Enforcement in financial regulation: an analysis of mechanisms in Kuwait and the UK*

Lulwa M. Al Ben Ali**

Abstract

Effective supervision and enforcement are important factors for well-established financial markets. Supervision seeks to deter noncompliance while enforcement seeks to detect and punish noncompliance. This study aims at identifying the most appropriate and effective approaches in regulating securities in relation to supervision and enforcement powers of the Kuwait Capital Markets (CMA). The study employs library resources to analyse laws and regulations governing the financial markets in the UK and Kuwait. This research analysis the UK regulation to reveal the deficiencies and shortcoming in active oversight in the UK.

However, three conclusions can be drawn. First, the CMA use risk-based approach which tend to assess current risks and do not have proactive intervention approach in identifying and responding to risk at an early stage. The risk-based approach failed to protect the financial markets from the 2008 financial crisis. Second, there are five core tasks for enforcement of financial markets regulation namely; detecting, responding, enforcing, assessing, and modifying. Each task must be well-organised to have effective enforcement.

Finally, the CMA tend to focus only on deterrence approach in exclusion of compliance mechanism. A combination of compliance and deterrence approaches is the best practice to ensure effective law enforcement. Overall, the CMA needs to improve detection techniques, enforcement tools, performance assessment procedures, precautionary procedures and modification capacities.

Key words: Financial markets, financial regulator, capital market authority, financial crises, tcansparecy.

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** A PhD student at Warwick School of Law, University of Warwick, UK.

1 Introduction and overview

1.1 Introduction

Effective enforcement must be a priority for any financial regulator. It means that the financial regulator has the tools and power to ensure that rules and regulations are followed and in case of any breach of the said rules the authority has the ability to punish and deterrent the violator. Supervision cannot achieve its objectives without having strong enforcement, which helps to detect and punish non-compliance. Enforcement is key to the credibility of regulators and fosters the achievement of all the objectives of securities regulation (investor protection, fair markets and financial stability).(3) In securities markets, the implementation of effective enforcement programmes has been very challenging for all the financial regulators since the financial crisis. The financial crisis in 2007-2009 exposed the failure of financial regulators. One of the reasons for that failure was that the enforcement tools were not effective enough to control the excessive risk nor did they have the capacity to protect the markets.(4)

Since the financial crisis, most financial regulators have reformed their enforcement regulations to adopt new tools and more effective procedures to protect the markets. Kuwait and the United Kingdom (UK) have adopted new enforcement policies to achieve the financial regulators' objectives. In Kuwait, the new enforcement policy was introduced in the Capital Markets Law No. 7 of 2010 (CML), which was amended in 2014 and again in 2015. In 2015, the Kuwait Capital Markets Authority (CMA) issued a new amendment to the Executive Bylaw of the CML, which explained in detail all the enforcement regulations. In the UK, the enforcement policy was previously set forth in the Financial Services and Markets Act 2000 (FSMA), a law that created a single regulator, the Financial Services Authority (FSA). In April 2013, the single regulator experiment ended and two regulators were created: the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) were both established by the Financial Services Act 2012 (FSA 2012).(5)

(3) Ana Carjaval and Jennifer Elliott, 'The Challenge of Enforcement in Securities Markets: Mission Impossible? (August 2009) IMF Working Paper WP/09/168, 4 <https://www.imf.org/external/pubs/ft/wp/2009/wp09168.pdf> accessed 8 February 2018.

(4) Gerard Caprio, 'Financial regulation after the crisis: how did we get here, and how do we get out?' (2013) 16 <http://www.lse.ac.uk/fmg/workingPapers/specialPapers/PDF/sp226.pdf> accessed 7 February 2018.

(5) Andreas Kokkinis, 'Rethinking Banking Prudential Regulation: Why Corporate Governance Rules

In this comparative analysis context, the ways in which the Crisis has influenced financial market regulation in the UK and Kuwait provides excellent guidance regarding how such regulations evolved and adapted to meet the particular, and extensive Crisis after-effects (the EU 'Eurozone crisis' is a notable post-Crisis example).(6) In particular, this comparative approach permits consideration of specific UK financial regulator activity (Financial Conduct Authority (FCA)),(7) as contrasted with how the national Kuwaiti market regulator (Kuwait Capital Market Authority (CMA)),(8) sought to overcome the weakness in enforcement regulations.

The research assembled and examined to advance this comparative study has been shaped by the following, inter-connected Research Questions. These are: (1) What specific advantages and disadvantages are associated with compliance and deterrence policies; (2) What are the differences (and thus what are the relative strengths and weaknesses) of the enforcement regulations in Kuwait financial markets: (3) How to improve the enforcement regulations?

The above-noted Research Questions have largely dictated which research methodology is best suited to advance this comparative study. Whilst quantitative methods such as empirical data-gathering, or similar evidence analysis secondary would likely lead to a strong dissertation, a qualitative methodology has been employed here. There are numerous, high level, peer-reviewed journal articles, and detailed, informative government sources that provide an excellent research basis in this market regulation area.

1.2 Structure of this chapter

This chapter examines the legal framework for the enforcement regime of Kuwait's financial regulator, the CMA. It begins (in section 1) by explaining the meaning of 'enforcement' followed by an examination of the compliance-based and deterrence-based approaches, with specific reference to those approaches in relation to the CMA's enforcement mechanism. It assesses

Matter' (2012) 7 Journal of Business Law 612-629.

(6) Michael Ioannides 'Europe›s new transformations: how the EU economic constitution changed during the Eurozone crisis' (2016) 53(5) C.M.L. Rev. 1237, 1282, re European banking regulation and stability.

(7) Financial Conduct Authority 'The FCA›s approach to advancing its objectives' (2015) [Online] Available: <https://www.fca.org.uk/publication/corporate/fca-approach-advancing-objectives-2015.pdf> [5 June 2018], as created under Financial Services Act 2010.

(8) Capital Markets Authority, 'Regulation' (2018) [Online] Available: <https://www.cma.gov.kw/en/web/cma/cma-handbook> [4 June 2018], as created by Law No. 7 of 2010 regarding the Establishment of the Capital Markets Authority and Regulating Securities Activities, the 2007 Law, as amended by Law No. 22 of 2015 (CMA Law Amendment).

the CMA's investigative power and identifies best practices based on the UK mechanisms. Essentially, this chapter discusses Kuwait's CMA and the CML's enforcement mechanisms vis-à-vis the UK's FCA.

There are five core tasks for the enforcement of financial markets' regulation: detecting, responding, enforcing, assessing, and modifying. Each task must be well-organised to have effective enforcement. This chapter analyses each task in turn (sections 2-4) and seeks to identify best practice in each area. The conclusion (section 5) includes an assessment of the current legal framework of Kuwait's enforcement regulations and suggests recommendations to improve enforcement.

In summary, this chapter will evaluate the Kuwait enforcement policy specifically in the CML. It will examine the UK legislative approach and compare it with the CML in order to develop and improve the Kuwaiti financial markets. This chapter will analyse the legal structure of enforcement policy in Kuwait and it will address the lack of tools or procedures in the Kuwaiti system by comparing it with the mechanisms in a developed financial market such as the UK. The chapter will draw direct comparisons between the CMA in Kuwait and the FCA in the UK to improve the procedures in the former.

1.3 What is 'enforcement'?

The robust enforcement of securities laws is fundamental to help enhance investor confidence and maintain fair and efficient markets. The term 'enforcement' should be interpreted broadly enough 'to encompass powers of inspection, investigation and surveillance such that the regulator should be expected to have the ability, the means, and a variety of measures to detect, deter, enforce, sanction, redress and correct violations of securities laws'.(9)There are obvious benefits to having adequate enforcement tools: a financial regulator that is properly equipped will help to impede operations of risky practice and products.(10) One way of looking at it is to view the supervision rules as the eyes with which the financial regulator observes the market and the enforcement tools are the hands of the regulator to ensure compliance with the rules. It must be noted that both supervision and enforcement must work

(9) IOSCO, 'Methodology For Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation' (May 2017) 63. https://www.iosco.org/library/pubdocs/pdf/IOSCOPD562.pdf accessed 21 November 2017.

(10) Bashar Alghanim, 'The Implications of Financial Regulation for Kuwait's Financial Sector', (8th Annual Conference of the EuriMed Academy of Business, Italy, 2011) 137, 140 <http://emrbi.org/wp-content/uploads/2015/11/euromed2015-book-of-proceedings-2015-11-02.pdf> accessed 8 February 2018.

in the same manner to protect financial stability: light supervision with strong enforcement cannot protect the markets. Both must work in tandem to achieve the law's objectives.(11)

1.4 Enforcement approaches: compliance and deterrence

Generally speaking, there are two main enforcement approaches. The first method is the compliance approach and the second method is the deterrence approach.(12) Both approaches require specific tools and procedures for effective supervision. Some jurisdictions, like Kuwait, only apply the deterrence approach whilst others, like the UK, apply both. There is no perfect answer regarding which enforcement approach the regulator should adopt, but the combination of both approaches will most likely be the most effective method for enforcement.(13) For example, in the deterrence-oriented strategy, the firm may choose the lowest cost option and hence evade rather than comply with the law because the cost of deterrence (often a financial penalty) is less than the expected cost of compliance.(14) There are several other reasons why the compliance approach is superior to the deterrence approach. First, monitoring costs are high and it is difficult to detect the non-compliant firm. Secondly, when violations are detected, there should be sufficient evidence to convict the firm, which as experience has shown, is difficult to obtain. Finally, judges and prosecution costs are high and sanctions tend to be low compared with the high costs of compliance. Therefore, developed countries tend to adopt the combination of both approaches for effective enforcement policy.

The regulatory environment in Kuwait suffers from various weaknesses, among which is the out-dated nature of the current law and regulations, despite their relatively recent implementation.(15) For example, insider trading was regulated before the CML was passed in 2010 but this law was not enforced. Historically, it has been very rare to hear about cases involving insider trading.(16) These defects led to research and analysis by academics and policy makers regarding best practice for effective and sufficient enforcement regulations.

(11) Robert Baldwin and Julia Black 'Really Responsive Regulation' (2008) 71(1) The Modern Law Review 59.
(12) John T Scholz, 'Voluntary Compliance and Regulatory Enforcement' (1984) 6(4) Law & Policy 385.
(13) Dalvinder Singh, Banking Regulation of UK and US Financial Markets (Ashgate Publishing 2012) 114.
(14) Scholz, supra n7, 389.
(15) Mohammad E Al-Wasmi, 'Corporate Governance Practice in the GCC: Kuwait as a Case Study' (PhD thesis, Brunel University 2011).
(16) Fatemah Al Shuraian, 'Market Manipulation in Kuwait Stock Exchange: An Analysis of the Regulation of Market Manipulation Prior and Under Law no. 7 of 2010' (PhD thesis, University of Leicester 2013) 7.

1.5 Settlement of cases

In the event of a breach of the law, firms usually prefer to settle the matter out of court to protect their reputation and to minimise damage. When the reputation of a firm is damaged, firms will lose investors' and shareholders' confidence, so using any opportunity to protect the firm from facing such a challenge is viewed as best practice.(17) The regulator must adopt a clear legal framework to ensure that the public interest is served. It is essential to ensure that the procedures and requirements for settlement are fair, effective and efficient and that they keep the ultimate objectives in mind, which are, to protect the market, investors and act in the public interest.

In Kuwait, the CMA has the power to settle ('reconcile') a matter with any firm at any stage of the criminal case before the final judgment is rendered, but this power is not absolute.(18) The matters that will be subject to settlement are restricted to certain areas; only crimes that are stipulated in articles 122, 124, 126 and 127 of the CML can be the subject of settlement under article 131. Another key point that must be recognised is that the settlement payment should not be less than the minimum amount of the prescribed fine and not more than the maximum amount of that fine. In addition to paying the settlement amount, any benefit achieved or losses avoided must also be refunded, and the accused must not be a recidivist.(19)

In other words, the settlement must ensure that the firm will be properly punished for their breach of the law. Furthermore, the CMA will set out the timetable for the firm to fulfill the reconciliation conditions.(20) The settlement decision – without mentioning any detail- shall be published on the CMA website.(21) These conditions and requirements are important to ensure fairness and to protect the markets. The outcome of the settlement agreement will end any criminal cases pending in the court between the two parties (the CMA and the firm) but this does not prevent any third party from filing a civil case seeking compensation or the enforcement of any other rights.(22) Note that just as there is differentiation between civil and criminal rights in any matter, the

(17) Mohamad Mostafa, Economic Crisis (2nd Edition, no publisher, 1979), part one, 215.
(18) Note that the English translation of the CML uses the term 'reconciliation' in article 131 rather than 'settlement' but the same meaning is intended and therefore the terms are used interchangeably in this discussion.
(19) CML, Article 131.
(20) CML, Article 131.
(21) Executive Bylaw Module Three, Chapter Seven, Article 7-3.
(22) Jalal S Othman, Commentary on Law No.7 of 2010 regarding the Capital Market Authority and Organizing the Securities Activities and its New Executive bylaws (Dar Al Eqraa, 2016) 979-980.

settlement agreement with the CMA only suspends the criminal procedures to give other parties the chance to protect their rights and obtain compensation for the wrongful act committed against them by the firm.(23)

In some cases the multi-supervisor authority creates complications in achieving settlement. For instance, if the investigated firm is a bank it would be regulated by both the Central Bank of Kuwait (CBK) and the CMA. In this scenario, regulatory wrongdoing overlaps with potential criminal misconduct. In other cases, the prosecutors may claim that possible prosecution could be harmed if regulatory settlements are reached. Another complicating factor in the settlement of cases is the involvement of individuals who are facing penalties for misconduct related to the action that the regulator is taking against the firm. The firm certainly wants to settle quickly to protect its reputation but the individuals want to clear their names because the allegations may have career-ending ramifications.(24)

The current legal framework for the settlement of cases under the CML is unclear and there are some areas that need further development to improve the settlement system. First, further conditions and procedures are required to cover all settlement agreements. For example, if a firm does not fulfil the conditions in the settlement agreement, or if it does not abide by the required timetable, the CML has no provisions to cover what should happen in these situations.(25)

Secondly, it is submitted that settlement agreements with non-compliant parties do not comply with principles of fairness and equality because big firms will not suffer as much as small firms. The financial implications could be greater for small firms who have not made provision for non-compliance, whilst large firms may keep a budget specifically for satisfying regulators in the event of non-compliance. Although the regulator can set the settlement amount, at least one author has argued that there is a lack of fairness between big and small firms in respect to the settlement process because small firms may find it more difficult to pay the settlement fines as compared with big firms.(26) It is difficult to confirm the soundness of this argument because the CMA only posts a basic notice of settlement decisions on its website, it does

(23) ibid, 980.

(24) Angela Hayes and Carlos Conceicao, A Practitioner's Guide to Financial Service Investigation and Enforcement (3rd edn, Sweet & Maxwell 2014) 4.

(25) Hussain Bouareki, 'For more determinate settlement procedures in the CMA' Al-Qabas newspaper (Kuwait, 22 March 2016) (in Arabic) <http://alqabas.com/6442/> accessed 17 November 2017.

(26) Mohamad Mostafa, supra n20, 220.

not publicly release the financial details of individual settlements.

Thirdly, the settlement process is arguably inconsistent with constitutional principles because settlement agreements are considered as verdicts, the rendering of which is supposed to be exclusively within the jurisdiction of the courts. The separation of powers is protected by Article 50 of the Kuwait Constitution, which confirms that there is a separation of powers between the three branches and none of them are allowed to waive part or all of their jurisdiction.(27) Moreover, only the judicial branch has the power to review cases and issue a verdict.(28)

Regardless of the above arguments, it is nevertheless important to have settlement agreements in the financial markets because the markets are dealing with commercial and financial matters, which are inherently related to economic stability. Therefore, it is useful to provide the regulator with flexibility and the discretion to settle some matters. If, for instance, a large firm is bankrupted because of substantial fines or compensation payments, it will affect the whole market, therefore, settlements are a tool which should be used wisely to protect both consumers' rights and the markets. It is important to note that the cost of an enforcement program will be reduced when the authority settles cases, thus, the regulator should be equipped with the ability to efficiently dispose of cases.(29) In addition, it should be acknowledged that the natural act which is the basis of the criminal actions stipulated in the CML are different from crimes specified in other laws, because the act itself is not considered to be criminal (e.g. buying and selling shares). If this legal act involves other circumstances (e.g. insider information) it will then become a breach of the law. Therefore, it is essential to provide some flexibility to the regulator in applying the law so that it has the discretion to reach appropriate settlements with unaware individuals and firms. In summary, there is a need to update the settlement provisions to provide a clear legal framework for settlements under the CML. That updating should include adding new requirements and conditions to protect the market from abuse of this power.

In the UK, the majority of cases which settle, settle at Stage 1 of the executive settlement procedures.(30) The complicating factors—multi-agency supervision

(27) Kuwait Constitution, Article 50.
(28) Tamer Salah, 'Criminal Protection for Financial Markets – Comparative Study' (Alexandria, Dar AlJamea AlJaded, 2011) 486.
(29) Carjaval and Elliott, supra n1, 21.
(30) Hayes and Conceicao, supra n19, 4.

and individuals' rights to clear their name—exist in both the UK and Kuwait systems. The UK legislation has struck a good balance between protecting individuals' rights and achieving effective regulatory enforcement. Under section 393 of the FSMA, if the FCA wishes to make public an enforcement 'warning notice' against a firm, it needs either to refrain from identifying any individuals or afford any such individuals their 'third party rights'. Until 2010, the FSA could only publish details of its case against a firm when a 'final notice' was issued at the conclusion of a case. However, the Financial Services Act 2012 gave the FCA the power to publish details about an enforcement action much earlier, and, 'notably before a firm or an individual under investigation has had an opportunity to formally challenge the FCA's case against them'.(31) In Kuwait, the CMA could use same solution to refrain from identifying any individual in the notice to protect the settlement procedures from any delays. In any case, it is important to set out a strong framework for settlement agreements because it is related directly to the protection of consumers and markets.

1.6 Judicial review

The final phase of regulatory law enforcement is judicial review. It is important to have well-developed judicial review procedures in order to enforce the regulator's decisions and provide timely and proper judicial oversight. Any delays in issuing a final judgement may affect the stability of the markets or the reputation of the financial regulator to supervise the firms and individuals. The judges who are tasked with judicial review must be specialised to render a verdict that takes into consideration the sensitivity of the commercial matters. Kuwait has specialised capital market courts, which are responsible for reviewing all matters related to the financial markets. Although there are specialised courts, there are no particular judges who are specifically recognised as experts in the field of financial market regulation. Therefore, some cases take at least three years until the judges reach a final verdict. It is necessary to investigate and evaluate the current judicial system in Kuwait in a separate chapter to cover all aspects of this issue and to suggest recommendations as well.

Having provided an overview of financial market regulation in Kuwait, the following three sections analyse the five core tasks for enforcement, namely,

(31) Allen & Overy 'The FCA confirms its approach to publishing information about enforcement warning notices' 23 October 2013 <http://www.allenovery.com/publications/en-gb/Pages/The-FCA-confirms-its-approach-to-publishing-information-about-enforcement-warning-notices.aspx> accessed 9 February 2018.

detecting, responding, enforcing, assessing, and modifying.

2 Detection

2.1 Introduction

The first step in regulatory enforcement is to expose undesirable behavior through detection. The enforcement procedures depend on obtaining information that enables the financial regulator to determine whether an investigation is appropriate or not. The power to obtain information is a prerequisite to ensuring the effective enforcement of the rules. It is important to provide the financial regulator with the appropriate power and tools to access information either on a daily basis or during an investigation. Gathering information is the first step towards achieving the enforcement objective.

In Kuwait, the CMA has the power to request information or to carry out an inspection in order to achieve its objectives. The CMA's power is based upon certain conditions or requirements, which are related to serving the CMA's objectives. It is important to note that any action that the CMA may take will be subject to judicial scrutiny and it may affect the trust and confidence in the market. In other words, the CMA's power to request information must be clear and must provide a mandate without any conditions or requirements. The CML allows the CMA to request information not only from the registered person but also from the non-registered person who is practicing securities activities. The CMA can seek information or request documents by telephone, at a meeting or in writing.(32)

In the UK system, the FCA and the PRA have broad powers to request information, which includes information from the regulated person and those who do not need, or do not have authorization, under Part 4A of the FSMA to carry out their business.(33) The FCA may use their power under s 165 of the FSMA to obtain information from regulated entities. Both regulators share the same powers to require information and appoint a skilled person to collect information as mentioned in s 166 of the FSMA. An additional power that the authorities have under s 165A of the FSMA is to obtain disclosure of information that is or might be relevant to the stability of any aspect of the UK financial system.(34) These powers are likely to be useful in protecting the integrity of the markets and in protecting the consumer as well. This wide-ranging power stands in contrast to the CMA's power in Kuwait, which is

(32) Bouareki, supra n20, 337.
(33) Hayes and Conceicao supra n19, 31.
(34) FSMA, s 165A(3).

constrained to merely requesting information that achieves the objectives of the CML. This condition or constraint on requesting information could be challenged via judicial review to ensure that the CMA uses its power to achieve its objectives. It is argued here that in order to protect the market's integrity, there must be some degree of trust placed in the CMA's decisions and powers so that it does not have to face the possibility of such a challenge in court. Finally, it is noteworthy that under s 166 of the FSMA, the FCA can appoint 'skilled persons' to provide a report about a particular issue or risk. In Kuwait, the CML does not recognise the skilled person. It is submitted that this type of provision could help the CMA to achieve its objectives to protect the integrity of the markets and consumers.

Any firm or individual who receives a request for information from the financial regulator must take into consideration whether its nature is voluntary or compulsory before they respond to the regulator. In some cases, it may not be wise to comply with the regulator's request. Once the information is released it cannot be retracted. If the firm provides more information than has been requested this may in turn lead to the firm or person facing further investigation. Therefore, it is important to fully understand the nature of the request, beginning with the question of whether it is voluntary or compulsory.

The following section explains how to deal with requests for information from the financial regulator where there is as yet no formal investigation. Such requests raise a lot of questions, regarding whether the regulated person can ignore the regulator's requests. This section will focus on who should comply and to what extent the firm and individual must cooperate with the CMA.

2.2 Compulsory or voluntary?

It is important to first establish the firms and individuals who are under the CMA's jurisdiction. The CMA has the power to supervise securities dealings and the activities of licensed persons according to article 5 of the CML. Article 5 allows the CMA to supervise not only the registered person but also the non-registered person who is practicing securities activities. Some scholars provide further explanation about this article and suggest that if the registered person is not practicing securities activities then they will not be subjected to the CMA's supervision.(35)

Scholars have observed that the CMA has the power to inspect and review the registered person who is not practicing securities activities, according to

(35) Bouareki, supra n20, 337.

article 142 of the CML. Article 142 states that the CMA's legal department has the right to request any information and documents from any person that is related to the CMA. Secondly, scholars argue that the reason for concluding that a registered person who is not practicing securities activities will not be under CMA's supervision is because the registered person will be observed strictly for the activity that relates to the CMA. For instance, if a bank that is licensed by the Central Bank of Kuwait (CBK) is also registered with the CMA because it is listed in the market as a bank, the CMA will only be responsible for matters that are related to the market; in all other areas the CBK will be the authority that is primarily responsible for supervising the bank and issues related to its license.(36) This argument leads to a related issue, which is: does the CMA have the authority to inspect the registered person who is not practicing securities activities, such as a bank? The Memorandum of Understanding between the CBK and the CMA states that each authority will be responsible for their licensed person.(37) In other words, each sector will be supervised by the relevant authority and in case that particular bank is listed in the market the CMA will ensure it supervises it in the limited matters which are related to the markets, otherwise, the CBK will be in charge of issuing a license or inspecting it.

Overall, the CMA has the ability to enter the premises of regulated firms without prior notice and to seize and copy documents. The broad investigative powers, which can involve third parties, will improve trust and confidence in the market. This significant power that has been entrusted to the CMA creates a public expectation that the CMA will not just work with the industry, but it will take on a disciplinary role when circumstances mandate it.

There are different methods by which an individual may be asked to comply with the regulator's request. The regulator may ask for information or documents to be provided, or for an individual to attend an interview. These requests may be made on a voluntary basis or pursuant to conducting compulsory interviews. It is suggested that the regulator's power to request information and review documents and records is the most important power it has to ensure the enforcement of the law.(38) The enforcement power that is described in this chapter relates to the authorised person as well as to the unauthorised person who is exercising securities activities, but not to traders

(36) Bouareki, supra n20, 339.
(37) Memorandum of Understanding between CBK and CMA singed on December 15, 2014.
(38) Mahthar Farghali, Criminal Protection to Trust the Financial Markets and Boursa (1st edn, Dar Al Nahatha, 2006) 461.

and shareholding companies who are obligated to disclose according to disclosure law. The following section examines the request for voluntary assistance where a decision to launch a formal enforcement investigation has not yet been made.

2.3 Requests for information

The CMA has the power to request any authorised firms and regulated persons to provide any information or documents in order to achieve its objectives. It may also request any other supervisory authorities to submit any documents that may be related to a particular firm or individual.(39) The CMA also has the power to request information in relation to an unauthorised firm that deals with securities activities.(40) In the UK, the FCA or the PRA can request information pursuant to Principle 11 of the 'Principles for Business' as set forth in the FCA Handbook ('Principle 11').(41) Principle 11 is specifically relevant to regulated firms, whereas Principle 4 of the Statements of Principle for Approved Persons ('Principle 4') applies to 'approved persons'.(42) Note that Principle 11 covers unregulated activities by regulated firms or individuals. Regulated firms and individuals must comply with Principle 11 and Principle 4 whether or not the relevant regulator has given notice.(43) The Enforcement Guidance states that the regulator normally expects to give reasonable notice of a visit, but on rare occasions, it may access premises without notice.(44) The possibility of an unannounced visit is 'intended to encourage firms to comply with the requirements and standards under the regulatory system at all times.'(45)

In both systems, the financial regulators have the power to request information and ensure that the authorised person complies, but in Kuwait's system the regulator goes even further to cover an unauthorised person who is dealing with securities activities. This power must be limited to the activities that the

(39) The Executive Bylaw, Module Three, Chapter Two, Article 1-1.
(40) CML, Article 5.
(41) Financial Conduct Authority, FCA Handbook <https://www.handbook.fca.org.uk/handbook> (accessed 19 February 2018) [hereinafter FCA Handbook]. PRIN 2.1.1 contains the 11 principles. Principle 11 states: 'A firm must deal with regulators in an open and honest way, and must disclose to the FCA appropriately anything that relating to the firm of which that regulator would reasonably expect notice.'
(42) Statements of Principle and Code of Practice for Approved Persons, February 2018 <https://www.handbook.fca.org.uk/handbook/APER.pdf> (accessed 19 February 2018). Chapter 1.1A sets forth the scope of application.
(43) Hayes and Conceicao, supra n19, 36.
(44) SUP 2.3.2 G and SUP 2.3.6 G, FCA Handbook, supra n36.
(45) SUP 2.3.2 G.

unauthorised person is carrying out, according to Article 5 of the CML.(46) It is worth mentioning that in the UK system, unauthorised firms and individuals are under no obligation to comply with requests for information because they are not specifically mentioned in Principle 11, therefore, there is no obligation on them to comply.(47) However, it is unlikely that a firm would refuse to comply with a voluntary request on that basis. The unauthorised firm usually cooperates with a request for information, to assure the regulators that its suspicions are unfounded and to avoid a formal investigation.(48) In that sense, the Kuwaiti regulator is in a stronger position because the CML includes a clear provision that unauthorised persons who deal with securities activities will be subject to the enforcement power; this is in keeping with its overall emphasis, which is to enhance trust and confidence in the markets.

2.3.1 Compulsory power to require information and documents outside of an investigation

The law may require the submission of periodical reports or documents. It becomes compulsory to submit a document or item of information if the laws clearly state that the authorised person is required to submit particular reports or documents. In that case, if the authorised person has not complied with this request it may be subject to sanctions. In Kuwait, the law states if a firm deliberately refrains from, or delays in submitting, any periodical report or document to the CMA as required by the CML, the CMA shall punish that person with a fine 'not less than five thousand Dinars and not exceeding fifty thousand Dinars'.(49) There is an argument as to what should be considered a required document pursuant to this article. It should be compulsory for a firm to submit documents or reports only if the required report or documents is stated in the CML.(50) In that sense, if the Executive Bylaw requires documents and reports, they will not be subject to the Article 126 sanctions. The reason for this limitation is because Article 126 uses the phrase, 'as required by this Law [i.e. the CML]'. Therefore, it is logical to assume that any documents or reports that the CMA may request which are not mentioned specifically in the CML will not be subject to those sanctions.

Another key argument in terms of interpreting Article 126 arises in relation to what documents should be considered as required by the CML. For example,

(46) Bouraeki, supra n20, 336.
(47) Hayes and Conceicao, supra n19, 36.
(48) Hayes and Conceicao, supra n19, 37.
(49) CML, Article 126(3).
(50) Bouareki, supra n20, 323.

pursuant to article 70 of the CML, the authorised person should notify the CMA about the appointment of the auditor within seven days from the day of appointment. This raises the question, should this 'notification' be considered a required document in terms of Article 126, and will failure to submit it subject the authorised person to the aforementioned sanctions? Scholars have asserted that any information that an authorised person must submit—whether it be a notification of appointment, report or statistic—should be considered as a required document, for the purposes of Article 126. Failure to provide any such document will amount to non-compliance and will expose the person to the stated sanctions.(51) This argument is compelling because it is important to ensure that the CMA has the power to enforce the law and this includes the power to compel any person to provide any information that is required by the CML. The power to sanction non-compliant parties, as provided for in Article 126, is a way to enable the CMA to flex its power. In the said example, the authorised person must notify the CMA with the auditors' names so that the CMA is able to supervise the conflict of interest rules. In short, these sanctions will ensure that firms and individuals report all of the required information to the CMA.

It is important to note that the Article 126(3) sanctions apply even if the authorised person 'deliberately refrains or delays' notifying the CMA. The above discussion has been largely focused on the 'refrains' aspect of this phrase, but a question arises as to the implications of the legislature having used the word 'delays'. In this context, the question is, what if the CML did not set a timetable to submit the information? What amount of time would be considered by the CMA as a 'delay'? There is a lack of specificity in Article 126 in terms of defining the word 'delays'. Thus, Article 126 ought to be amended to add a timetable, to ensure all firms are treated fairly. In order to remedy this defect in Article 126, the timetable should be a reasonable time according to commercial customs to submit the required information.(52)

Overall, it is important for effective enforcement to provide the financial regulator with adequate tools to ensure compliance with its rules and requirements. The deterrence approach can help to enhance trust and fairness in the market, as long as the rules are sufficiently clear and able to be both understood and applied.

(51) Bouareki, supra n20, 323.
(52) Bouareki, supra n19, 324.

2.4 Inspection

Inspection is a way to gain information about undesirable and non-compliant behavior. Administrative inspection includes on-site inspectors having access to firms' records and files. It does not aim to discover something specific like crimes but the objective is to have an overall review to ensure that the firm is following the law.(53) One of the CMA's powers to collect and gather information is to carry out on-site inspections.(54) There are two kinds of inspection, the first of which covers all the operations and transactions that firms do. The second type of inspection is for a certain purpose, to inspect a specific transaction. On-site inspection focuses on analysing the challenges and risks that the firm faces to ensure that it can practice financial activities.(55)

In Kuwait, the CMA has the authority to perform periodical inspections with prior notice and it can also perform inspections without prior notice to achieve its objectives, as stated in the CML and its Executive Bylaws, or to investigate the complaints and reports submitted to the CMA.(56) There is an argument that the inspection without prior notice must still fall within the stated scenarios, which could be considered as a constraint on its power. In practice, the CMA can inspect any regulated firm or individual if it considers it necessary to achieve the CML's objectives, although that interpretation could be potentially challenged in court. The stated provision, 'in order to achieve the CML objectives', gives the CMA discretionary power that it may wield in relation to regulated firms and individuals, which could to some extent be considered as inspection without giving prior notice.

With regards to on-site inspections, the CMA has the authority to go to the

(53) Mubarak AlNwabeat, An Explanation of General Principles for Criminal Court Procedures, (1st edn, no publisher, 1998) 250.

(54) CMA, Article 5(4): 'The Authority shall carry out all the work necessary to achieve its goals…(4) Conduct inspections, and supervise Securities dealings and the activities of the Licensed Persons in accordance with this Law.'

(55) The CMA Report for the Financial Year 2016/2017 (in Arabic) <https://www.cma.gov.kw/ar/web/cma/pdf-viewer?file=/documents/20622/87708/6th+Annual+Report.pdf/94100eca-817f-44d1-8309-e83aa8af3cbd#page=1&zoom=page-fit,-22,849> (accessed 23 November 2017) [hereinafter The CMA Financial Report 2016/2017].

(56) Executive Bylaw, Module Three, Chapter Two, Article 2-2 which provides as follows: 'The Authority shall perform periodical inspection after prior notice to ensure compliance with provisions of the Law and these Bylaws, and applicable policies and procedures. It may inspect without prior notice in order to achieve its objectives stated in the Law and these Bylaws or to investigate complaints and reports submitted to it': <https://www.cma.gov.kw/pdfviewer/?file=/documents/20622/487166/E03-+Enforcement+of+the+Law.pdf/35e25c4a-688a-4370-9583-1e77cf2ecb81#page=1&zoom=page-fit,-22,849 (accessed 20 February 2018).

regulated firms and inspect their records and books.[57] There is a regular routine inspection for certain purposes and other inspections without determination. In addition, there is the aforementioned power to inspect without giving prior notice. In the fiscal year 2016/2017, there were 11 inspections of investment firms and 13 inspections of funds. In relation to the inspections with a determined purpose, there were 32 inspections of firms, auditors, and intermediaries.[58]

Before issuing the final report about the outcome of the on-site inspection, the CMA can give the regulated person the opportunity to reform their situation.[59] The various steps in the process of inspection and reporting are summarised here. First, the on-site inspection involves the collection of all relevant information and the making of observations.[60] These may be used to prepare an 'initial report'. Secondly, the initial report will be sent to the regulated person(s), so they may have the opportunity to respond and comment on what the inspection team observed.[61] The regulated person has ten business days from the date of receiving the initial report to respond and comment.[62] Thirdly, after a discussion based on the initial report with the inspected person, they will have an opportunity to correct the observations within a period of time set by the Authority.[63] The last step in this process is for the CMA to prepare the 'final report', which sets out the results of the inspection.[64] The final report may include the CMA initiating disciplinary procedures to correct violations identified in the report.[65]

It should be noted that this procedure gives the regulated person the chance to correct all of their actions or transactions that were observed to be non-compliant with the laws and regulations. Although the regulated person may have the opportunity to correct their position before the issuance of the final report, this procedure is optional and is exercised at the discretion of the CMA. For example, sometimes the CMA will issue the final report without first discussing the issues with the inspected person and allowing them to comment. Thus, the CMA may take disciplinary procedures without any prior

(57) Executive Bylaw, Module Three, Chapter Two, Articles 2-2 and 2-3.
(58) The CMA Financial Report 2016/2017 (n 50).
(59) Executive Bylaw, Module Three, Chapter Two, Article 2-3.
(60) Executive Bylaw, Module Three, Chapter Two, Article 2-3(1).
(61) Executive Bylaw, Module Three, Chapter Two, Article 2-3(2).
(62) Executive Bylaw, Module Three, Chapter Two, Article 2-3(2).
(63) Executive Bylaw, Module Three, Chapter Two, Article 2-3(3).
(64) Executive Bylaw, Module Three, Chapter Two, Article 2-3(4).
(65) Executive Bylaw, Module Three, Chapter Two, Article 2-3(4).

consultation. In such a case, the inspected person will miss the chance to correct their actions and potentially avoid disciplinary procedures. In order to treat all inspected persons fairly, it is suggested that this provision should be amended to allow all inspected persons the opportunity to respond and comment on the initial report. This would ensure that all regulated persons are treated equally, with fairness and justice, which ultimately will better serve the CMA's objective, which is to protect the market's integrity.

The CMA has the authority to supervise and inspect a third party if that third party is related in some way to the securities activities, in accordance with article 5 of the CML. The CMA can supervise, inspect, and investigate the request for information from a third party. The third party cannot ignore the CMA's request and it is obligated to answer the CMA's questions, otherwise it will be subject to criminal and civil sanctions according to Article 127. If the third party is not registered as an approved person and it's not related to securities activities, the CMA can't require the third party to make changes or improvements. For example, auditing firms who are licensed by the Ministry of Commerce and Industry pursuant to Law No. 5 of 1981 cannot be supervised or inspected by the CMA. The only authority that can supervise and inspect is the authority who provides the license which the Ministry of Commerce and Industry.(66)

In the UK, the FCA has the power under s 165 to require information and documents to support both its supervisory function and its enforcement function.(67) In accordance with s 165 of the FSMA, the FCA and PRA have investigatory powers to serve a written notice on an authorised person to provide specific information and documents within a reasonable period. The investigatory power's scope of application is very wide. The FCA can send a notice to enforce to someone in order to require him or her to produce information. They can send this not only to an authorised person, but also to any person who relates to an authorised person. The connected person includes persons who are—or at a relevant time have been—members of the same group, controllers of the firm, officers, managers, employees or agents.(68) This provision is broader than the Kuwaiti provision, which includes third parties but only those that had a direct relation with the events.(69) This condition, to only involve third parties who are directly related to the events, is presumably

(66) Bouareki, supra n19, 338
(67) Hayes and Conceicao, supra n19, 38.
(68) FSMA, s 165(7)(a) and s 165(11), which defines a 'connected person' for the purpose of this section.
(69) CML, Article 5

meant to protect the privacy of the third party.(70) It should be noted that most cases, whether in Kuwait or the UK, relate to commercial matters and the reputation of third parties is important. Therefore, it is good practice to set forth conditions that must be satisfied before involving third parties in inspections or investigations.

2.4.1 Confidentiality

There are many areas where privilege can be claimed in both public and private law because the right to privacy is, to some extent, often more important than investigation in commercial matters. In general, there are only limited situations where it would be legitimate for an authorised firm to withhold requested material.

If the CMA is carrying out an on-site inspection and the employee discovers a violation of the law, the employee—who has judicial power—can inspect further and can ask the firm for certain documents; the firm cannot refuse to provide them.(71) If the violation is proven by the judicial officer, it can be used in court as valid evidence to punish the non-compliant firm. The firm cannot argue in court that this evidence was obtained without the prosecutor's permission because the judicial officers have the authority to prove the actions committed in violation of the law, regulations and the Executive Bylaws. This power can also be used in response to a particular inquiry that has been submitted to the CMA. The judicial officers have subpoena power to call witnesses to complete their investigation. This is an exceptional power which gives the CMA the authority to inspect without first obtaining the prosecutor's permission. Such permission, that is required by other laws, exists to ensure that private property is always protected from the abuse of power. Therefore, some scholars insist that the CMA staff must not have judicial power. Instead, they argue that the CMA's staff must be under the prosecutor's jurisdiction if they wish to carry out further inspections. (72) Although this argument is well-intentioned, commercial matters and economy stability need quick actions and the proper tools to discover crimes without the delay that would be inherent in first seeking prosecutorial permission.

It is important to note that no person can refuse to provide documents or information required by judicial officers on the basis of the confidentiality of such information or documents, or on the basis of their superior's instructions

(70) CML, Article 142
(71) CML, Article 30 and the Executive Bylaw, Module Three, Chapter Two, Articles 2-4 and 2-5.
(72) Othman, Commentary on Law No.7 of 2010 regarding the Capital Market Authority, supra n17, 962.

not to disclose them.(73) This means that all firms and individuals must not refuse the judicial officers' requests, even if those requests are related to confidential matters.

This stands in contrast to the UK approach, which includes limited circumstances in which it would be acceptable for an authorised person to withhold requested material. For example, if the person is being investigated.(74) Furthermore, based on confidentiality, the authorised person can refuse to provide information. There are certain laws and circumstances that the FCA takes into consideration to protect confidentiality, such as banking confidentiality, legal privilege, and the Data Protection Act 1998. All these protections of confidentiality in principle should be considered by the Kuwait legislature, with a view to amending the current provisions to ensure the protection of rights to confidentiality.

3 Formal investigation

3.1 Introduction

Once an investigation has been formally launched, the financial regulator can utilise its investigatory powers. These powers cover the civil investigation by the regulator and include how a firm or individual should respond to the use of such powers. The outcome of this investigation may result in civil rather than criminal sanctions. The period since the issuance of the CML in 2010 has witnessed rapid change in Kuwait's regulatory architecture. A lot of firms and individuals have been punished pursuant to the CML.(75) However, it will be argued here that the CMA's investigatory powers and tools need further refinement to enable it to incorporate best practices, which are being utilised in some developed countries.

After the financial crisis in the UK, the enforcement and investigation framework changed significantly because the Financial Services Authority was replaced by the FCA and the PRA. The Financial Services Act 2012 amended the FSMA to provide for the new regulatory bodies to inherit the FSA's former investigatory powers, though some changes have been made to the regulators' powers of investigation, which were originally provided for in the Financial Services Acts of 2010 and 2012. Some modifications have been made in relation to breaches of the short selling regulations, while others enable the retention of documents, including originals, for as long as

(73) Executive Bylaw, Module Three, Chapter Two, Article 2-7.
(74) Hayes and Conceicao, supra n19, 40.
(75) The CMA Financial Report 2016/2017, supra n50.

is necessary.(76) These modifications help to improve the effectiveness of the financial markets' legal regulation.

3.2 Investigation powers

When analysing the investigative powers, the first stage is to consider what wrongful act the financial regulator should select for investigation. In Kuwait, enforcement action will generally be taken in all cases that come to the CMA's attention involving a breach of the CML. This stands in contrast to the FCA's policy, whereby the matters for enforcement action are based on the FCA's priorities. In the UK, not all breaches of rules and principles will result in enforcement action being taken but when the breach amounts to a threat to its statutory objectives, there must be an investigation. It is worth mentioning that this setting of enforcement priorities leads to criticism that matters are unfairly selected for enforcement because they fall within a specified priority. (77)

Regardless of the said criticism, the statutory objectives priorities can help the FCA to direct its powers and resources towards the investigation of important breaches, which can in turn help to protect the markets and consumers. It is suggested that in Kuwait, the CMA should create a policy to prioritise the investigation of breaches in a way that best utilises the CMA's resources. It may lead to overregulation of the markets if absolutely any wrongful act is investigated. Pursuing every potential infringement absorbs the CMA's power and time. Thus, the CMA must focus on the most significant breaches or wrongful acts to enable the enforcement tools and power to serve its objectives and protect the markets.

In Kuwait, the legal department of the CMA has the power to undertake administrative investigations of violations covered by the CML or its Executive Bylaw. The investigator has many powers for the purpose of investigation, which can help to ensure that the right sanction is ultimately applied. The investigator has the right to request any data, documents or papers from any government organisation or any organisation related to the CMA. For instance, the investigator can request the Ministry of Commerce and Industry to provide the notified person's record to double check for potential conflicts of interest.(78) The investigator has the right to hear the testimonies of any witnesses and the right to call on whomever it may deem necessary to testify during the investigation. For example, the investigator can request a consultancy firm

(76) Hayes and Conceicao, supra n19, 150.
(77) Hayes and Conceicao, supra n19, 152.
(78) Othman, supra n17, 1007.

to testify about its consultation regarding an investment fund to ensure that the manager of the fund invested in accordance with that consultation.(79) In addition, the investigator has the right to visit the premises of, and inspect any register or information at, any government body or any entity of relevance to the activities of the CMA.(80)

The investigative powers that are exercised by the CMA legal department are supported by the threat of punishment for non-compliance. There is punishment of a fine of 'not less than five thousand Dinars and not exceeding fifty thousand Dinars' if any person who commits an action that may obstruct an investigation or any supervisory activity of the CMA or its employees including the following situations: 1) If a firm/individual fails to enable the CMA employee to access any data or information deemed necessary by the CMA, 2) if a firm/individual fails to comply with any final resolution issued by the disciplinary board, 3) if a firm/individual provides the CMA with false or misleading information.(81) These punishments provide a strong and effective threat of sanction to the investigator in order to force compliance from the regulated firm/individual. However, these provisions only apply to the licensed firm/individual or any firm/individual who is practicing securities activities.(82) Scholars have argued that 'a firm/individual who is practicing securities activities' is too vague and it could include even a firm not supervised by the CMA.(83) There is a necessity to include all the firms and individuals related to the securities activities to enable the CMA to protect the markets and consumers.

The UK has a similar approach to Kuwait. Under s 167 of the FSMA the person appointed by the Regulator to conduct the investigation is also able to supplement the investigation by 'appointing one or more competent persons' to conduct an investigation into 'the nature, conduct or state of the business'(84) or 'a particular aspect of that business'(85) or 'the ownership or control of…an authorised person'.(86) The term 'business' is broadly defined to include any part of a business even if it does not consist of regulated activities conducted

(79) Othman, supra n17, 1007.
(80) CML, Article 142 and the Executive Bylaw, Module Three, Chapter Four, Article 4-10.
(81) CML, Article 127.
(82) Boaruki (n x) 336.
(83) Bouareki, supra n20, 337.
(84) FSMA 2000 s 167(1)(a).
(85) FSMA 2000 s 167(1)(b).
(86) FSMA 2000 s 167(1)(c).

by an authorised person or appointed representative.(87) This comparison shows that the Kuwaiti approach, to extend the investigative power to include firms who are practicing securities activities, is applying best practices.

During an investigation, the Kuwait prosecutor based on the CMA's request has the power to temporarily suspend an employee from work but any such suspension must be for the investigation's benefit.(88) In other words, it would be done to ensure that the records and documents are safe and that there is no influence from the employee during the investigation. If this condition is not met there is no need for a suspension. The power of suspension does not only include the accused employee, it also extends to any witness in the investigation as well.(89) The extension of the suspension power will only be applicable to the crimes that are stated in the CML. Although the prosecutor is the authority responsible for issuing any work suspension order, it must not include the witness because it may result in the employees being too afraid to testify if this may affect their work, even on a temporary basis. The precautionary procedures should only include the accused. It must be noted that this suspension may be issued based on the CMA's request or if the prosecutor considers it necessary. There is another situation where the accused will be suspended from work based on the law: if the prosecutor refers the matter to the court the accused will be suspended from work automatically.(90) In that case, the accused may file a request to reverse the suspension decision or if the judge sees it is necessary.(91)

Overall, the CMA's powers of investigation are wide ranging. In some situations the powers can be exercised in relation to another supervisory authority to obtain information or documents that could help progress the investigation.

3.3 The conduct of the investigation

The methods that the CMA uses to conduct an investigation are consistent with its objectives. The investigation process must protect the accused's right of defence. It is important to comply with the constitutional principle that everyone is entitled to fair procedures.(92) The investigator must review the evidence and the accused's records in order to organise the investigation's

(87) FSMA 2000 s 167(5); see also Hayes and Conceicao, supra n19, 156.
(88) CML, Article 132
(89) Bader AlMullah, Legal Structure of the Kuwait Capital Markets (2nd edition, 2012) 928.
(90) CML, Article 132.
(91) CML, Article 132.
(92) Kuwait Constitution, Article 34.

questions and to consider the manner in which the investigator will present its case. This can help to ensure that the conduct of an investigation proceeds on a strong legal basis. The investigator's report will not be provided to the accused. It will remain with the CMA's records. This is slightly different from the equivalent process in the UK whereby the FCA will formulate a letter with its preliminary findings; in some circumstance the accused might be able to obtain a copy of the letter in case of urgency.(93)

After the investigator has reviewed the evidence and decided to commence an investigation, there are two important aspects of the investigative process that have to be kept in mind: first, the accused's right of defence, and secondly, the investigation's limits. Those two factors, discussed briefly in turn below, are important to analyse in order to evaluate the effectiveness of the enforcement policy in any financial market.

3.3.1 The right of defence during an investigation

The accused person has the full right to defend him/herself or appoint a lawyer to defend him/her.(94) This right means that the accused has the right to ask to postpone the investigation session to review the files and documents. It also means that the accused person has to be given time to prepare a defence or appoint a lawyer to prepare his/her defence. The accused person may file a defence memorandum or make an oral presentation to refute the case.(95)There is no formal procedure that the accused must follow in order to defend him/herself. It is important to emphasize that any person has the right to defend him/herself and to be afforded adequate time to prepare his/her defence.

3.3.2 The investigation's limits

As explained above, the legal department of the CMA carries out a civil investigation. This investigation is important to gather accurate information to either prove a breach of the law or to prove that the firm/individual is in fact complying with the CML. Although the investigation has powers to enforce the law, there is another consideration that the investigator must bear in mind. The accused may refuse to disclose information or documents if they are related to confidential matters. The investigation has limits: it cannot breach confidentiality agreements with other parties. It is not allowed to force a lawyer, doctor, representative, agent, or other to present any information related to

(93) Hayes and Conceicao, supra n19, 176.
(94) CML, Article 144.
(95) AlMulla, supra 80, 928.

their work.(96) This protects the confidentiality of any information that relates to their work, which includes the matters related to financial markets and securities activities. (97) Furthermore, even the Kuwait Civil Law emphasizes the importance of protecting confidential agreements between parties.(98) It is arguable as to who can decide what is 'confidential information'. If the agreement between two parties states in clear language that their provision must be kept confidential, it means there is no discretionary power in this regard. In other more ambiguous cases, it could be challenged in court and the court may have to consider whether information or a document is protected by confidentiality. Regardless of the determination of the confidential documents, during an investigation by the legal department of the CMA the accused person has the right to refuse to provide information or documents on the basis that it is protected by confidentiality.

3.4 The investigation's outcome

The final stage of the investigative process is the investigator's decision on the matter. If the investigation reveals evidence that a violation has been committed, the investigator prepares a report to the CMA which may contain a recommendation to refer the suspect to the Disciplinary Board. The CMA may then proceed to refer the suspected violator to the Disciplinary Board or it may issue a warning to the violator to cease committing violations.(99) It may require an undertaking not to repeat such a violation in the future and the CMA may impose additional supervision on the violator.(100) If the CMA's Board of Commissioners refers the matter to the Disciplinary Board for an enforcement decision, the Disciplinary Board shall issue its decision about the referred violation.(101) The Board of Commissioners and relevant parties shall be notified about the decision within seven business days from the date of issuance of the decision of the Disciplinary Board.(102) On the other hand, if the investigation is deemed not justified, the investigated person shall be notified of the decision and they may obtain a certificate of this from the Authority.(103) Having outlined the various possibilities regarding the investigation's

(96) Kuwait Evidence Law No. 39 of the year 1980, Article 43.
(97) Osama Al Fouly, 'Global Governance and Financial Society in Light of the Capital Markets Authority Law of Kuwait' (2016) 4(15) Kuwait International Law School Journal 55.
(98) Kuwait Civil Law, Article 197.
(99) Executive Bylaw, Module Three, Chapter Four, Article 4-13.
(100) CML, Article 143.
(101) Executive Bylaw, Module Three, Chapter Four, Article 4-13(2).
(102) Executive Bylaw, Module Three, Chapter Four, Article 4-13(3).
(103) Executive Bylaw, Module Three, Chapter Four, Article 4-14.

outcome, there are some final points that are worth noting.

First, the CMA is the authority responsible for deciding whether to refer the suspected violator to the Disciplinary Board or not; that decision is based on the investigator's report. The managing director of the CMA will issue any decision to refer the violation to the Disciplinary Board with documentary evidence and relevant investigation reports.(104) The CMA cannot refer the suspected violator without the investigator's report; this is to ensure that the suspected violator was afforded his full rights to defend himself.

Secondly, there is significant discretionary power in the CMA's decision either to refer the suspected violator or to issue a warning letter requiring a pledge not to repeat the violation. There is no condition or requirement that the CMA must issue a warning letter; the decision on how to proceed falls solely within the CMA's discretion. This may lead to inconsistencies in treating suspected violators. Therefore, it is necessary to prepare a list of all the violations which will result in a warning letter rather than referral to the Disciplinary Board. There should be some conditions or criteria to guide the CMA when deciding whether to refer to the Disciplinary Board or issue a warning. For example, if it is the first violation or if the violation did not harm a third party then perhaps a warning letter would normally suffice. These conditions or requirements should be kept up-to-date and would be subject to change to minimise the harm caused by the violation.

Finally, the CMA has the power to impose increased supervision on the suspected violator. This is a new power which has been granted to the CMA and it currently exists without any specification or limitation.(105) Although it is potentially useful, it is broadly stated and in practice it may cause an overlap in supervision or even over-regulated supervision.

In summary, it is necessary to provide the CMA with discretionary power to decide on how violations should be handled once an investigation is complete, but this discretion must be used in accordance with a clear legal framework. It is submitted that the final stage of the investigation process needs reconsideration and further amendment to help ensure that all violators are treated equally.(106)

(104) Executive Bylaw, Module Three, Chapter Four, Article 4-13.

(105) Executive Bylaw, Module Three, Chapter Four, Article 4-13: 'The Authority may warn a Violator to cease committing the Violation and require him to undertake not to repeat it in the future **as well as subjecting him to additional supervision.'** (emphasis added).

(106) Hayes and Conceicao, supra n19, 293.

4 How the regulator makes enforcement decisions

4.1 Introduction

The enforcement decision aims to punish firms and individuals for breaches of the law and deter future breaches. Essential to an understanding of the decision-making process is the recognition that it is administrative in nature rather than judicial. It enables the financial regulator to take enforcement decisions, which have binding effect, without the need for sanctions from a court.

After the issuance of the CML in 2010, enforcement actions increased year by year. In the financial year 2015/2016 the total number of violations was 161 while in 2016/2017 this number increased dramatically to reach 309.(107) Some penalties were challenged through judicial review.(108) According to the CMA annual report of 2016/2017, there are 192 registered case in the court while 73 have reached the final verdicts only 6 cases were against the CMA.(109) Thus, it may be observe that the CMA has shown an ability to use its power. The enforcement role is vitally important because it ensures the financial regulator has the tools and power to detect non-compliant firms and individuals, which in turn protects both markets and consumers.

In Kuwait, the Disciplinary Board has jurisdiction to review violations that any firms or individuals commit against the CML, the Executive Bylaw or 'any law, or decision or instructions issued by the Authority [the CMA]'.(110)At the same time, the Disciplinary Board cannot investigate violations of any other laws, such as the customs laws. This means that the Disciplinary Board's scope of work is related solely to the CML, which should help ensure that there is no duplication between the supervisory authorities.

In the UK system, both regulatory authorities—the FCA and the PRA—have powers to impose disciplinary sanctions within their jurisdiction. Under the new regulatory architecture, the FCA is responsible for most enforcement actions. Due to the transfer of the FSA's powers of enforcement to the FCA, which commenced on 1 April 2013, all the FCA's procedures and policies were inherited from the FSA.(111) It is worth mentioning that following the Enforcement Process Review (the Review) the FSA's procedures were

(107) The CMA Financial Report 2016/2017, supra n50.
(108) <https://alqabas.com/435715/> accessed 10 April 2018
(109) The CMA Financial Report 2016/2017, supra n50
(110) Executive Bylaw, Module Three, Chapter Four, Article 5-2.
(111) Hayes and Conceicao, supra n19, 219.

completely overhauled. The statutory provisions relating to the procedures for taking enforcement action are now contained in Part XXVI of the FSMA, as amended by the Financial Services Act 2010 (FSA 2010) and the Financial Services Act 2012 (FSA 2012). Furthermore, the FCA sets out detailed procedures in the FCA Handbook module known as 'The Decision Procedure and Penalties Manual' (DEPP), which was released in June 2013. Finally, the 'Enforcement Guide' (EG), issued on 1 April 2013, describes the FCA's approach to exercising its main enforcement powers.(112) It provides an overview of the matters that will be investigated or resolved informally.

It is noteworthy that the FCA has adopted a strategy of 'credible deterrence', which has had the following four effects. First, this strategy has raised the level of penalties imposed on individuals and firms. The DEPP states that, '[i]f the FCA considers the [penalty] is insufficient to deter the firm who committed the breach, or others, from committing further or similar breaches then the FCA may increase the penalty.'(113) Secondly, the credible deterrence strategy has been used to personally hold senior individuals to account. Examples of this strategy being employed by the FCA include the fine that was imposed on Yohichi Kumagai, the former Executive Chairman of Mitsui Sumitomo Insurance Company, of nearly £120,000 in May 2012, furthermore the fine imposed on Peter Cummings, a former Executive Director of HBOS plc and Chief Executive of its Corporate Division, in September 2012.(114) These fines are the embodiment of the enforcement goal, which is to hold individuals to account with strong enforcement action. This strategy can help to protect the markets and consumers. The third feature of the credible deterrence strategy is that it has increased the regulator's criminal prosecution power. Finally, the credible deterrence strategy has helped to develop the enforcement tools and power in UK's financial markets. Collectively, these improvements could, in the long-term, lead to better overall protection of the markets from future financial crises by enabling the regulator to effectively enforce adequate and appropriate sanctions.

The following section in this chapter explains the decision-making process and the enforcement decisions that the financial regulator can issue in order to enforce the rules in the financial markets.

(112) FCA EG 1.1 Overview, 1 March 2016 <https://www.handbook.fca.org.uk/handbook/EG/1/?view=chapter> (accessed 23 February 2018).
(113) DEPP 6.5A.4 'Step 4 – adjustment for deterrence', 1 April 2013.
(114) Hayes and Conceicao, supra n19, 3-4.

4.2 Authority to bring charges and impose a wide range of sanctions

The enforcement of securities market regulations can be achieved through civil remedies and criminal sanctions, and market abuse enforcement varies between civil and criminal penalties. Civil penalties include the imposition of monetary fines, and criminal law sanctions involve imprisonment or monetary fines.(115)

In Kuwait, enforcement decisions are made by a body known as the Disciplinary Board, while in the UK system, the equivalent entity is known as the Regulatory Decisions Committee (RDC). The Disciplinary Board is responsible for reviewing violations of the CML and its related laws, as well as any complaints against the Kuwait Stock Exchange's (KSE) decisions. The law requires that the any complaint against the KSE must be submitted within 15 days of the issuance of the decision.(116) Enforcement decisions related to KSE matters will be final.(117)

The Disciplinary Board has the authority to enforce administrative penalties on non-compliant firms and individuals and refer the violator (both firms and individuals) to the Capital Market Prosecutor who can impose criminal sanctions. The mechanism for applying sanctions is essential to the type of sanction that can be applied. The financial regulator should have at its disposal a wide range of sanctions and remedies, including monetary penalties.(118) The CMA has the authority to fine firms and individuals who have breached the CML. In this matter, article 139 of the CML states that, '[a] violation is any act which is not in accordance with the rules, regulations, decisions, or instructions issued by the Authority within the framework of this Law'. Article 139 creates civil liability, is very general and does not specify the violations that are included. The Disciplinary Board will be the authority responsible for reviewing the complaints and imposing financial penalties, if necessary.

The formulation of the Disciplinary Board provides some guarantee to the alleged violators that they will be treated with fairness and impartiality. The Disciplinary Board must be chaired by a judge who is seconded by the Supreme Judicial Council.(119) In addition to the judge, two members who are

(115) Emilios E Avgouleas, The Mechanics and Regulation of Market Abuse: A Legal and Economic Analysis, (Oxford University Press 2005) 452.

(116) AlMulla, supra n80, 1011.

(117) CML. Article 140

(118) Carjaval and Elliott, supra n1, 20.

(119) Note that in Kuwait, the Supreme Judicial Council is the body that is responsible for making recommendations to the Amir for all judicial appointments. It consists of Kuwaiti judges and Ministry of Justice Officials.

experts in financial and economic affairs should be present for the purpose of deciding administrative penalties for violations against the provisions of the law.(120) This stands in contrast to the UK equivalent, the RDC, which consists of a chairman and several deputy chairmen wherein none of the members are from the judiciary. Furthermore, the FSMA and DEPP require that the chairmen must be appointed by the FCA's board on the recommendation of an independent group established for that purpose. The chairman of the RDC is an employee of the FCA and is salaried.(121) The formulation of the Disciplinary Board in Kuwait provides a form of trust and confidence in the Disciplinary Board's decisions. A member of the Disciplinary Board is prohibited from having any direct or indirect interest with any entity that is subject to the CML, nor may he/she be allied with any such entity during the time of his/her said work.(122)This prohibition is to ensure that all of the Disciplinary Board's members do not have any conflict of interest while carrying out their duties.

4.3 The regulatory process

The Executive Bylaw describes the process of decision-making once a matter has been referred from the CMA to the Disciplinary Board. The Disciplinary Board has the right to access the evidence that the CMA's investigation relied on to refer the matter to the Disciplinary Board. The accused firm or individual has the right to be informed of the action being proposed and the reason for it.(123) Either the referred person or their representative has the right, within a reasonable time, to make written or oral representations to the Disciplinary Board.(124) Furthermore, the Disciplinary Board may, at its own discretion or in response to a demand by the referred person or their representative, hear testimony from any person it either wants or is required to hear from, or from anyone whose assistance it seeks due to their relevant expertise.(125) The decision-making process is important to facilitate the issuance of fit and proper decisions in relation to regulated and related activities.

The legislation provides the Disciplinary Board with the authority to continue the investigation even if the referred person fails to attend the investigation session. If it is established that the person was duly notified of the date of the Disciplinary Board session, their absence shall not prevent the Disciplinary

(120) AlMulla, supra n80, 1009.
(121) Hayes and Conceicao, supra n19, 228.
(122) CML, Article 141.
(123) The Executive Bylaw, Module Three, Chapter Five, Article 5-6.
(124) The Executive Bylaw, Module Three, Chapter Five, Article 5-7.
(125) The Executive Bylaw, Module Three, Chapter Five, Article 5-8.

Board from considering the violation or grievance and indeed from deciding upon it.(126)

The investigation stage may lead to a confirmation, variation or withdrawal of the proposed enforcement action. The Disciplinary Board has the right to decide the enforcement action, while the referred person has a right to a judicial hearing with a consideration of all relevant evidence before the court. However, after the Disciplinary Board has reached a decision, the CMA's Board must implement that decision against the concerned firms or individuals.

In the UK, when the FCA proposes to take enforcement actions it must use the statutory notice procedures. The enforcement action that the FCA will take depends upon the type of notice.(127) Annex 1 to 2 of the DEPP lists the enforcement actions that are subject to the warning notice and decision notice procedures; it also provides for who is the decision maker in each case. The statutory framework for the issuance of warning notices, decision notices, notices of discontinuance, and final notices are set out in Part XXVI of the FSMA 2000.

4.4 Enforcement of the decision

If it is satisfied that a violation has been committed, the Disciplinary Board may issue any of the following penalties:(128)

1. Cautioning the violator to discontinue committing the violation.
2. Issuing a warning.
3. Requiring the violator to re-pass pre-qualification tests.
4. Suspending his/her activities for a period not exceeding one year.
5. Suspension from practicing work or profession in final.
6. Suspending the license for a period not exceeding six months.
7. Revocation of the license.
8. Imposing restrictions on the activity or activities of the violator; such restrictions shall be specified by the CML Bylaws.
9. Canceling the voting or proxy or power obtained by the violation of the provisions of the CML.
10. Suspending or canceling any acquisition offer or purchase transactions outside the scope of the acquisition offer if they are in violation of the

(126) The Executive Bylaw, Module Three, Chapter Five, Article 5-9.
(127) Hayes and Conceicao, supra n19, 226.
(128) CML, Article 146.

provisions of Chapter 7 of CML or the Bylaws.

11. Prohibition of exercising voting rights for a period not more than three years by any Person who refrained from submitting any statement, or submitted an incomplete statement, or one contrary to the truth or in violation with the CML or the Bylaws.
12. Suspending the validity of an applicable prospectus according to the provisions of CML.
13. Cessation of trading of a Security temporarily or suspension or cancellation of the decision to list a Security before the effective date thereof.
14. Dismissal of a member of a Board of Directors or of a manager of one of the licensed companies or listed companies or Investment Controller or Custodian of a Collective Investment Scheme who failed to perform his/her duties as provided in CML or the Bylaws.
15. Imposing financial penalties that are defined according to the severity of the violation not exceeding fifty thousand Kuwait Dinars.

In all cases, the Disciplinary Board may cancel all transactions related to the violation and the entailed effects, or require the violator to pay amounts equal to the benefit he/she acquired or the value of the loss he/she has avoided as a result of the violation. The amount may be multiplied if the Person repeats committing the violations.

The range of penalties is broad, which gives the Disciplinary Board flexibility. Enforcement includes the possibility of imposing financial penalties, as per Article 146(15). It is suggested here that the power to impose financial fines is particularly useful because it exacts an immediate punishment on the violator whilst avoiding a potentially lengthy judicial process that may involve matters that are difficult to prove in court. These penalties might be subject to the interpretation of the 'Disciplinary Council' since there are no clear controlling guidelines to follow and there is no specified gradation in its application. For example, in January 2018 the CMA lost a case against an investment firm which was charged with fictitious trading but the law does not provide any clear definition of 'fictitious trading' and there is no interpretative guideline as to how to apply the appropriate penalties. The firm was successful in proving that there was no fictitious trading by the firm.(129)

On the other hand, the maximum permissible amount of monetary penalties is insufficient. There is currently a limitation in Article 146(15), which

(129) Case No. 25/2014 First Instance Court, Appeal Court Case No. 14/2017.

provides that any financial penalties should not exceed fifty thousand Kuwaiti Dinar.(130) It should be noted that violations in the financial markets involve figures that often far exceed this amount. Indeed, violations in the commercial and financial markets can result in benefits that are measured in the millions of dinars. For example, the Disciplinary Board imposed financial penalties against Mushrif for Trading and Contracting Company as follows: the first penalty is two thousand Kuwaiti Dinar for violating the rules of disclosing material information and corporate governance to be specific for not reporting the two lawsuits filed against the Ministry of Public Works for withdrawing two projects. The second penalty is fifty thousand Kuwaiti Dinar for failure to keep the books and records accurate according to international accounting standards and transfer cost between projects.(131) The Mushrif company stopped trading in the Stock Market which caused huge losses to the public and the market.(132)

Furthermore, on 4 January 2018 the CMA imposed financial penalty against investor for not submitting mergers and acquisition proposal as the law required. The financial penalty was five thousand Kuwaiti Dinar which will be renewal monthly starting from 30 March 2018 if the investor did not correct the violation. The imposed financial penalty with the monthly renewal is not stated on the Article 146(15) of the CML which proves that the current financial penalty in the law is insufficient to punish and deterrence the markets. The investor filed a case against the CMA based on that creation of the financial penalty and its not stated in Article 146 of the CML. On 28 May 2018 the court of the first instance issued its verdict which stated clearly that the CMA does not have the power to imposed penalty not stated in the CML.(133) Regardless of the court verdict, the case confirms that it is necessary to amend the financial penalty to provide deterrence and ensure compliance with law.

Therefore, it is important to reconsider the maximum allowable financial penalties. All penalties are important to ensure the enforcement of the law, the proper punishment of the offender and the effective deterrence of future non-compliance. However, the current civil penalties as determined by Article 146 of the CML are very lenient and, it is submitted, do not achieve deterrence.

(130) This is the equivalent of approximately £124,000.

(131) Disciplinary Board Resolution No. 65/2017 issued on 29 November 2017 Available at <https://www.cma.gov.kw/en/web/cma/cma-board-releases/-/cmaboardreleases/detail/488317> accessed 9 April 2018

(132) Kuwait Stock Markers "Boursa" Website << https://www.boursakuwait.com.kw/news-details/35245/0>> accessed 10 April 2018

(133) Case No. 18/2018 Capital Market Court, Administration Circle No.5.

To put it simply, such relatively meagre financial penalties will undermine the CMA's effectiveness. Furthermore, it would be useful to determine, under a special section, exactly what constitutes a breach in order to establish civil liability.(134)

This stands in contrast with the UK approach: whilst the FCA can impose substantial fines on market manipulators, in Kuwait the CMA can only impose limited financial penalties. The financial penalties that the FCA can imposed depend on the percentage between 0% up to 20% on the market manipulator.(135) The penalty must be proportionate to the breach. Furthermore, there are guidelines in the FCA handbook describing, in details, all the requirement and conditions for applying a financial penalty. Finally, as mentioned above, the FCA applies the compliance approach, therefore, it could issue a public censure instead of financial penalties if it fits the stated criteria.

There is another key element of the enforcement regime that should be subject to amendment. Once a violator has paid its financial penalties, the funds go into the CMA's budget and become part of its financial resources. Although this is probably well-intentioned, to offset the cost of regulation and enforcement, it creates a conflict of interest because the CMA might be tempted to increase the size and number of financial penalties.(136) This arrangement seems to be wrong in principle. In the UK, the penalties go to the Treasury after deducting the enforcement costs.(137) It is important for Kuwait to amend the law to ensure that financial penalties are paid to the Ministry of Commerce and Industry or the Ministry of Finance to avoid this conflict of interest.

Another area of concern is the publication of penalties. It is the practice of the CMA to publish all penalties on its website. However, this publication is arguably a violation of privacy and confidentiality rights, which must be afforded priority. The Kuwait Constitution provides that there must be no punishment without a law which states that the act is forbidden.(138) Article 146 of the CML—which sets forth an exhaustive list of all the penalties that the Disciplinary Board can impose—does not include any penalties related to publication of imposed penalties.(139) Therefore, the legislature needs to pass

(134) Fatemah Al Shuraian, 'Market Manipulation in Kuwait Stock Exchange', supra n 11, 102. Al Shuraian argues at 102 for the importance of 'issuing a special section that describes market manipulation and prohibits it, directly and clearly, so that the nature of market manipulation is clarified…'

(135) The FCA Handbook, Section 6.5A the five steps for penalties imposed on firms. Page6/21

(136) CML, Article 19.

(137) Financial Services Act 2012, Schedule 1ZA s 20.

(138) Kuwait Constitution, Article 32.

(139) Bouareki, supra n20, 354.

a law that specifically permits the CMA to publish the penalties it imposes. The current situation is unacceptable, arguably unconstitutional, and there is a need for further consideration of this issue by the CMA's board. Publication not only impacts the reputation of the firms and individuals who have been penalised, but it may also lead to the identification of third parties, which should be protected from any publication.

In the UK, s 391(7) of the FSMA and the DEPP govern the manner of publication. Section 391(7) states that information will be published in a manner that is determined by the FCA, according to the circumstances of the situation. Unlike Kuwait, the authorisation to publish is specifically provided for by law. Thus, final notices may be published in accordance with the law and at the discretion of the FCA. In some circumstances, the FCA may decide not to publish the information if it will be unfair to the person or to protect the markets.(140) The publication takes the form of a release on the FCA's website. It includes a summary of the case, comment from a senior member of the FCA's staff and a copy of the final notice. The concerned person can comment on the final notice with 24 hours of publication.(141) This opportunity to comment on the final notice is important for the firms and individuals to emphasize the transparency in the markets. Moreover, the FCA adopted a new policy in 2010 regarding the enforcement of financial penalties, as a result of which the amount of fines increased. This is reflected in the FCA's Enforcement Guide (2016), section 6.2.16 which states:

"Publishing notice is important to ensure the transparency of FCA decision-making; it informs the public and helps to maximize the deterrent effect of enforcement action."

Finally, any person who has received a penalty pursuant to Article 146 may appeal in writing against the Disciplinary Board's decision. This appeal must be made within 15 days of receiving written notification of the penalty. The CMA's Board will refer such an appeal to the Disciplinary Board for further consideration so that it may issue its final decision. In practice, there are two possible outcomes. The first scenario is that the Disciplinary Board could uphold the appeal and modify the enforcement decision. The second scenario is that the Disciplinary Board could decline the appeal, either explicitly or implicitly. If the Board does not respond to the concerned person within 30 days from submitting the appeal, the person should consider this as an implicit

(140) Financial Services Act 2012, s 397(4), (6).
(141) Hayes and Conceicao, supra n19, 259.

refusal. It is recommended that another Disciplinary Board, with different members, should review the appeal to ensure fairness and impartiality. The current situation leads to a rejection of all appeals against the Disciplinary Board's decisions.

1.1 Ability to act immediately - precautionary procedures

It is vital for a financial regulator to have the power to take immediate action and/or precautionary measures in order to protect investors and the marketplace. If the regulator can quickly implement precautionary measures, it will be able to minimise the damage.(142) For example, the regulator has the power to freeze assets, impose injunctions, suspend trading or suspend the activities of regulated firms. The aim is to prevent the firm from damaging the individuals or firms by distributing assets to family and friends.

In Kuwait, the CMA must refer the matter to the Capital Market Prosecutor for further investigation and deterrence if a firm allegedly committed a crime.(143) In that case, the CMA can request the Capital Market Prosecutor to take precautionary procedures against the firm. The precautionary procedures could be to: 1) suspend a person from work temporarily, 2) ban a person from travel and, 3) prevent a person from managing his money.(144) These measures are available in addition to the normal precautionary procedures according to the Civil Procedures Law. The CML takes into consideration the nature of the commercial matters that are related to the market and imposes a timeline for the Prosecutor to respond to the CMA's request to impose precautionary procedures. The Prosecutor must make a decision regarding a request from the CMA within twenty-four hours from the time of submission.(145) In the event that the request is rejected, the cause of such rejection shall be stated. This obligation, to state the cause of rejection, could be challenged by the CMA to ensure that the decision was made on a sound legal basis. The Prosecutor is the only authority that has the power to impose the precautionary procedures. The CMA cannot impose or take any of the precautionary procedures without the Prosecutor's order. These procedures are related to the person's rights of freedom and managing their money, so it is necessary to carefully protect these rights from any abuse of power and ensure that these orders from the Prosecutor are kept to a minimum.

(142) Carjaval and Elliott, supra n1, 18.
(143) Executive Bylaw Module Three, Chapter Seven, Article 6-1
(144) Executive Bylaw Module Three, Chapter Seven, Articles 6-2 and 6-3.
(145) Executive Bylaw Module Three, Chapter Seven, Article 6-4.

5 Conclusion

The previous four sections have outlined the enforcement framework in Kuwait and compared it to the framework in the UK. In the process, a number of areas have been identified wherein Kuwait can improve its regulatory enforcement. Those are briefly summarised here.

In terms of overall approach, the foregoing analysis of Kuwait's enforcement law architecture shows that the CMA is focused only on the deterrence approach without using the compliance approach. The deterrence approach uses a lot of resources, involves high costs and also involves a time-consuming process to issue the final enforcement decision. Good enforcement strategy can reduce both enforcement and compliance costs by encouraging cooperation rather than confrontation between the regulator and regulated firms.(146) In order to punish a firm or individual for non-compliance, a great deal of effort is expended by the CMA staff in terms of the initial inspection, the legal department's investigation, the Disciplinary Board's decision-making process, and the responsibility of the CMA Board to implement the Disciplinary Board's enforcement decision. These procedures could be avoided, or at least resort to them could be minimised, if Kuwait were to adopt a compliance approach, which would encourage firms and individuals to comply with the laws.

Another key reason to support the compliance approach is that the deterrence approach cannot achieve complex purposes because it is inherently difficult to write clear, unambiguous laws that have the desired effect and cover all possible situations.(147) The compliance approach creates the appropriate legal framework that can take into consideration complex situations that the firm may face and provide considerable discretion in resolving legal ambiguities to achieve the financial regulator's objectives. For example, in difficult situations, a firm may breach the rules based on extraordinary circumstances, yet if the regulator applies only the deterrence approach the firm will be exposed to criminal or civil sanctions. By contrast, the compliance approach takes into consideration other circumstance that the firm may face on a daily basis. When relying solely on the deterrence approach, there is a difficulty in knowing when to make an exception and when to enforce the letter of the

(146) Scholz, supra, n7, 385.

(147) Singh, supra n8, 115. See also Scholz, supra n7, who makes a similar point at 387: 'There is a limit, however, beyond which rules and laws cannot match the complexity of the world they attempt to govern without becoming too complex for enforcement…even an elaborate set of rules cannot eliminate ambiguity caused by the bigness of the world…'

law because of the contingent nature of enforcement decisions.(148) Therefore, it is suggested that Kuwait should adopt a new enforcement policy, which embraces both deterrence and compliance approaches.

In term of the settlement agreement system in the CMA, there is a need for further amendment to adopt conditions that will ensure all firms and individuals are treated equally. The law must set out a clearer legal framework for the settlement matters and not leave it to the absolute discretion of the CMA.

On the other hand, the CMA must prioritise confidentiality. The right to privacy and confidentiality must not be breached without reasonable evidence. The CMA should follow the FCA's policy regarding the protection of confidentiality and people's privacy. The UK laws related to banking confidentiality, legal privilege, and the Data Protection Act 1998 contain iterations of the confidentiality principle, all of which should be carefully considered by the Kuwaiti legislature. Kuwait ought to amend the current framework to ensure better protection of the confidentiality rights of alleged and proven CML violators and third parties.

In respect to the enforcement of decisions, the CMA needs to give further consideration to the following three areas: (i) the maximum amount of financial penalties, (ii) the publication of violations on the CMA website, (iii) the receipt of penalty money. As for the first point, it is certainly an improvement to add financial penalties to Article 146 of the CMA, but the maximum amount of the penalty is set too low; the law needs to be amended and the current maximum amount needs to be substantially increased. As for the second point, it is suggested that the CMA must amend the Executive Bylaw to expressly permit publication of CML violations on the CMA website. The current practice of publishing the violation without any express statutory permission needs to be resolved as soon as possible. The third point refers to the collection of financial penalties – it is recommended that the money must not go directly to the CMA's budget to avoid a conflict of interest. It might be better for penalties to be paid to the Ministry of Commerce and Industry or the Ministry of Finance, to protect the public interest.

The above analysis shows that the CMA wields significant power. It can enter the premises of regulated firms without prior notice and it can seize and copy documents. The CMA staff members, who are essentially granted a judicial power of investigation, can access the necessary records and books to obtain

(148) Scholz, supra n7, 387.

key information, which can help to prove that violations of the law have been committed. Furthermore, the wide investigative scope—which can involve third parties—emphasizes the need for trust and confidence in the market. A great power has been entrusted to the CMA but this creates a public expectation that the CMA is not there to merely work with the industry, but to take on a disciplinary role when circumstances mandate it. There is a limitation on the CMA's ability to request information from third parties. The CMA's power in this area is not as strong as the FCA's power in the UK. The FCA can involve not only the authorised person but also the person who is connected with an authorised person. Expanding the investigative scope so that it is on a par with the FCA could led to even greater trust and confidence in the CMA and, ultimately, greater confidence in its ability to effectively regulate the financial markets.

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