only started to produce an annual report recently.

[31] Technically, it adopted the code before its listing (Ahmed Aweidah, presentation, 2 December, 2014).

[32] Please refer to: http://www.dfsa.ae/Pages/AboutUs/WhoWeAre/Governance.aspx. Please note that not all ethics codes adopted by regulators or exchanges are publicly available.

A number of securities regulators in the region are starting to provide transparent disclosures regarding their supervision and enforcement activity. For example, the Saudi and the Omani CMAs publish detailed aggregate figures regarding investigations undertaken and their results. That said, even regulators which provide some information about their disciplinary actions do not always provide full details. For instance, the IMF noted that more transparency should be provided by the Saudi CMA, noting that board sanctions of authorised persons are not always published (IMF, 2012). This reluctance to publish regulatory enforcement actions arises from the fact that "naming and shaming" in the region is relatively new and is often seen as inconsistent with cultural norms in the region.[33]

Enforcement tools and mechanisms

The low levels of disclosure by Arab securities regulators around their enforcement should not be taken as being synonymous with the lack of enforcement activity. Although, as mentioned elsewhere in this paper, the full palette of investigative and enforcement powers is not well defined in all countries' securities laws and hence not utilised effectively, some regulators and MOICs in the region have high and in some cases relatively unorthodox powers of oversight. For instance, the Omani CMA can participate directly in the general and extraordinary shareholder meetings to ensure compliance with rules governing the conduct of AGMs. In Kuwait, the new Companies Law allows shareholders with 5% capital to request an appointment of an inspector by the Ministry of Commerce and if this request is not granted, shareholders have the right to petition this decision to court.[34] In Egypt, the Capital Markets Law of 1992 allows any shareholders with 5% of shares to call for an extraordinary assembly, subject to the approval of the regulator (EFSA).

Apart from these relatively isolated examples, the powers of securities regulators or other government entities to engage on behalf of shareholders appear relatively limited in the sense of supporting derivative suits for instance. Regulators can generally engage when they believe market abuse or failure to disclose the required information has occurred. From a review of available evidence, it appears that regulators' supervision and enforcement activity in listed companies is focused on disclosure practices. This is in part due to the fact that disclosure is a key priority for governance improvements targeted by regulators. Non-financial disclosure in particular remains limited, vague and not focused on presenting the company's strategy, risk management practices or remuneration policies.

A review of reports published by Arab securities regulators demonstrates the extensive use of warnings and penalties related to lacking or late disclosure. These sanctions were accompanied by the move to directly facilitate disclosure through dedicated platforms for electronic disclosure of financial statements and any announcements relative to immediate events such as Tadawulaty in Saudi Arabia, E-Gem in Turkey, and Company Announcement and News Disclosure Platform operated by NASDAQ Dubai. In

[33] To be fair, it does not vary widely from examples outside of the region where regulators do not always disclose names of specific companies which they have fined or companies/individuals under investigation. For example, the UK Financial Services Authority in the UK only publicises aggregate enforcement statistics and details of cases that result in public censure prohibition or a civil or criminal liability.

[34] The latter provision is particularly unique in the region considering that the mechanisms to petition decisions of the regulatory body are not common.

Tunisia, the securities regulator has taken the initiative to publish certain corporate disclosures on its own website to address the quality of information disseminated on public companies[35] (CMF, 2012). This focus on disclosure practices reflects to some extent the regulators' so far limited experience in investigating and prosecuting more complex governance breaches which may arise in the context of related party transactions, corporate mergers or de-listings which may require soliciting the expertise of outside valuation specialists.

This relatively lenient enforcement approach in the region, with great reliance on warnings and generally small – by international standards - financial fines is a consequence of the recent introduction of governance rules and the desire by regulators to give listed companies a period to adapt to new regulatory regimes. While this line of reasoning may be legitimate in some jurisdictions where the corporate governance code and related regulations are relatively new, some codes in the region are now a decade old and hence listed companies are aware of their requirements. Regulators also need to have the requisite experience to review the quality of disclosure against the national code. When a comply-or-explain code was introduced by the Qatar Regulatory Authority, it did not yet have the necessary expertise to monitor company disclosures relative to it.

One issue with the adoption of a comply-or-explain approach in the region is that the quality of companies' disclosure relative to the recommendations of these codes is uneven and securities regulators face challenges to force companies to take these requirements seriously. Corporate governance disclosures by listed companies sometimes remain superficial, in part because they do not disclose compliance by item. To address both the level of awareness and the willingness of companies to communicate on their governance practices, Arab securities regulators have been active in organising workshops for listed companies to promote awareness of board members' and executives' knowledge of provisions of local corporate governance codes. This process of reaching out to corporates has been facilitated by the fact that in a number of countries such as Saudi Arabia or Oman, the corporate governance unit or center is a department in the CMA.[36]

While the approach of securities regulators to corporate governance breaches by listed companies has been relatively lenient, regulators have been active in ensuring that market intermediaries operate according to the relevant rules, especially after the 2006 crash of stock markets in the Gulf. A review of enforcement decisions by securities regulators indeed demonstrates a focus on market intermediaries. For instance, in Morocco, out of 8 enforcement decisions published by the securities regulator in the past 5 years, 3 dealt with infractions in listed companies, the other 5 penalties imposed were in relation to market intermediaries. In the 3 cases dealing with listed companies, enforcement actions were motivated by companies' disclosure failures.

Review of available evidence

[35] It bears to note that in Tunisia, public companies are not required to disclose their annual reports to the wide public.

[36] For example, the Omani Center for Corporate Governance is a department in the CMA and its employees are hence under the ultimate oversight of the CEO of the Omani Capital Market Authority.

A number of trends in the region, not least greater foreign investor interest in MENA markets following the MSCI upgrade of Qatar and the UAE to the emerging market status in 2014 and the events of the Arab spring, have brought to fore shareholders' and the general public's interest in better corporate governance enforcement (Amico, 2014). The evidence to support this claim lies in the growing number of complaints to the securities regulators, especially in Tunisia and Egypt, where allegations of crony capitalism in a number of listed companies or those that had linkages to listed companies were uncovered.

In Egypt, following the disposal of the Mubarak government, the stock exchange required listed companies to make disclosures about their dealings with entities and persons under investigation to the exchange and the regulator. In 2012, the EFSA investigated over 400 complaints, which placed a significant pressure on the existing institutional structure given the limited human resources to deal with the volume of cases.[37] The securities regulator estimates to have forwarded approximately 12 cases dealing with various governance-related breaches (incorrect disclosure, breach of AGM conduct rules and prospectus requirements) to the Public Prosecutor in 2010-2014.[38] In addition, the sons of Hosni Mubarak were charged with insider trading.

In Tunisia, where investigations uncovered a wide spread abuse of public and private property by the Ben Ali family and elites associated with the regime[39], the securities regulator (Conseil de Marché Financier) has intervened to freeze shareholdings in these companies to pave the way for their confiscation. It has also facilitated the resulting restructuring of these companies. In one case, a 60% stake in Ennakl Automobiles, a listed company, was sold to a strategic investor, as a result of the CMF making a derogation for the acquirer regarding the need to conduct a takeover and hence offer to purchase shares of the remaining 40% investors. A number of other stakes in listed but also in state-owned companies were confiscated from the Ben Ali family and associates; their future is still unclear.

In addition to regulators in so-called "transition" Arab economies, the Saudi securities regulator is known to be the most vigorous in investigating listed companies: in total, 288 cases were investigated in 2012 – 20% disclosure related and 12% arising from other corporate governance breaches out of a total 800 investor complaints.[40] (Saudi CMA, 2012). In March 2014, the CMA announced penalties to be imposed on 26 listed companies for breach of certain board related provisions, each company being fined $2600 USD. The majority of governance-related breaches have resulted in warnings, fines and requirement to repair a particular breach.

[37] In Egypt, the EFSA is legally obliged to review all cases and justify to the public prosecutor why it has decided not to pursue any particular case.

[38] This includes cases up to July 2014 on which data was provided directly by the EFSA.

[39] The World Bank estimates that 220 companies owned by Mr Ben Ali relatives earned 21 per cent of all the country's private-sector profits between 1996 and 2010 (Daragahi, March 24, 2014). Refer also to the reports of the Tunisian Anti-corruption Commission.

[40] Investor complaints deal with a variety of issues beyond the listed companies sector such as issues pertaining to investment funds or IPO subscriptions.

The Dubai Financial Services Authority, has also issued a number of sanctions on insider trading, market manipulation and other matters, which are all transparently presented on its website.[41] Examples of its enforcement actions undertaken by the DFSA include an action against one of the subsidiaries of Shuaa Capital, a diversified listed financial services firm based in the UAE, for manipulation of shares in DP World, another listed company which is cross listed in London. The company was fined $850,000 and the DFSA has required the appointment of a suitable Compliance Officer for Shuaa and all of its subsidiaries. In addition, the company was forced to undertake an independent risk and compliance review by a DFSA-approved firm (DFSA, 2008).

Apart from disclosure weaknesses mentioned above, public enforcement in the area of corporate governance, has focused – in large part due to public pressure – on graft, corruption and market integrity related charges. In one of the most publicly followed cases in the region, the CEO of Oman Oil, a state-owned Omani company, was sentenced for 23 years in prison on charges related to accepting a bribe in awarding a public tender for a multi-million dollar project in Oman to a Korean company. This case was part of a larger campaign aimed at restoring integrity, especially in the public sector, in Oman, where it is estimated that 20 civil servants and businessmen were arrested last year on corruption related charges (Reuters, 2014).

Some cases which drew public attention in the region have not yet been resolved and investigations show the failures of the current governance regimes and the complexity in investigating and prosecuting such cases. For instance, in the Saad and Algosaibi affair, where the two groups defaulted on their debt obligations and saw their accounts frozen by the Saudi Central Bank (SAMA), stands unresolved since 2009. Although the details of this case are complex, the result is that today, over 100 foreign banks, including some of the most prominent global financial institutions, claim to be owed approximately $12 billion USD dollars. As the details of this case unraveled and banks in Bahrain, the UAE and elsewhere in the world stopped their dealings with the associated entities, the limits of “name lending” became exposed in the region. The role of banks, as key corporate financing source in the region, in promoting good governance practices was particularly underscored in this case.[42]

Aside from these relatively mediatised cases, there have been few sizeable enforcement cases that attracted public attention. The overall number of cases investigated varies by jurisdiction and these statistics are not easily comparable due to disclosure challenges. The difficulty of gauging the overall level of public enforcement is compounded by the fact that stock exchanges in some jurisdictions have significant enforcement powers and have de-listed a number of non-compliant companies, generally for failure to disclose on time or due to liquidity concerns (which often results in companies being taken off the main market to be traded in specific periods). [43] Hence, in order to obtain a complete picture of the enforcement activity in jurisdictions such as Egypt, a review of both EFSA and EGX activity is needed.

[41] For a review of decisions, please refer to: http://www.dfsa.ae/Pages/RegulatoryActions.aspx.

[42] For more recommendations in this area, please refer to the OECD Policy Brief Corporate Governance of Banks in the Middle East and North Africa.

[43] Refer to T*he Role of Stock Exchanges in Corporate Governance* (OECD, 2012b) for a full overview of stock exchanges’ enforcement powers.

One area that saw little public or private enforcement is suits against directors or managers, outside of large corruption cases evoked above. This is a consequence of the fact that in many countries of the region directors' duties are not defined specifically. For instance, the relevant laws rarely differentiate between the duty of care and duty of loyalty (OECD, 2011). Nonetheless, in cases of evident and serious breach of actions, the regulators have moved to investigate and sanction some companies. Perhaps the most widely spoken of example of governance-related enforcement is the case of the UAE-based international jewellery retailer, Damas, which listed on NASDAQ Dubai in 2008.

In this case, the controlling shareholders, also company founders, made unauthorised withdrawals of corporate funds for a total value over $160 million USD. The investigation conducted by the company's auditor found grave corporate governance failures: conflicts of interest at the level of the board, failure of the audit committee to meet, unauthorised use of company assets, inadequate segregation of duties and other issues. Following an extensive investigation, the DFSA proceeded to remove the board, appoint senior executive staff and force the majority shareholders to make a full disclosure of assets. The investigation of the case was complicated by a number of considerations notably the fact that DFSA does not have criminal jurisdiction, that all assets of persons under investigation lied outside the DSFA jurisdiction and that some property was fully protected from proceedings. This investigation uncovered serious corporate governance failures and the controlling shareholder was fined $700,000 USD (of which $600,000 USD was suspended indefinitely).

Another case that received significant public attention and went to court was the board dispute of Zain, a Kuwait-based telecommunications company. In this particular case, there were allegations of breach of duties by some Zain's board members in the context of a potential sale of Zain assets. The dispute arose in the context of Etisalat's bid to purchase 46% of Zain's assets, which was conditioned on a sale of Zain's Saudi subsidiary. One board member of Zain disputed the sale on the basis that Zain would not obtain fair value for the Saudi subsidiary as long as it was a condition for the deal with Etisalat, an Emirati telecommunications company. The lawsuit filed by the board member accused Zain of unfair selection of members to the board of directors in April 2011. In October, five of Zain's board members including the Chairman appealed the court's decision that annulled the board and all its decisions.

In April 2013, three years after the dispute started, the suing board member was voted off the board and replaced by another significant shareholder, who was behind the original proposal to sell a stake in Zain to Etisalat, an offer which was eventually withdrawn by the UAE's telecom operator in March 2011. The court of cassation - the highest court in Kuwait - ruled that no breaches in appointment of directors were made, dismissing the allegations of the shareholder who filed the claim in courts. In this interesting example of a board dispute, board members of the company sought to sue the firm for alleged governance breaches without involving the regulator.

Aside from these isolated examples, there has been little evidence of private enforcement in the region either against executives, board members or other shareholders. There is currently little evidence of cases where investors were able to put pressure on management by divesting their stakes, tabling opposing proposals or initiating proxy fights as it now common in Europe, North America and to a lesser extent Latin America and Asia. Private enforcement in the region is virtually non-existent for a number of

reasons, including the lack of a litigation culture, and the emerging understanding by investors of laws and regulations empowering them to litigate breach of director duties.

Experts privy to board discussions point to the fact that these matters are sometimes addressed away from the public eye without recourse to the regulator, other shareholders or the courts. In order to facilitate a more structured dialogue between corporates and their investors, there has been a move by a number of large corporates to establish an investor relations function. The Emirates Securities and Commodities Authority, the UAE's securities regulator, has this year decided to make it compulsory for local listed companies to have an investor relations department. However, the establishment of the investor relations function has in some instances not been accompanied by a fundamental shift in mentality of the management and boards to engage with their shareholders. This goes to some extent against the global trends. In the United States for example, it is estimated that about half of the engagements are facilitated by the investor relations function, and much less directly with the CFO, CEO or legal council (Goldstein, 2014).

To a large extent, this is due to the fact that large shareholders who control MENA private and listed firms already make their views known without having to utilise such channels, whereas minority shareholders are aware of the limits of engagement. Another, less direct channel of shareholder influence on governance practices is for them to invest in companies with a high governance standard. Although a number of large institutional investors globally have started to pay significant attention to governance of their investee companies either through developing internal monitoring capacity or by recruiting the help of proxy advisors, this trend has so far not taken hold in the region, in part due to lagging awareness, but also due to inadequate capacity and instruments for engagement.

One notable initiative designed to provide an investable index of companies screened for their governance, environmental and social practices is the S&P-Hawkamah ESG Index which tracks the performance of regional listed companies against over 200 indicators in 11 markets of the Middle East and North Africa. The index, comprising 50 companies, has outperformed the market in each of the years from 2009. (Hawkamah, 2013)[44] Although drawing causation from governance to performance is empirically challenging, it is plausible to suggest that going forward, investors in the region may be willing to pay a premium for well-governed companies.

[44] As compared with the performance of the S&P Pan Arab Composite Index.

Priorities for reform

Against this gradual move by shareholders and regulators to engage with listed companies, a number of recommendations can be made to facilitate private and public enforcement of corporate governance rules in the MENA region. These recommendations bear principally on further refining the relevant rules and regulations especially on key issues such as director responsibilities and liability, related party transactions, insider trading, as well as on the instruments available to and the capacity of regulators and investors to bring about legal action.

Capacity of regulators

As aluded to elsewhere, the enforcement capacity of securities regulators requires further development in most countries of the region, owing to their relatively recent establishment and lack of precedent or experience which may be leveraged to identify and prosecute new cases. Bilateral and regional training programmes and staff secondments to jurisdictions with greater enforcement experience would be useful in this regard and are already facilitated by some regional organisations such as the Union of Arab Securities Authorities and the regulator's committee of the GCC Secretariat. In addition, exchange of experience with the central banks, which in all countries of the region have a longer experience in corporate governance oversight and enforcement may be useful.

In parallel, the laws that outline the responsibilities of regional CMAs and their budgetary structure might benefit from further review in order to specifically define the powers of CMAs, the conditions and the type of infractions for which these powers may be used. Alternatively, the CMAs of the region could issue secondary regulations further outlining their rights in case of corporate governance infractions. This would give issuers a better understanding of the scope of potential penalties, while at the same time allowing CMAs to better combat any breaches. A few regulators in the region such as for example the DFSA have already issued an Enforcement Module as part of its overall regulatory regime, which outlines its enforcement powers and policies.[45]

In addition to supervision or enforcement departments within the CMAs, high-level disciplinary committees should be established to review and decide on important and potentially visible cases. Such structures are already in place in a number of jurisdictions or planned to be established. As mentioned, the DIFC Courts and the Financial Markets Tribunal which reviews enforcement decisions by DFSA in case of appeals, are already quite active. In Lebanon, the Capital Market Law previews the establishment of both a Financial Court and a Sanctions Committee as part of the securities regulator.[46] These structures, if

[45] Refer to DFSA Enforcement Module: www.complinet.com/file_store/pdf/rulebooks/DFSA_ENF_VER1.pdf

[46] The Sanction Committee is by law to be composed of a senior judge, a lawyer, and other financial and economics experts to be appointed by a decree upon proposal by the Ministers of Finance and Justice, contingent on the prior approval of the High Judicial Council concerning the appointment of the Chairman. No individual can fill simultaneously a Chairman or member position in both the Board and Sanction Committee. They are appointed for a five year term, renewable once.

properly constituted, could address the legal void created by the lack of specialised financial expertise in the court systems of most Arab countries.[47]

It would be important to endow such structures with the requisite powers of discovery such as for instance, the right to subpoena the relevant documents from listed companies and market intermediaries. A better definition and perhaps greater powers to regional CMAs or relevant regulatory entities to enforce any governance and integrity related abuses may be also necessary as a transition step until better capacity to adjudicate specialised financial law suits is developed in the region within the local courts system.[48] It is understood that some regulators in the region (e.g. DFSA) are currently reviewing the scope of their regulatory regime with a view to strengthen their supervisory and enforcement authority.[49]

An additional complication is that the length of litigation in the region is extremely long by international standards. In fact, the Zain case, which was treated in the courts of Kuwait – is a unique example of board dispute in the region since it was addressed through the formal legal process, whereas most others are resolved through negotiations or arbitration between major shareholders, board members of investors.[50] The fact that this particular case was treated in Kuwaiti courts, is not only a reflection of the fact that Zain is a Kuwaiti company, but also the fact that the courts in Kuwait, are considered to be relatively independent.

Generally speaking, the lengthiness of court proceedings is still a wide-known challenge in the region: resolving a commercial dispute through the courts takes 651 days on average —longer than in any other region except Latin America and the Caribbean and South Asia (World Bank and IFC, 2012). In part to address lengthy court proceedings, lagging financial expertise and independence concerns within the domestic court system, the financial centers in Qatar and Dubai established parallel court systems for adjudicating disputes for companies domiciled in their jurisdictions (QFC Civil and Commercial Court and DIFC Courts, respectively). In addition, the DFSA, which has an enforcement division within its overall structure, has also established a Financial Markets Tribunal which is has powers equivalent to other integrated financial services regulatory tribunals and is independent of the DFSA. [51]

[47] The result of this is that most corporate governance and even more broadly, securities legislation/regulation infringements, is not addressed in courts, which, to be sure, might have a positive externality of avoiding costly shareholder suits but may also be an indication of weaknesses in shareholder protection regimes in the region.

[48] Financial expertise that shareholder or regulator-driven legal action may require in dealing with complex related party transactions or mergers and acquisitions is still generally not available within the courts in Arab countries.

[49] Some of the new DFSA regime proposals include for instance, including a general prohibition against misconduct in relation to the carrying on of financial services and to financial products and increasing the scope of DFSA Surveillance to oversee all companies within a given group, not only the parent company. For more information on the proposed changes, refer to DFSA Consultation Paper No. 94, 6 March 2014.

[50] The Dubai Chamber of Commerce houses the Dubai International Arbitration Centre which aims to provide the regional and international business community a local alternative to international arbitrational centers.

[51] Decisions on proceedings of the FMT may be appealed in DIFC Courts. Decisions of the FMT on appeals of Exchange decisions may be appealed to the DIFC Court on a point of law only.

Other jurisdictions, where the independence and financial expertise of judges can be questioned are following the steps of these financial centers. The Egyptian Ministry of Justice established specialised economic courts in 2008 with a mandate to deal with a range of capital market related offences. In Lebanon, the Capital Markets Law adopted by the government in 2012, provides for the establishment of a specialised financial affairs court.[52] All over the region, the establishment of specialised courts remains a priority and one of which policymakers in the region are aware of, although where tangible progress has been difficult to materialise.

The capacity of CMAs to enforce governance related rules is important not only due to the limitations of the judiciary, but also because of the trends affecting the stock exchanges in the region, notably their possible transition to private ownership. The vast majority of stock exchanges in the region were established as government-owned institutions and have retained their governmental character over the years, unlike their counterparts in North America and Europe which have transitioned to private ownership and, in many cases, even to self-listing.[53] While privatisation and demutualisation of exchanges is at very early stages in the region, and only in a few countries such as Morocco and Kuwait[54], it is of growing interest across the region.[55]

While the concerns and opportunities presented by the privatisation of exchanges are beyond the scope of this paper[56], international experience with stock exchange privatisation points to the need to transfer regulatory responsibilities from stock exchanges run as private, for profit companies in order to limit conflicts of interest. The capacity of regulators to investigate and enforce governance breaches will be all the more important in this new regulatory configuration. The transparency of their enforcement activities are equally important and a number of good examples in this regard are emerging in the region (e.g. DFSA which posts its enforcement decisions on its website, along with the rationale and details of investigation conducted).

In order to lay effective ground for further enforcement activity by the securities regulators, a better understanding of compliance with existing provisions is required to identify weaknesses in current practices as well as areas of high risk where surveillance and enforcement activity should be concentrated. An evaluation of the rate of compliance with existing corporate governance codes is necessary to understand broader gaps in its application. This evaluation is important not necessarily to

[52] To date, no steps have been taken however to establish such a court.

[53] With the exception of the Palestine Stock Exchange which was established as a private shareholding company, as well as exchanges of Tunisia and Morocco which are mutually owned.

[54] Other countries such as Egypt and Oman have also manifested their interest in transitioning to greater private ownership in order to increase their strategic flexibility and to attract additional capital to the bourses, but these discussions remain for the moment theoretical.

[55] As witnessed in the OECD roundtable with regional stock exchanges held in December 2013 in Muscat, Oman and other fora such as meetings of the Arab Federation of Exchanges where heads of Arab stock exchanges regularly meet.

[56] For an in-depth exploration of this issue and its implications for MENA stock exchanges, please refer to OECD (2014) Privatisation and Demutualisation of MENA Stock Exchanges : To Be or Not to Be ?

move to a more prescriptive regime, but as a general basis of understanding of aspects of the governance framework that continue to pose a challenge for companies.

A perhaps more challenging task would be a qualitative evaluation of the informative value of the disclosures published by companies relative to their governance codes, which remains a challenge globally. For example, a study by the European Commission of its member countries found that only 39% of explanations provided by listed companies relative to the domestic comply-or-explain corporate governance code were sufficiently informative (EU, 2009). Based on this review, local CMAs might contemplate other measures that might be required to ensure the effectiveness of local codes such as for example, audit of the disclosure provided by external auditors (i.e. content of the disclosure, not its mere presence) or the introduction of some mandatory provisions.

Related party transactions

The treatment of related party transactions (RPTs) is a relatively new subject to the corporate law and securities framework in the MENA region. Although a few countries use the International Accounting Standard 24 definition of related parties, some countries such as Iraq and Tunisia use local accounting standards. The definition of related parties in local laws and regulations often remains vague and the relevant laws and regulations rarely establish thresholds beyond which RPTs necessitate special approvals from the company's board or its shareholders. Shareholder approval of RPTs is more common than board approval and this carries certain risks considering the concentrated ownership structure in the region and the lack of provisions requiring the involvement of minority shareholders. Likewise, where board approval of RPTs is required, few countries have mandated the involvement of independent directors in their approval. Disclosure of related party transactions remains weak, especially to the public.

Some countries in the region have moved to further specify and tighten the definition of who is considered to be a related party, even for unlisted companies. The recent revision of the Company's Law in Kuwait included a further specifications and approvals around RPTs, requiring board members to seek CMA approval before entering into RPTs (regardless of the size of the transaction), in addition to the requirement that RPTs shall be approved by the AGM. The Law also places some limitations on the types of allowed RPTs, effectively banning loans to board members and the CEO. This is a unique provision in the region where such transactions are generally not prohibited. The Kuwaiti legal regime appears relatively unique in involving the security regulator in approval of RPTs whereas the majority of Arab countries require the approval of the board or the audit committee.[57] On the other hand, the majority of Arab countries require the review of RPTs by the external auditor before they are submitted to the AGM.

Most countries in the region require the board to develop a conflict of interest policy, including in relation to RPTs. A number of jurisdictions have recently moved to put pressure on board members to disclose if they have any conflicts of interests and to abstain from voting in circumstances where board members are conflicted. For instance, the Saudi CMA does not allow board members of listed companies to have any interest in company's business and contracts, except with prior approval from the General Assembly

[57] In Jordan also, the Companies Control Department of the Ministry of Industry and trade reviews RPTs before they are approved.

which must be renewed annually. Furthermore, the Chairman is required to notify the General Assembly of any activities and contracts in respect of which any board member may have a personal interest (and must attach to such notification a special report prepared by the company's auditor). This is in effect similar to the US approach which requires registered companies to disclose at least annually any transactions by the issuer involving the sum of $120,000 USD or more with any director, executive officer or holder of 5% or more of shares.[58]

A recent joint project by the OECD and the Union of Arab Securities Authorities which surveyed all securities regulators in the region on RPT frameworks and practices revealed once again a low record of formal enforcement proceedings related to RPTs which is explained by difficulties faced by the regulators in detecting these transactions and identifying their beneficial owner. The difficulty of treating these cases in courts – in large part due to lack of financial training of judges - compounds the challenge faced by the securities regulators in successfully prosecuting those engaged in illicit RPTs. To address weaknesses in the courts system, a number of countries have moved to endow the securities regulators with powers to directly repair any damages associated with illegitimate related party transactions by cancelling them (OECD and UASA, 2014).

Further review of existing definitions of related parties is necessary, as is the approval mechanisms for RPTs, which should be defined by specific materiality requirements and other characteristics such as whether a given transaction is recurrent. The requirement that persons who are identified as related parties must abstain from voting in the board meetings or participating in AGMs where a given RPT is reviewed, reinforced by provisions to ensure explicit minority shareholder approval of these RPTs would be beneficial to lower the risk of tunnelling by controlling shareholders. International experience in curbing illegitimate RPTs should be taken into account, such as for instance, the requirement recently proposed in the EU member countries that independent third-party valuations would be required for those involving 1% of a company's assets and that shareholders would vote on those involving more than 5%.

Insider trading and market manipulation

Capital market participants and experts in the region evoke irregular share price movements prior to major announcements which point to the fact that instances of insider trading and market manipulation continue to be common, especially in GCC markets. Although a few enforcement cases against market manipulation were already mentioned in this paper (e.g. DFSA regulatory action against Shuaa), these cases are often not investigated and not enforced in the region (OECD-ISS webcast, 2014). This situation prevails despite the introduction of formal regulations criminalising insider dealing activity, the latest of which was introduced in Lebanon in 2012. Some limited evidence of a crackdown on insider trading is starting to emerge, although most of it remains unreported in the media or by the regulators.

For instance, in a high profile case, a Kuwaiti court has fined the Chairman of a large local bank over $5 million USD for bank trading in its own shares and manipulating the share price (Arabian Business, 3

[58] In addition, the Securities and Exchange Commission (SEC) requires that the issuer disseminate to all investors detailed information about the transaction including purpose, alternatives and fairness of stockholders.

March, 2014). This follows a revision of the Companies Law in Kuwait preventing the CEO or board members to trade on inside information. Other cases, which are not necessarily insider trading cases per se, demonstrate the opaque disclosure of dealing in company shares by key executives. In a recent case, as the share price of Arabtec, an Emirati construction company listed on the Dubai Financial Market, plunged by 50%, the company suddenly revealed that its CEO amassed a 25% stake in it[59] (Zawya, June 18, 2014). Details around this case remain unclear and the CEO has recently resigned.

A number of enforcement actions have also taken place in Saudi Arabia, where the CMA has taken an active stance against insider trading since the 2006 market crash, which led to enormous stock market losses and responsibility placed on the regulator and the exchange for failing to prevent them. It is estimated that from 2006 to 2009, about 400 cases of suspected market manipulation were investigated by the Saudi CMA, which resulted in some administrative penalties and - for the first time - a prison sentence for one of the offenders in 2009 (Allam, A. and A. England, 2009). In addition, the CMA closed hundreds of websites that were spreading misleading information and market rumours (FT, August 18, 2009). This pace of insider trading violations has slowed down in recent years, perhaps as a result of an earlier crackdown: in 2013, only one case related to insider trading was investigated and raised to the attention of the Committee for the Resolution of Securities Disputes (CMA, 2013).

Apart from Saudi Arabia, Kuwait and the UAE (DFSA), the majority of other securities regulators in the region do not report to have undertaken any enforcement in market manipulation cases.[60] A number of factors can be advanced to explain this, notably the difficulties of identifying beneficiary owners of shares, recent emergence of regulations defining insiders and regulating their trading activity. More generally, the fact that in a number of MENA countries, board members hold significant stakes in listed companies, increases the potential of insider dealing, either directly or through third parties (i.e. “tipees”). In addition, there is a lack of regulations that would require the simultaneous disclosure of information to investors (equivalent to Regulation FD in the United States[61]).

Greater collaboration between stock exchanges and securities regulators on insider trading and market manipulation is required as investigations typically arise from evidence on suspicious price movements witnessed by the exchange surveillance staff. The formal collaboration between the Saudi Stock Exchange (Tadawul) and the Saudi CMA in this regard is useful as part of their overall Memorandum of Understanding, as are less formal arrangements in other jurisdictions.[62] Such arrangements are particularly useful in the region considering that a number of stock exchanges do not necessarily have SRO powers to investigate such cases and act on them. At the same time, in most MENA markets, stock

[59] His share in the company is reported to have jumped from 8% a few months earlier to 28% in June 2014.

[60] Ongoing investigations or those where evidence was found to be inconclusive are not disclosed publicly due to possible unjustified reputational damages.

[61] Regulation FD provides that when an issuer, or person acting on its behalf, discloses material nonpublic information to certain enumerated persons (in general, securities market professionals and holders of the issuer's securities who may well trade on the basis of the information), it must make public disclosure of that information.

[62] For example, the regulators in Qatar (QFMA, QFCRA, and the CB) have common leadership. Same is the case in Dubai, where there is an overlap in key leadership posts between the DIFC, NASDAQ Dubai and DFM.

exchanges can, through NASDAQ and Euronext acquired technology platforms, detect suspicious price movements, thus providing the necessary information for exchanges and securities regulators to conduct investigations.

Securities regulators and stock exchanges in the region often have the right to stop trading activity in a particular stock and this power is used in practice in most markets. For instance, the EGX can refer any insider trading and market manipulation cases to the EFSA, the securities regulator in Egypt, which has the authority to conduct on-site inspections and refer cases to specialised economic courts. The latter can issue fines of up to 20 million Egyptian pounds (approximately $2.8 million USD). In addition, the Exchange's Surveillance Department can cancel executed trades in a number of defined cases such as placing orders to give a misleading picture of the liquidity or price of a certain instrument.

In addition, in instances where evidence is not conclusive, as in the recent case of investigation into the trading in the shares of the Gulf Finance House, the regulator has placed the company under surveillance (Al Sayegh, 2014). In a number of other instances, the trading of a particular stock has been suspended temporarily, but rarely has this been followed by a formal investigation or compensation of shareholders who might have suffered a prejudice. The central securities depositories (CSDs) in the region do have investor compensation funds, but those are generally aimed at compensating investors in case of problems related to trading activity, not market abuse instances.

In principle, insider trading in most countries of the region carries both administrative and criminal penalties. For instance, in Tunisia and the UAE, insider trading can be punished by up to 3 years imprisonment, in addition to fines. In most countries, criminal liability for insider trading does not exceed 5 years, which again is relatively lenient by international standards, depending naturally on the nature of the abuse and the damages arising from it. By way of contrast, a review of insider trading cases in the United States demonstrates a rigorous level of enforcement and heavy fines and criminal charges in cases investigated and prosecuted by the Securities and Exchange Commission.[63]

Improvements in the enforcement of insider trading cases can be made by facilitating linkages between market surveillance and enforcement functions in regional stock exchanges and CMAs, further guidance in corporate governance codes and in securities regulations on the use of privileged information, forcing insiders to declare to the regulators companies in which they exercise influence in major corporate decisions, disclosure of share ownership by senior executives, board members and related parties and last but not least, more precise definition of who constitutes and insider (as well as expanding the regime to "tipees").

Director duties and responsibilities

The third area where review and reform could facilitate private and public enforcement in the region is related to the definition of director duties and responsibilities. At the present time, director duties and responsibilities, notably fiduciary duty and duty of loyalty, are not well described in the body of corporate

[63] Refer to https://www.sec.gov/spotlight/insidertrading/cases.shtml for a review of insider trading investigations undertaken by SEC.

law or codes in the region. While board members are generally asked to act in the best interests of the company, few norms and regulations delve in detail, by requiring board members to act in the interest of the whole company, and not just its majority shareholders. Such requirement would also be difficult to enforce in the region considering that shareholders often also serve as board members.[64]

Unlike in jurisdictions with dispersed ownership such as the UK or Australia, where the root of the corporate governance dilemma lies in the principal-agent problem, in the MENA region, directors often represent the interests of controlling shareholders and hence have a very direct stake in monitoring the management. This is the case equally in privately held companies, in listed firms and in state-owned companies, where boards tend to reflect the interests of the state or more specifically, the ownership ministry, which often does not leave boards to operate on an arm's length basis as recommended by the OECD Guidelines on Corporate Governance of SOEs (OECD, 2012b). OECD's research on governance practices in regional SOEs demonstrates that in the majority of companies, government-appointed board members are not selected through a structured nomination process and may receive instructions on the day-to-day operation of the company.[65]

The obligation that board members are required to act in the best interests of the company would naturally be easier to enforce for non-executive, independent directors who – at least in principle – are not nominated by any particular shareholder. However, even in cases where independent directors are nominated by the board to improve its performance, there remains a risk that the selected candidates are not entirely independent if they are nominated by executives serving as directors or by directors representing majority shareholders. Recent surveys of independence of boards demonstrate some progress made in this regard, in part as a result of greater awareness of family owned companies of the need to bring in independent expertise, in part as a result of growing requirements by the securities regulators to improve board independence.

Available surveys of boards in the region demonstrate a general consensus that a third of the board should be independent and that at least some members should have an international profile. For instance, in Saudi Arabia and Oman, one third of the board is required to be independent by virtue of the corporate governance code. In Oman but also in the UAE[66], half of the board members are also required to be non-executive directors.[67] A recent review of the 50 best-governed listed companies part of the Hawkamah S&P Index, demonstrates a level of independence in the boards of leading regional companies comparable with international good practices, with 49% of the board members considered independent (Hawkamah Institute, 2013).

[64] In fact, a number of countries require board members to hold at least one share in the company to be nominated.

[65] This issue is especially acute in situations where the regulatory and ownership functions have not been separated. For instance, the UAE's Roads and Transports Authority acts both the regulator and the owner of SOEs. While regulatory and ownership functions have been separated in sectors such as telecom, other sectors such as petrochemicals have not yet seen a separation of these two functions in the region.

[66] These provisions are included the corporate governance requirements of ESCA, however DFSA regime requires at least one third of the board to be non-executive of which at least two directors shall be independent.

[67] Refer to, for instance, GCC BDI 2013 Board Effectiveness Report.

These figures are not representative of the region as they reflect standards of the top 50 listed companies and the definition of independence applied by some companies is quite liberal and requires further consideration. For instance, the European Union's 2005 recommendation of independence reads as following: board member is free of any business, family or other relationship, with the company, its controlling shareholder or the management of either, that creates a conflict of interest such as to impair his judgement. In OECD member countries, majority board independence is considered the prevalent standard[68] and most jurisdictions require that all or a certain number of independent directors shall be independent of substantial shareholders (*e.g.* shareholders with more than 10% shareholding). The latter requirement would also be important to transpose in the corporate codes of the region.

A number of other issues complicate the effective exercise of duties by board members, notably the low frequency and attendance of board meetings, sometimes taking place only on a quarterly basis, as it required by local rules and regulations. Recent research demonstrates that on average 6.7 board meetings per year are held in the region's leading listed companies but that only 11 percent of boards had full attendance at more 75 percent of the meetings, and only 2 percent of boards had full attendance at more 90 percent of the meetings (Hawkamah, 2013). While some companies such as Du (an Emirati telecom company) are starting to disclose the attendance rates of board and its committees, this remains very much an emerging practice in the region.

Recent research demonstrates that effective boards spend about 40 hours per annum on the exercise of their board duties (Mckinsey, 2014) and while exact statistics for the region on this do not exist on this point, experience suggests that on average less time is dedicated to board duties by directors in the region. This is in part related to the fact that the pool of qualified directors is relatively small[69] and the related fact that directors often serve on multiple boards.[70] In order to ensure that directors exercise their duties with diligence, a number of jurisdictions such as Morocco, Oman and Kuwait have moved to limit the number of concurrent appointments of board members.[71]

Another issue in the region is that regular re-election of board members can be avoided by virtue of company articles of association or through informal re-appointment on existing board members, which, coupled with the fact that board evaluations are not mandated, results in boards where turnover is very low (except for Saudi Arabia where it is required every 3 years). The average tenure of a board member in

[68] The typical criteria of independence is a combination of: 1) not to be a member, or an immediate family member of a member, or of the management of the company; 2) not to be an employee of the company or a company in the group; 3) not to receive compensation from the company or its group other than directorship fees; 4) not to have material business relations with the company or its group; 5) not to have been an employee of the external auditor of the company or of a company in the group; 6) not to exceed the maximum tenure as a board member; and 7) not to be or represent a significant shareholder (IOSCO, 2007).

[69] This is especially the case in GCC countries where independence criteria are difficult to fulfil by virtue of close tribal links.

[70] This was for example the case of a number of prominent experts of Islamic finance, whose enterprise to approve financial instruments resulted in them sitting on more than 50 boards concurrently.

[71] In both cases, the number of concurrent board appointments is limited to 5: in Morocco by virtue of the corporate governance code and in Kuwait by virtue of the updated Companies Law.

the region is higher than the international standards would suggest, however staggered boards are becoming increasingly rare and cumulative voting increasingly common. Further measures such as the election of an independent director by minority shareholders as is practiced in Italy or allowing shareholder nominated candidates to compete with candidates put forth by the board, as well as periodic reviews of board performance would be beneficial to reach a healthy level of turnover in the region's boards.[72]

As a result of the lack of precision in the definition of board members' duties, the liability of board members has proven challenging to define and hence to enforce. The evidence of this can be seen in much lower rates of director insurance taken out in the region than in developed markets. Some moves have been made recently to further define the responsibility of board members, both individual and joint, as in the case of Kuwait, where both the company and its shareholders can file a lawsuit against board members, the latter able to also file personal or derivative suits. However, apart from the Zain case evoked earlier, there are few precedents of suits against MENA boards or individual members thereof and it is not clear that legal liability acts as much of a consideration in the decision-making processes on MENA boards.

Finally, few codes or regulations in the region address the issue of governance in company groups or holding companies which represent a common organisational form in the region as well as in other markets. One study of 1433 firms from 18 emerging market economies found that two thirds of insider controlled firms belong to control pyramids and insider voting rights are 2.7 times their cash flow rights (Lins, 2003). While group companies and pyramids represent a perfectly legitimate organisational form, a number of governance issues are commonly associated with them, including higher agency costs, managerial entrenchment, political lobby against desirable reforms, (Kirkpatrick, 2012).

The definition of director duties in the context of company groups is particularly important. This issue gains especial importance in the context of approval and disclosure of intra-group and related party transactions which –if not properly overseen, could present a risk of tunnelling to minority shareholders (UASA and OECD, 2014). In particular, duties should be defined in such a way as to be owed directly to the company and not its parent/holding company, whose interests might be different. Even beyond director duties, the corporate law should seek to address governance issues arising in the context of company groups as it is already done in some jurisdictions such as Germany which has introduced specific legal provisions on their structure and governance practices.

Shareholder activism

The concentrated ownership framework, the legal and social traditions in the region, and the limited nature of foreign ownership in some counties of the region has made shareholder engagement a rare occurrence in the Middle East. This low incidence of shareholder engagement is at odds with global trends where both investors on the one hand, and boards and management on the other, are entering in a more active dialogue on a variety of issues ranging from remuneration, social and environmental issues,

[72] Based on a review of 200 largest listed companies in the region, the Hawkamah Institute estimates that only 13 percent of companies conduct board evaluations (Hawkamah Institute, 2013).

board composition, as well as operations and strategy related matters (Amico, 2014). In the United States, despite the historical challenges related to tabling shareholder sponsored proposals, the recent overhaul of governance rules under Dodd Frank has facilitated a further rise in engagement. Nearly half the issuers and more than half of the investors surveyed for a recent study report to have initiated engagements (Goldstein, 2014).

In principle, legal frameworks in the region generally provide shareholders with all the standard rights they are entitled to such as the right to participate in AGMs, table items for discussion in AGM, and to propose board members (OECD, 2011). In practice, however, shareholder powers are limited in both listed and unlisted firms, essentially due to the controlled nature of companies, either by the founding shareholder, the state or another strategic blockholder. Even the largest, most liquid companies in the region have a clear controlling shareholder, and their identity may not be clear in terms of underlying beneficial ownership.[73] This particular gap is essential to address in order to allow for effective enforcement.

In countries with similarly concentrated ownership structures, additional mechanisms have been introduced to empower minority shareholders such as the minority director system or a system of derivative suits supported by the securities regulator. Other measures, such as cumulative voting for directors (as opposed to the election of a slate), already recommended in a number of countries such as Saudi Arabia, might also be useful to promote effective participation of board election by minority directors.[74] On the other hand, the longstanding practice in the region that directors ought to also be shareholders in the company, might be detrimental.

Other measures that might support greater engagement by investors are derivative and class action suits, which are currently permitted in some, but not all, countries of the region. In a derivative action, a major disincentive for shareholders is that the recoveries go to the company and only to pro rata to the individual shareholder. Nonetheless, derivative actions may develop the region's markets and improve the levels of shareholder protection. While it may be argued that derivative and class action suits are inconsistent with the legal and cultural traditions of the countries of the region, one recent research of 25 legal systems found that they have been integrated in the legislation of countries with diverse legal traditions such as the US and Japan (Siems, Van Uytsel and Wrba, 2012).

More generally, better quality dialogue between investors and securities regulators, already seen in some countries of the region, notably in Tunisia, Saudi Arabia and Egypt, should be supportive of further shareholder engagement. In this regard the possibility of the regulator to support derivative or class action suits and to further investigate investor complaints are ultimately important for the evolution of their enforcement capacities. For instance, in Egypt, shareholders can submit a complaint to the capital markets regulator which has the power to suspend the resolutions of any AGM that might have treated

[73] Data providers such as Factset or Bloomberg often label holdings by specific government entities under a general government label and the identity of some large private shareholders is also not always revealed.

[74] The ISS recommended against 83% of 112 director nomination proposals in MENA companies in 2013 due to concerns of directors being nominated as a slate and to the lack of timely information presented to the shareholders on the selected candidates (ISS, 2014).

any given shareholder or group of shareholders unfairly. The ability of the regulators to overturn such decisions and repair injustices inflicted on an investor or on a group of investors through insider trading, tunnelling by majority shareholders or other means remain important.

These powers of regulators will be of particular importance as the region continues to attract greater foreign investment, which is expected at least in some jurisdictions such as the UAE and Qatar. It is plausible to suggest that once greater foreign institutional capital enters the region, the level of engagement may improve as foreign investors "import" their engagement practices in other markets into the region. Whereas local investors might continue to be reluctant to engage for fear of entering into a proxy fight with powerful shareholders and board members, many of which are linked to large merchant families or the state, foreign shareholders might be less afraid to question the status quo, on a number of issues such as board composition and disclosure practices in particular.

The debate on the value of engagement by institutional investors is ongoing: certain regulators, market participants and executives have expressed concerns about the tactics used by some institutional investors, notably hedge and private equity funds (Lipton, 2014). Others have claimed that these concerns are unfounded (Bebchuck et al, 2014; Brav et al, 2008) and instead sound the alarm around the tactics used by companies to protect or, as some suggest, entrench management through instruments such as poison pills. It is not the objective of this paper to contribute to this debate. Clearly, the risks associated with specific potentially value destroying, short-termist tactics would have to be addressed by the regulators if such concerns arise.

However, given the low level of dialogue between key investors in capital markets and their investee companies in the region, the impact of greater engagement by foreign and local investors is likely to be positive as it would allow them to exercise a number of hereto largely unused minority shareholder rights and further diversify boards in the region. For the moment, foreign institutional investors in the region tend to take minority stakes for a number of reasons, including restrictions on portfolio investment, portfolio diversification or risk management objectives. Overall, the impact of foreign ownership on MENA corporate performance for the moment appears insignificant (Zeitun, 2014), but as the levels of investment rise and the composition of foreign investors shift, this finding may need to be revisited.

Going forward, institutional investors will have an important role to play in promoting a constructive dialogue on the quality of governance practices in the region. Domestic institutional investors such as pension and sovereign funds are reported to act as passive investors with a long term buy and hold strategy, whose impact on their investee companies has so far been minimal, despite their sometimes significant ownership of the market capitalisation in local markets. In Oman for instance, local social security and pension funds are reported to own close to 20% of the total market capitalisation of the Muscat Securities Market (Muhanna, 2013). Although up to date figures are not available, sovereign wealth funds in the Gulf countries were estimated to have ownership stakes in over 130 listed companies a few years ago, accounting to close to 30% of total market capitalisation in GCC (Markaz, 2008). This figure has likely increased in recent years.

While investor engagement guidelines such as the UK Stewardship Code and similar codes that have proliferated in other countries in recent years may be premature for the region at this stage, a number of

measures can be contemplated to provide incentives to large investors to better exercise their voting rights. A requirement for certain categories of government investors such as pension and insurance funds to introduce a voting policy and to exercise their voting rights could be an important step to greater shareholder engagement in the region and possibly a precursor to greater engagement by large private investors such as family offices. This is currently not required in the region whereas it is a common obligation in other countries.[75] Such policy measures would be consistent with international experience which indicates that free float investor participation at general meetings is higher in countries where investors have a duty to report on their engagement and voting policy (EU, 2009).

Although formally, investor relations departments have been established, it is perhaps too early to say that they act as a conduit of meaningful dialogue between management and investors. Investors and board members often note that information on company strategy can at times be difficult to access and that the "burden of proof", at least at the outset, is on investors to demonstrate that their proposals are indeed value-adding (OECD, 2013a). The heavy burden of proof placed on investors wishing to block related party transactions they view as illegitimate was for instance, highlight as a key obstacle to effective private enforcement of RPTs (OECD and UASA, 2014). Better access to information by investors is still needed and might be helped by the introduction of broader access to information legislation absent in most countries of the region.

In the meantime, requirements placed on institutional investors to actively participate in AGMs of their investee companies, combined with incentives that may make their participation more rewarding, would go a long way to improve the quality of corporate governance arrangements in the region, making governance market-driven as opposed to regulator-imposed. The latter is especially important if companies perceive that they would be able to access a market premium for their governance practices, one of the objectives behind the establishment of the Hawkamah/S&P ESG Pan-Arab Index and similar indices at the level of individual MENA exchanges (e.g. Egypt).

Better coordination between large investors, initiated by the OECD in the form of the MENA Investor Council, based on international models of investor coordination such as International Corporate Governance Network (a global institutional investor forum) or the Council of Institutional Investors in the US or the Investment Managers Association in the United Kingdom, is important for the emergence of more effective investor engagement in the region. Investors in the region, whether local or foreign, could explore and leverage successful models of institutional investor coordination existing in other jurisdictions, including in the Netherlands (Eumedion), Australia (ACSI) or Switzerland (Ethos) to spread monitoring and engagement costs and to amplify their voice.

In the short term, shareholder-driven enforcement is not likely to become a quick solution to shareholder rights' abuses and governance change at the company level will still predominantly take the form of discreet changes in the boardroom and executive suites as opposed to public proxy fights. However, a growing expectation of fairness of the capital market as a mechanism of wealth redistribution will exert pressure on regulators to demonstrate an active and even-handed approach. It is plausible to suggest

[75] For example, in Chile, the sectoral regulator (i.e. the Pension Superintendence) can request information related to funds' position on issues such as board elections.

that with the internationalisation of investment in MENA capital markets and the growing entry of sophisticated international portfolio managers, the securities regulators in the region will have stand ready to pro-actively address governance breaches before their potential consequences spill out in the public domain.

Concluding thoughts

The call for a fairer, more egalitarian economic system has sounded in recent years in a remarkably consistent way across the word: from Wall Street to the streets of Cairo, and from Hyde Park all the way to Riyadh. Although the role of capital markets and the banking sector has been under consistent spotlight in the public debate in Western markets, the focus in the MENA region has been on the role of the state as an actor of wealth re-distribution through subsidies, services provided by state-owned enterprises, and public sector employment (e.g. in Lebanon, Saudi Arabia, the UAE, etc.). This emphasis on the public sector might be to some extent be natural as it reflects the historically important role of the state as a source of employment, service and job provision in the region (OECD, 2012b).

However, it does not take into account recent economic trends whereby the future of economic growth in the region lies in the private sector, including publicly listed companies. The latter, although for the moment not a key driver of economic value creation in the MENA region, are poised to grow with increasing intermediation of household savings, with the inflow of foreign portfolio investment and with listing of state-owned and private companies expected in the coming years. To cite just one figure, MENA households are estimated to hold $2.7 trillion USD of assets, of which only 14% are invested in fixed income and 18% in equities (McKinsey 2011), which is rather low by global standards and demonstrates the potential for further recycling of savings into capital markets.

Likewise, while the larger capital markets in the region such as Qatar and Saud Arabia have historically remained relatively closed to foreign investors[76], this dynamic may change now that Gulf markets' bids to be considered by institutional investors as serious emerging markets are being recognised. The inclusion of the UAE and Qatar in the MSCI emerging market index is anticipated to attract substantial foreign investment and hence potentially open MENA markets to more activist and potentially more litigious investors. Large domestic investors such as sovereign funds, which hold sizeable stakes in listed companies in the region but also abroad, are likely also to accumulate experience of engagement with their investee companies in global capital markets and "repatriate" it to domestic markets.

While corporate governance frameworks in the region have so far developed as a result of almost exclusively regulatory pressure, investor-initiated actions may grow in the coming years for reasons highlighted above. Investor engagement in the region has, as explored in this paper, so far taken the form

[76] The Saudi stock exchange, Tadawul, is closed to foreign investment except through swaps which allow authorised local firms to trade on behalf of foreign clients. Foreign investors can also invest in the Saudi stock exchange through mutual funds. Other markets in the Gulf, notably UAE's and Qatar's exchanges have thresholds for foreign investors and other limitations such as no foreign investor participation in privatisations. Company specific thresholds for foreign investments are also in place (see for example, the Emirati telecommunications company, Du).

of an informal dialogue as opposed to tabling official proposals at AGMs or engaging in proxy fights. In the medium term, this status quo will not survive. Systems of private enforcement, including commercial courts, will need to evolve to accommodate these changes in shareholder structure and sophistication in the region. At the same time, public enforcement capacities will also need to grow in order to assure investors of the integrity of capital markets, the trust in which has already been shaken in the past years such as for example the GCC financial markets decline in 2006 or in the course of change of regimes in Egypt and Tunisia more recently.

This paper has put forward a number of recommendations on institutional reforms necessary to strengthen the capacity of securities regulators, stock exchanges and other relevant entities to investigate illegal and market-damaging behaviours such as market manipulation, but also in relation to infractions of other recommendations contained in the fast-evolving corporate governance regulations and legislation in the region. In parallel, it has also sought to prioritise areas of reform in legal and regulatory requirements, notably in relation to board responsibilities, related party transactions and insider trading, where further precision in standards should improve market transparency and enable legal action against market participants, auditors and board members where they may be in breach of their responsibilities.

In addition, the effectiveness of existing corporate governance frameworks has not been subject to analysis, and only a few regulators in the region such as Saudi Arabian and Omani CMAs as well as financial center regulators such as the DFSA, have taken a dynamic approach, amending existing rules to suit emerging corporate realities and global good governance practices. An evaluation of the effectiveness of corporate governance codes, beyond requiring companies to comply-or-explain whether they adhere to the prescribed standards, would be useful in most markets. The range of sanctions for non-compliance should also be re-considered as a review of few existing enforcement cases demonstrates that penalties are often not economically significant. Some proposals that could be usefully considered include limited access to public procurement contracts by non-compliant companies (as already proposed by the European Commission), or the denial of preferential access to feedstock or other subsidised government services or goods.

The capacity and powers of securities regulators to engage in public enforcement also need to be strengthened and examples of international regulatory mechanisms to do so may be instructive in this regard. In particular, the power of discovery and the capacity of staff to investigate specific cases need to be reviewed. Given the growing number of investor complaints in some countries such as Tunisia and Egypt, innovative mechanisms for detection and prioritisation of most market damaging cases need to be developed. For example, under the Dodd Frank Act, the Securities and Exchange Commission became empowered to grant financial awards to whistle-blowers leading to recovery of $1 million USD or more through public enforcement proceedings.

Fundamentally, the economic and social context in which the enforcement of governance rules has emerged as a priority in the MENA region is quite different from the European and North American experience where it developed in large part as a response to scandals and, more recently, as a response to the financial crisis. Better private and public enforcement of corporate governance rules has grown to

be an important priority in the MENA region owing to the perception that corporate governance rules and regulations exist only “on paper” and that they have not led to a desired governance culture change. While this paper does not seek to propose a more litigious approach to corporate governance or provide a defence of investor activism, it sought to demonstrate that without the threat of enforcement by private and public actors, governance frameworks in the region risk remaining theoretical constructs that will not lead to the emergence of a corporate governance culture commensurate with the growing sophistication of capital markets in the region.

Bibliography

Allam, A. and A. England (2009), "First Insider is Jailed in Saudi", *Financial Times*, 18 August.

Al Sayegh, H. (2014). "Gulf Finance House Put Under Probation by Kuwait Market Regulator", *The National*, 8 May.

Amico, A. (2013). "Survey of Listing Requirements of MENA Stock Exchanges", Survey results presented at the annual meeting of the OECD Taskforce of MENA Stock Exchanges on Corporate Governance, OECD.

Amico, A. (2014), "Shareholder Spring in the Middle East?", *Corporate Governance in Emerging Markets*, Springer, Boubaker, Sabri and Nguyen, Duc Khuong.

Arabian Business (2014). "Kuwaiti Bank Chief Fined over Alleged Insider Trading", 3 March.

Aweidah, A. (2013), Presentation to the MENA Taskforce of Stock Exchanges for Corporate Governance, 2 December, Muscat, Oman.

Bebchuk, Lucian A. and Brav, Alon and Jiang, Wei (2013). The Long-Term Effects of Hedge Fund Activism. Columbia Law Review, Vol. 114, December 2014; Columbia Business School Research Paper No. 13-66.

Brav, Alon and Jiang, Wei and Partnoy, Frank and Thomas, Randall S., The Returns to Hedge Fund Activism (March 2008). ECGI - Law Working Paper No. 098/2008

Çelik, S. and M. Isaksson (2013). "Institutional Investors as Owners: Who Are They and What Do They Do?", *OECD Corporate Governance Working Papers*, No. 11, OECD Publishing.

Conseil du Marche Financier (2012). " Rapport Annuel " (Annual Report). Tunis, Tunisia.

Dahawy, K. and N. Shehata (2013). "2013 Review of the Implementation Status of Corporate Governance Disclosures in Egypt", Paper presented to UNCTAD Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting, 6-8 November, Geneva, Switzerland.

Daragahi, B. (2014), "Former Tunisia President Changed Business Rules to Family's Benefit", *Financial Times*, 24 March.

Dubai Financial Services Authority (2008). Enforceable Undertaking Against Shuaa Capital. 24 September, 2008. Dubai, United Arab Emirates.

Dubai Financial Services Authority (2010). Enforceable Undertaking Against Damas International PLC. 21 March, 201. Dubai, United Arab Emirates.

Dubai Financial Services Authority (2014). Consultation Paper No. 94. Proposed Changes to the FMR Jurisdiction, to the DFSA's Supervisory Powers and to the DFSA's Approach to Decision Making. Dubai, United Arab Emirates.

European Commission (2009). Study on Monitoring and Enforcement Practices in Corporate Governance in Member States. Conducted by Risk Metrics Group with assistance from Businesseurope, ecoDa and Landwell and Associes.

GCC Board Directors Institute (2013). Challenging Board Effectiveness. A review of Board Practices in the Gulf 2013. Dubai, United Arab Emirates.

Goldstein, M. (2014). Defining Engagement: An Update on the evolving relationship between shareholders, directors and executives. Conducted by Institutional Shareholder Services for Investor Responsibility Research Center Institute.

Hawkamah Institute (2013). "Environmental, Social and Corporate Governance Practices in the MENA region 2007-2012", Review of the Hawkamah/S&P Pan Arab ESG Index, In partnership with Ernst and Young, Dubai, United Arab Emirates.

International Corporate Governance Network (2014), "Global Governance Principles", ICGN member consultation, 28 March.

International Monetary Fund (2012). "Saudi Arabia: Reports on the Observance of Standards and Codes", *IMF Country Report*, No. 12/93, Washington, D.C., USA.

Institutional Shareholder Services (2014). *MENA Region Governance: Analysing the Proxy*.

Kuwait Research Center –Markaz (2008). *The Golden Portfolio Report*.

Kirkpatrick, Grant (2012). Corporate Governance and company groups: considerations from the OECD Principles. Draft Report.

Lins, K. (2003). *Equity ownership and firm value in emerging markets.* Journal of Financial and Quantitative Analysis, 2003, 38:1

Lipton, Martin (2014). Current Thoughts on Activism, Revisited. Posted on Harvard Law School Forum on Corporate Governance and Financial Regulation. April 8, 2014. http://blogs.law.harvard.edu/corpgov/2014/04/08/current-thoughts-about-activism-revisited/

McKinsey (2011). The Emerging Equity Gap: Growth and Stability in the New Investor Landscape. www.mckinsey.com/insights/global_capital_markets/emerging_equity_gap

Muhanna, Ibrahim (2013). Presentation to the OECD Taskforce of Stock Exchanges for Corporate Governance, 2 December, Muscat, Oman.

OECD (2012a), *The Role of MENA Stock Exchanges in Corporate Governance*, OECD Publishing, Paris, France.

OECD (2012b). *Towards Better State Ownership in the Middle East and North Africa*, OECD Publishing, Paris, France.

OECD (2013a), *Supervision and Enforcement in Corporate Governance*, Corporate Governance, OECD Publishing.

OECD (2013b), "Launching meeting of the MENA Investor Council", Discussions with Major Institutional Investors in MENA, 4 November, Istanbul, Turkey.

OECD (2014), *Privatisation and Demutualisation of MENA Stock Exchanges: To Be or Not to Be?*, OECD Publishing, Paris, France.

OECD and UASA (2014). *The Guide on Related Party Transactions in the MENA Region*. Paris, France and Dubai, United Arab Emirates. Forthcoming.

Qatar Financial Center Regulatory Authority (2012), *Enforcement Policy Statement*.

Siems, M., S. Van Uytsel and S. Wrbka, (2012), *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?*, Cambridge University Press, Cambridge.

Stack, L. (2012). "Mubarak's sons charged with insider trading", *New York Times*, 30 May. http://www.nytimes.com/2012/05/31/world/middleeast/mubaraks-sons-charged-with-insider-trading.html?_r=0

Reuters (2014). "Oman court jails business to 15 years over bribes". 9 March 2014.

World Bank (2011). *Financial Access and Stability: A Road for the Middle East and North Africa*, Washington, D.C., USA.

World Bank and the International Finance Corporation (IFC) (2012), *Doing Business in the Arab World 2012,* The International Bank for Reconstruction and Development and The World Bank, New York, USA.

World Bank (2014). "World Bank Development Indicators", accessed 15 March.

Zawya (2014). CEO of Dubai's Arabtec Quits, Leaving Ownership, Strategy in Question. June 18, 2014. http://www.zawya.com/story/TR20140618nL5N0OZ27S3/

Zeitun, Rami (2014). Corporate Governance, Capital Structure and Corporate Performance: Evidence from GCC Countries. Review of Middle East Economics and Finance, 10(1).