AVERTISSEMENT

LIENS

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A Legal Assessment of the Jordanian Law in the light of French and European Approaches

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Shareholders' Best Interest in Open-End Investment Companies A Legal Assessment of the Jordanian Law in the Light of French and European Approaches

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«*Watch your thoughts; they become words. Watch your words; they become actions. Watch your actions; they become habits. Watch your habits; they become character. Watch your character; it becomes your destiny.* » *Frank Outlaw*

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Linda LAHLEH

Sommaire

List of Abbreviations

A-

AACIF *: Association Des Analystes Conseillers En Investissements Financiers*

ACAM: *Autorité de Contrôle des Assurances et des Mutuelles*

ACPR: *Autorité de Contrôle Prudentiel et de Résolution*

ADR: Alternative Dispute Resolution

AFECEI : *Association Française des Etablissements de Crédit et des Entreprises d'Investissement*

AFEP/MEDEF: *Code de Gouvernement d'Entreprise des Sociétés Cotées*

AIF: Alternative Investment Fund

AOA: Articles of Association

AML/TF: Anti Money Laundry and Terrorist Financing

AMF: *Autorité des Marchés Financiers*

AMP: Accepted Market Practice

ANACOFI-CIF : *Association Nationale Des Conseils Financiers-CIF*

ANSA: *Association Nationale de Société Cotée*

ASE: Amman Stock Exchange

C-

CA: *Cour d'Appel*

Cass. : *Cour de cassation*

Cass. Civ: *Cour de Cassation Chambre Civile*

Cass. Com.: *Cour de Cassation Chambre Commerciale*

CB: *Commission Bancaire*

CIF : *Conseillers en Investissements Financiers*

CCIFTE : *Compagnie Des Conseillers En Investissement, Finance Et Transmission D'entreprise*

C. civ.: *Code Civil*

C. com.: *Code de Commerce*

CE: *Conseil d'Etat*

CEA: *Comité des Entreprises d'Assurance*

CECEI: *Comité des Etablissements de Crédit et des Entreprises d'Investissement*

CEO: Chief Executive Officer

CESR: Committee of European Securities Regulators

CIC: Collective Investment Company

CIR: Collective Investment Regulation

CIS: Collective Investment Scheme

CIU: Collective Investment Undertaking

CMF: *Conseil des Marchés Financiers*

C. mon. Fin : *Code Monétaire et Financier*

CNCIF : *Chambre Nationale Des Conseillers En Investissements Financiers*

COB: *Commission des Operations de Bourse*

Cons. Cons. : *Conseil Constitutionnel*

CPC : *Code de Procédure Civile*

C. pén.: *Code Pénal*

CPP : *Code de Procédure Pénale*

C. trav.: *Code du Travail*

D-

Dir.: Directive

E-

ECB: European Central Bank

ECHR: European Convention of Human Rights

ECtHR: European Court of Human Rights

EGAM: Extraordinary General Assembly Meeting

ESA: European Supervisory Authority

ESA 95: European System of National and Regional Accounts

ESFS: European System of Financial Supervision

ESMA: European Securities Market Authority

ESME: European Securities Markets Expert Group

ESRB: European Systematic Risk Board

EBA: European Banking Authority

EIOPA: European Insurance and Occupational Pensions Authority

EU: European Union

F-

FASB: Financial Accounting Standards Board

FSB: Financial Stability Board

FSCB: Financial Skills Certification Board

G-

GA: General Assembly

GAM: General Assembly Meeting

H-

H3C: *Haut Conseil du Commissariat aux Comptes*

HUP: Harvard University Press

I-

IAA: Independent Administrative Authority

IAS: International Accounting Standard

IC: Investment Company

IF: Investment Fund

IFLR: International Financial Law Review

IOSCO: International Organization of Securities Commissions

IPA: Independent Public Authority

IPO: Initial Public offering

ISIN: International Security Identification Number

IAS: International Accounting Standards

IFRS: International Financial Reporting Standards

J-

JCC: Jordanian Company Code

Jo. Cass. civ.: Jordanian Court of cassation civil chamber

Jo. Co. admin.: Jordanian Administrative Court

JOD: Jordanian Dinar

JSL: Jordanian Securities Law

JSC: Jordanian Securities Commission

K-

KIID: Key Investor Information Document

M-

MAP: Market Abuse Practice

MC: Management Company

MiFID: Market for Investment in Financial Instruments Directive

MAR: Market Abuse Regulation

MMOU: Multilateral Memorandum of Understanding

MOA: Memorandum of Association

MS: Member State

MTF: Multilateral Trading Facility

N-

NAV: Net Asset Value

NYSE: New York Stock Exchange

O-

OECD: Organization for Economic Co-operation and Development

OEIC: Open-End Investment Company

OGAM: Ordinary General Assembly Meeting

OJ: Official Journal of the European Union

OPCVM: *Organisme de Placements Collectif en Valeurs Mobilières*

OTC: Over-the-Counter

OUP: Oxford University Press

P-

PD: Prospectus Directive

PIT: Propriety, integrity and transparency

Plc: Public Limited Company

PO: Public Offering

PSE: Paris Stock Exchange

Q-

QPC: *Question Prioritaire de Constitutionnalité*

R-

RCCI: *Responsable de Conformité et du Contrôle Interne*

Reg.: Regulation

Régl. Gèn.: Règlement Général

REO: Reassessed Expected Outcome

RIA: Regulatory Impact Assessment

RJDA: *Revue Juridique de Droit des Affaires*

RTDF: *Revue Trimestrielle de Droit Financier*

S-

SA: *Société Anonyme*

SAS: *Société par Actions Simplifiée*

SDC: Securities Depository Center

SEC: Securities and Exchange Commission

SFS: System of Financial Supervision

SGP: *Société de Gestion de Portefeuille*

SICAF: *Société d'Investissement à Capital Fixe*

SICAV: *Société d'Investissement à Capital Variable*

T-

TD: Transparency Directive

U-

UCITS: Undertaking for Collective Investment in Transferable Securities

USA: United States of America

Introduction

01 Individuals differ though they may, yet they share basic financial goals. They seek the allocation of their current wealth in such a way achieving their long-term financial interest while taking into account their current consumption and future objectives[1]. They look for investment opportunities. They turn to companies and investment professionals to increase the value of their assets particularly when lacking the necessary level of financial and economic knowledge and awareness. Their investment horizon differs, so does their risk tolerance and wealth. They find a solution in a one-stop shop where they delegate their investment decision-making to companies and professionals that generate a previously endorsed financial objective. Investors' satisfaction is the key to a successful financial management. Requires strong and reliable institutional and legal structures. Protective, thoroughly explained and adequately standardized. Asset management emerges as the secret ingredient to achieving investors' financial goals and their satisfaction. Through offering the expertise they lack and the financial foresight, they aspire for.

02 ***Economic intuition.*** Asset management emerging as a solution to investors' investment decisions is reasoned from different angles. The notion behind asset management and its functioning mechanism are the key for its importance and viability. The main purpose is providing expertise and resources that support and bring to life still assets[2]. From an economic perspective, it is based on the portfolio theory[3]. Generally, it pushes investors to diversity in order to optimize their portfolio of securities. Portfolio theory in its pure economic conception holds that assets should be chosen based on their interaction with one another rather than their isolated individual performance[4]. Therefore, this theory studies the method through which an investor could achieve the maximum expected return and the minimum level of risk from a

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[1] Richard Brealey and Stewart Myers and Franklin Allen, *Principles of Corporate Finance* (11th edn, McGraw Hill 2014)

[2] Nicolas Hastings, *Physical Asset Management* (Springer 2010) page 14

[3] Harry Markowitz, 'Portfolio Selection' (1952) 7 (1) Journal of Finance 77; Hannes Marling and Sara Emanuelsson, 'The Markowitz Portfolio Theory' 15 November 2012 < http://www.math.chalmers.se/~rootzen/finrisk/gr1_HannesMarling_SaraEmanuelsson_MPT.pdf > Accessed 24 January 2017

[4] David Scott, *Wall Street Words: An A to Z Guide to Investment Terms for Today's Investor* (3rd edn, Houghton Mifflin 2003) page 278

pooled portfolio of securities[5]. The expected return in this case equals the sum of the return of the different investments constituting the portfolio. As for the risk, it is minimized due to diversification. Therefore, having an overall risk smaller than the risk attached to each individual investment due to minimizing the spread of risk exposure generally securities face due to financial changes[6].

03 ***Asset management models.*** Asset management is deeply rooted in economic literature and theory. They classify it into four main models depending on portfolio selection. Single-period static model, single-period stochastic model, multi-period static model and multi-period stochastic model. Single-period models constitute of single decision at the start of the horizon. According to Markowitz model, it is based on a mean-variance framework with a single nature. It hedges against small changes in the current state of the world. Being static means that it follows a conservative strategy very close to passive management, as it guarantees that assets and liabilities move in the same direction as deviations. It provides an immunization to the portfolio. The downside of this model is that any inappropriate choice of the length of time horizon can lead to suboptimal investment decisions[7]. As for the stochastic model, it guarantees that the portfolio has well-defined distribution of error with no precise prediction[8]. Multi-period model considers possible independencies with external factors[9] and does not limit the utility function to a single horizon. It might address lifetime consumption. The main difference between the different models found in considering the single-period model as conservative and the capital market needs a stochastic approach while considering multi-layered horizons[10]. Therefore, multi-period stochastic model introduces dynamically managed portfolios. The

[5] Christopher Pass and others, *Collins Dictionary of Business* (3rd edn, Collins 2005)

[6] Ducan Hughes, *Asset Management in Theory and Practice: An Introduction to Modern Portfolio Theory* (New Age International 2005) page 20

[7] Ban Kawas, 'A Robust Optimization Approach For static Portfolio Management' (master thesis, Lehigh University 2005) page 24

[8] Dimitris Bertsimas and Dessislava Pachamanova, 'Robust Multi-period Portfolio Management in the Presence of Transaction Costs' (2008) 35 Computer and Operation research 3

[9] Edwin Elton and Martin Gruber, 'The Multi-period Consumption Investment Problem and Single Period Analysis' (1974) 26 (2) Oxford Economic Papers 289; Paul Samuelson, 'Lifetime Portfolio Selection by Dynamic Stochastic Programming' (1969) 51 (3) Review of Economics and Statistics 239

[10] Don Rosen and Stavros Zenios, 'Enterprise-Wide Asset and Liability Management: Issues Institutions and Models' in Stavros Zenios and William Ziemba (eds), *Handbook of Asset and Liability Management* (Vol. 1 Theory and Methodology, 1st edn, Elsevier 2006); Stavros Zenios, 'Valuation and Portfolio Risk Management with Mortgage-Backed Securities' in David Babbel and Frank Fabozzi (eds), *Investment Management for Insurers* (Frank Fabozzi Associates 1999)

closest concept to active management. Further asset management is legally categorized based on the chosen structure into two main categories. Asset management for own account (Self-managed portfolio such as that performed by banks for their property) and that for the account of third party (Delegation of management to a professional third party). The management for the account of third party is performed either individually through a mandate or collectively through Collective Investment Schemes. Legal intuition in this paper stresses the structure the asset management follows and particularly CIS. As the regulatory framework interests in the final product of asset management, its performance and results of selection rather than the economic selection approach.

04 ***Collective Investment Schemes.*** CIS is the management of investors' assets by diversifying their risk and pooling assets on securities markets following the portfolio theory[11]. In return, investors are attributed shares or units in the established vehicle that performs the management and administer the relation between different participants[12]. CIS have three basic legal structures. Trust, corporate and contractual forms. At EU level, the three structures are accepted[13]. In France, merely the contractual and the corporate forms are addressed as possible structures for portfolio investments[14]. Jordanian rules also address the contractual and corporate forms of CIS[15]. The available choices of legal structure in French and Jordanian rules are justified in the light of their legal system. The unit trusts are a common law conception that is not addressed neither it is known in civil law systems. Contractual form in the sense of having a vehicle with no separate legal personality on its own[16]; a common fund managed by a Management Company[17]. Final investors own units in this fund and a contract administers the relation between the MC and the fund. Funds may be open or closed end[18]. Unit trusts are a long-standing conception in Anglo-Saxon law. In the framework of portfolio investments, the same notion of trust is used yet for commercial purposes. Where a trustee holds an identified

[11] Article 3 Collective Investment Regulation of 1999; C. mon. fin., art. L. 214-1
[12] Pierpaolo Ferrari, 'Collective Investment Vehicles and Other Asset Management Products' in Ignazio Basile and Pierpaolo Ferrari (eds), *Asset Management and Institutional Investors* (Springer 2016) page 31
[13] Article 1.3 UCITS Dir
[14] C. mon. fin., art. L. 214-4
[15] Article 3 Collective Investment Regulation of 1999
[16] Michel Storck, 'La Nature Juridique des Fonds Communs de Placement : Un Patrimoine d'Affectation' in *Mélanges Gilles Goubeaux* (Dalloz-LGDJ 2009)
[17] C. mon. fin., art. L. 214-8-1
[18] Article 89.b JSL of 2017

group of assets for the benefit of the beneficiary (investors holding units in this trust) and having a fund manager – which occupies a fiduciary position- that makes the investment decisions in the trust[19]. In this context, unit trusts are close to the contractual form of CIS. The trust has a trustee having the role of a custodian and a manager that is usually a MC. In UCITS directive unit trusts and common funds are attributed the same governing rules. As for corporate form, it means having a statute creating an investment company according to company law whether open or closed end where investors own shares in this company. The corporate form of CIS is our main concern in this thesis. Particularly Open-End Investment Company.

05 ***CIS role***. CIS address the relation between investors in the form of unitholders or shareholders and the established vehicle. Further to being an intermediary between financial system and investors, financial system brings together economic agents with surplus financial resources, such as households, with those having net financial needs such as companies[20]. The system provides two main forms of financing direct and indirect. Direct meaning those with excess directly finance those with needs, the perfect example is a shareholder subscribing to the shares issued by a listed company. Indirect in the sense that requires an intermediary between those with surplus and those with needs, such as the role of banks in lending. Financial system allows investors to turn their current revenues into future consumption. CIS is a means through which this goal is fulfilled.

06 ***Global economic importance.*** Research in CIS has stemmed from CIS being one of the most significant recent developments of financial intermediation. The reports of the Organization for Economic Co-operation and Development (OECD) indicate that CIS assets have formed a crucial share of national income and financial assets[21]. The importance of the CIS lies in the opportunity it provides for inexperienced and small investors to participate in large national and international capital markets depending on the scope of commercialization of its shares or units. They invest on behalf of their shareholders or unitholders in financial markets. They pool assets and diversify the risk among different securities constituting a

[19] Alastair Hudson, *Equity and Trusts* (3rd edn, Cavendish 2003) page 736
[20] D. Hughes, n (6) page 55
[21] OECD (2005), "White Paper on Government of Collective Investment Schemes (CIS)", *Financial Market Trends*, Vol. 2005/1. http://dx.doi.org/10.1787/fmt-v2005-art5-en page137

portfolio. Therefore, making CIS a safer means of private placements. In terms of the OEICs, they start the financial cycle by raising money through selling shares to investors. Once the investor becomes a shareholder, they can increase their shareholding by buying additional shares in the company, they decrease their share ownership through share redemption or they maintain their initial ownership percentage. This flexibility though deeply established in corporate theory it is considered a key incentive and particularity of OEICs. As the performance of these rights is limited neither to a specific timeline nor to a particular financial venue.

07 ***OEIC shareholder.*** The character of shareholder offered by the OEIC holds further incentives in the form of rights and advantages. They are no longer mere investors. Shareholder is the natural or legal person who owns shares in a company that allows him to have a share in the profits and the loss proportionate to its participation. In addition to attributing this person voting rights and a level of control. This definition is linguistic, provided in language and business dictionaries. As for the definition of a shareholder in legal texts we take for example, EU Shareholders Rights Directive (2007/36) provided a definition that refers the identification to the discretion of Member States[22]. Therefore no harmonized definition. As this directive does not aim at creating new substantive right for shareholders rather improving the voting process. It was the MS wish to make straightforward referral to national rules instead of taking the exact wording of the Transparency Directive (2004/109). OEIC shareholders' are seen in the light of this directive as long-term shareholders. They see a common value on a long-term basis and they do not merely investment for short-term profits[23]. OEIC is a vehicle that offers particularly retail investors the chance to access the market and maximize their long-term wealth. Therefore, the directive favors the communication between the company and its shareholders to enforce their long-term engagement in the company[24]. The TD provides a harmonized definition[25]. The harmonization under the TD was necessary in order to avoid differences between different

[22] Article 2 (b) Shareholders Rights Dir. 2007/36

[23] Benoit Lecourt, 'L'Actionnaire de Long Terme, Nouvelle Notion Européenne' in 'Dossier : Réflexions Collective sur la Nouvelle Directive Droits des Actionnaires' (2017) 12 Revue des Sociétés p. 675; similar to the concept of responsible investor that tend to be committed on a long-term basisand loyal to the companies he/she invests in; Steve Lydenberg, 'Responsible Investor: Who they are, What they Want' (2013) 25 (3) Journal of Applied Corporate Finance p. 44

[24] Patrick Barban, 'L'Identification des Actionnaires' in 'Dossier : Réflexions Collective sur la Nouvelle Directive Droits des Actionnaires' (2017) 12 Revue des Sociétés 678

[25] Article 2.1 (e) TD

domestic rules in MS, further to hinder regulatory arbitrage. Defining the term shareholder asks a question on whether or not the term investor may be used as a synonym. Shareholders are in fact investors. Nonetheless, they hold rights and have an incentive that differs than other investors. Shareholders care about the rights and powers attributed by this character. Investors are seen more or less as creditors whose interest in the shares is the enrichment it brings and they neglect the power the shares may hold. The main difference between both characters is made in company rules. These rules attribute rights and impose obligations merely on those holding the character of shareholder. A certain level of protection is also provided for shareholders that in most cases does not extend to investors and vice versa. Notably we mention the prohibition of lion clauses and the intangibility of voting rights they provide a level of fidelity to the character of shareholders that otherwise a general investor cannot enjoy[26]. Both shareholders and investors are stakeholders in the company's performance, being profitable or not. Nonetheless, this general categorization does not put both on equal footings before the governing legal rules. This thesis focuses on shareholders and not the other remaining categories of stakeholders.

08 ***Codification of CIS.*** CIS in its early days did not have a proper regulatory framework. Over the years, its regulation became a necessity and a national objective. The first common fund dates back to 1924. MFS Investment Management created it in Boston. In the US, the codification of the CIS began in 1933 with the issuing of the Securities Act that regulated the registration and public offering of new securities including units of funds. Later in 1935 with the creation of the Securities and Exchange Commission by the Securities and Exchange Act. Completed in 1940 with the Investment Company Act that laid down the industrial structure for mutual funds (it is the term used by the US legislature to refer to open-end investment companies). In France, CIS dates back to 1945 where the closed-end investment companies (*SICAF*) was created legally. The key date for CIS in France is 1957. Where a law was issued introducing the legal structure of the most well-known form of CIS in France the open-end investment company known as *SICAV*. The actual application of the law and the authorization for the incorporation of *SICAV* was made in 1963 and for the common funds in 1969. At EU

[26] François-Xavier Lucas, 'Les Actionnaires Ont-Ils Tous La Qualité D'associé ? Brefs Propos Discursifs Autour Du Thème De L'associé Et De L'investisseur' (2002) 4 Revue de Droit Bancaire et Financier p. 1

level, Undertakings for Collective Investment in Transferable Securities (UCITS) form the main framework covering CIS that are suitable for retail investors. They are investment funds regulated at the Union level. UCITS created a safe and transparent investment environment. Professional and retail investors consider the label. This label provides one of the highest standards in asset management industry. The investment fund structure in Europe dates back to the 19th century, although the first attempt to regulate investment funds at a European level was in the 80s[27]. This attempt was represented through the adoption of the Directive 1985/611/EEC. This directive created the label UCITS. The aim of this directive was to facilitate the UCITS distribution across Member States while ensuring a significant level of investor protection. The facilitation was addressed through exporting UCITS from their home country to other MS under a single authorization system. Being an EU MS the French legislature transposed the directives adopted on EU level. The label UCITS was entered for the first time into the French national securities rules in 1988. The following year 1989 witnessed the creation of management companies.

09 ***Codification in Jordan.*** The introduction and codification of CIS -or what is domestically referred to as the Collective Investment Project- into the Jordanian legal system dates back to 1989 (company code no. 1 of 1989). However, in 1997 some Jordanian commercial legislation witnessed major reform. This reform was embodied in simultaneously issuing a new Securities Law (no. 23 of the year 1997) and Company Code (no. 22 of 1997, in force until this day). The newly issued Securities Law defined the concept of 'Investment Company' and distinguished this type of Company from a Financial Services one. The definition laid down a framework for the IC that is similar to the currently existing one. In a similar manner, the then newly implemented Company Code defined an IC as a public limited company, whose sole objective is collective investment in securities[28]. Until this day, the definition did not undergo any amendments or replacement. The company code nonetheless underwent several amendments from 2002 to 2010 including the key regulatory reform that introduced and for the first time private shareholding companies. In 1999 Jordanian legislature took a step forward, and implemented a Collective Investment Regulation (No. 1 for the year

[27] Iris Chiu, *Regulatory Convergence in EU Securities Regulation* (Kluwer Law International 2008) 1
[28] Article 209.a JCC

1999), issued for the sole purpose of providing explanations and further codification for CIS related matters. Jordanian securities legislation went through a major reform in 2002, which resulted in amending the existing law of 1997 (amending law no. 55 of 2002) that was annulled by a then newly issued temporary law replacing the formerly applicable Securities Law no. 76 of 2002. This amending law changed the structure of the previous code and introduced more applicable, but insufficient rules that govern the IC. This temporary law remained applicable fifteen years without the approval of the parliament to become fully enacted positive law.

10 ***CIS and economic crisis***. Since the beginning of the codification of the CIS, the governing regulations were considered effective and thorough in comparison with other existing regulatory frameworks on financial markets. Nonetheless, during the latest global economic crisis of 2008, CIS as other financial and investment vehicles suffered a sum of the globally occurred damages. Investor confidence in the financial market deteriorated. To restore this confidence and provide higher level of investor protection particularly for retail investors, regulatory reforms were performed nationally and regionally to remedy occurring damages and foresee future potential risks. Regulatory frameworks addressing portfolio investments in all its forms witnessed major changes and amendments. The most noticeable amendments were the implementation of the Dodd Frank Act, also known as the 'Consumer Protection Act' in the United States. The regulatory framework around UCITS investment products has been updated over time since its implantation with five directives and today is one of the most advanced frameworks for funds regulation. Simple structure and compliance with international regulatory standards have made UCITS successful in the investment fund industry, particularly among fund providers and institutional clients[29]. The most noticeable amendment on an EU level, post economic crisis, is Directive 2009/65 replacing the former UCITS directive 85/611. In addition to the latest Directive 2014/91 amending directive 2009/65. Following these European changes, French rules witnessed a wave of reform particularly the French Financial Market Authority's (*AMF*) General Regulation in addition to the French Code de Commerce and the financial and monetary code to cope with the changes introduced by the newly adopted EU Directives. The Jordanian legislature was a little bit late in taking legislative amending measures. Two thousand

[29] Diego Valiante, 'Europe Untapped Capital Market: Rethinking Financial Integration After the Crisis' EU Capital Market Union Report 2016 < https://www.ceps.eu/system/files/Capital%20Markets%20Union_1.pdf > Accessed 1 December 2017

and seventeen was the year of regulatory reforms for securities market. The Securities Law underwent a recent major amendment. A permanent law replaced the temporary law in 2017. The law today addresses directly the IC in a separate section as proposed the amending bill prepared by the Jordanian Securities Commission in 2010. It provides this company with a clear definition directly linking it to the governing rules in the company code. Another attempt was taken in the same year; an amending bill for the company code was put in place to reform particular contents and introduce for the first time the concept of corporate governance as a legal obligation into the code. The reform does not address the legal texts governing the IC. Corporate governance occupied a large portion of the regulatory reform, taking place in 2017, following the doctrinal work that considered one of the main reasons of the crisis is weak corporate governance mechanisms. A corporate governance regulation was issued for listed companies. Prior to this regulation corporate governance was not seen as a legal obligation. It was optional.

11 ***Legal question.*** In the general theory of company law, social interest of the company prevails over the individual interest of its shareholders. In the scope of CIS and particularly the IC, the vehicle is expected to act in the best interest of its shareholders or unitholders and protect their interest, therefore, diverting from a globally accepted standard. This thesis aims to look further into this diversion and provide a better understanding to the applicability mechanism of such obligation. The scope of the studied applicability is the Jordanian IC legal framework. Therefore, this thesis asks the following key question: How is shareholders' interest protected in Open-End Investment Companies?

12 ***Research methodology.*** IC offers interests and benefits differing in risk incurred by shareholders emerging out of listing shares on regulated markets. Answering this question within the framework of a developing country with a relatively small economy requires understanding to which extent OEIC fulfill their obligations to achieve the aimed for investor protection. Two key questions pave the way to answering the main question this thesis petition. What is shareholders' interest? In addition, where is it found? By understanding the localization and the essence of the interest, the protection mechanism avails. At first glance, the protection mechanism may hold three options. Firstly, be in place and satisfactory therefore no regulatory

reform or amendments are necessary. Secondly, inexistent meaning a regulatory reform is necessary to introduce the most appropriate level of investor protection. Alternatively, insufficient meaning having an investor protection plan in place yet, not coping with investors' financial needs. Therefore, amendments should take place in the portfolio investment regulatory framework. Where they explore higher level of investor protection without incurring companies and other participants excessive operational costs and expenses that divert the reform from its initial purpose of balancing the double pans of the scale.

13 Attaching shareholders' protection under one of the previous options requires assessing the existing legislative framework governing the IC in Jordan. Therefore, this thesis follows the concept of regulatory quality. Meaning assessing the quality of regulations across a specific field of activity within a country. Requires analytical work concerning the given regulation, two approaches for the analytical work exists: direct and indirect. Direct analysis of existing outcome indicators on a comparative basis. Meaning having a previously assessed regulation. *Indirect analysis through the assessment of the quality of regulatory management practices in relation to a range of principles of regulatory quality based on the work of regulatory reformers*[30]. This thesis follows the indirect approach in deciding whether the regulatory framework is proportionate in the sense that it provides a response to the problem with minimum compliance burden. Is it effective in solving the problem and achieving the goals of the regulation at low cost? Studies the consistency of the different regulations, the flexibility and improvements of the regulation, its transparency and accessibility. Furthermore, is the regulation understandable and promotes an accountable environment responsive to shareholders' needs, in addition to the enforceability of the regulation. Responding thoroughly to the questions we decided to conduct a legal assessment of the Jordanian regulatory framework in light of strongly established model of portfolio investment. The choice of reference model was made based on historical background and the influence of the corner stone country of civil law system, over the Jordanian legal structure. Therefore, the choice fell on the French model.

[30] Jacobzone, S., C. Choi and C. Miguet (2007), "Indicators of Regulatory Management Systems", OECD Working Papers on Public Governance, No. 4, OECD Publishing, Paris. http://dx.doi.org/10.1787/112082475604 Page 8

14 ***Historical relationship.*** The historical relationship between Jordanian and French laws dates back to 1850. The influence French rules have on the current Jordanian legislative structure is attributable to the initial transposition of French commercial and company rules when Jordanian commercial rules were constructed. The transposition of French rules began with the Ottoman Empire. In 1850, the empire adopted a commercial law transposing the Napoleon Code[31]. This law was implemented in Arabic countries –including Jordan- falling under the empire's power. The independence movements following the disappearance of the empire and the end of French and British mandates induced the adoption of new commercial laws inspired by French laws. Other Arabic countries such as Lebanon, Egypt and Syria were faster in the adoption of new commercial law. They directly transplanted the Napoleon code into a national one. Unlike these countries, the Jordanian legislature remained silent and the Ottoman commercial law remained in force until a reforming movement took place in 1966. The newly implemented law referred to both Syrian and Lebanese laws as reference models, which were, in their turn, influenced by French law. The adoption of a separate company law was based on the French inspired commercial law. Being a member of the EU referring to EU rules governing ICs is obligatory. Due to the influence, EU rules have on the currently existing portfolio investment model in France. French rules regulating portfolio investments are stemmed out of the EU adopted rules. The assessment aims to transpose the most effective and appropriate rules and theories introduced in the reference model into the Jordanian one while learning from the lessons of previously implemented programs in ensuring their optimal implementation in the Jordanian context and averting problems hindering their perfect execution. This research is oriented towards OEICs that are financially stable, holding a financial standing and not suffering any difficulties. Therefore, the research does not address companies in liquidation or in any form of financial difficulties. Furthermore, this research does not address taxation issues related to CIS returns.

15 ***Plan.*** To perform a thorough assessment of the state of the world of the Jordanian OEIC regulatory framework in the light of shareholders' interests; we had to first locate the interest of shareholders. The interest is born with the incorporation of the company and remains active throughout the legal existence of the company. The scope of the interest is wide and in order to

[31] Fawzi Sami, *Sharah Qanon Tijari* (Vol 1, Dar Thakafeh 2008) page 23

safeguard it; protective measures should be put in place starting from the incorporation. Therefore, this research is divided into two main parts. The first part addresses the interest during the incorporation of the company up until the beginning of the performance of activities. The part asks questions as follows: what is the legal form of the IC? How can the choice of the legal form be a source of shareholders' protection? What form of prior performance control does the capital market and the securities authority have? In answering these questions this part was divided into two main titles the first addressing prior incorporation requirements. Meaning the legally imposed conditions that give birth to an OEIC. These conditions generally include organizational and financial services related conditions. *Inter alia* questions of corporate governance, management structure, management liability and remuneration policies. The second title addresses post-incorporation requirements. The legal conditions that should be adhered to once the OEIC becomes a legal person. Therefore, adhering to market conditions in addition to defining its internal conduct mechanism whether auto-managed or it chooses to appoint an MC.

The second part addresses the interest throughout the performance of company's activities. This part calls for questions including where is the interest found and how can it be protected? Who is the main body responsible for maintaining the necessary level of protection? Do shareholders have a direct role in protecting their interests? Therefore, this part was divided into two titles. First addressing the external control and supervision exercised over the activities of the IC. It identifies the competent authority and its supervisory mechanism. Second title addressing the internal control companies exercise over their proper activities. Whether the control is exercised indirectly through complying with legally imposed obligations. Alternatively, direct control through private enforcement actions exercised by shareholders and auto internal control of the company through audit and compliance functions.

Part I: Structuring a Pro-Shareholder Investment Company: A Balanced and Protective Legal Structure

Part II: Controlling the Performance of Investment Companies: Continuous or One Time Shareholder Protective Supervisory Obligation

Part I: Structuring a Pro-Shareholder Investment Company: A Balanced and Protective Legal Structure

16 ***CIS.*** Collective Investment Schemes offer a means for ordinary non professional individuals to invest on stock exchange, gain potentially good returns on their investments and beat inflation[32]. The CIS is often described as an investment method that allows several individuals to pool in their money into a portfolio. This pooling leads to a diversification in risks and loss. CIS enables smaller investors to gain exposure to the financial markets, which they would otherwise be precluded from accessing in their individual capacity. Investors can choose from three basic legal structures to CIS[33]. Corporate form (CIS is a company that trades its shares in securities and investors hold the character of shareholders). Trust form (CIS is a trust in accordance with the concept of common law and investors are beneficiaries) and contractual form (CIS is a contract entered into between the investment manager and the final investors in return for units)[34]. The focus of this thesis is the corporate form of CIS.

17 ***Notion of company.*** Several general theories in legal doctrine address the notion of the company and its creation. The theories are divided into classical and modern[35]. Companies are best understood as the intersection of different things rather than a single thing. The organization and governance of the company are influenced by the surrounding economic, social and regulatory factors. The governance and structure should respond to the increasing complexity and dynamism of the market the company inhabits.

18 ***Contractual theory.*** The most globally known classical theory addressing the company is the contractual one. This theory address the company as a contract entered into between shareholders, in accordance with the general theory of contracts addressed in the civil code. This theory since its appearance was not stable. The application of this theory avails in terms of

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[32] FSB, 'Collective Investment Schemes' < https://www.fsb.co.za/feedback/Documents/Collective%20Investment%20Schemes.pdf > Accessed 27 July 2017

[33] John K. Thompson and Sang-Mok Choi, *Governance Systems for Collective Investment Schemes: Schemes in OECD Countries* (Occasional Paper No. 1 – OECD 2001)

[34] Classic forms of CIS introduced by the OECD countries

[35] Paul LeCannu and Bruno Dondero, *Droit des Sociétés* (6th ed, LGDJ 2014) page 67

companies' under-incorporation, the companies with no personality and the group of companies. It cannot be applied in case of unipersonal companies. This theory requires the existence of two persons at the incorporation. The criticism connected to this theory relates to the surrounding factors to the functioning of the company and statutory rules[36]. Companies follow the rule of majority. The possibility to impose decisions on minority shareholders through modifications of the statutes by company's majority voting. Nonetheless, the company as a contract can be regulated like other forms of contracts (sale or lease). The legal rules interfere with their particular substance to impose minimum requirements or obligations that influence the freedom to contract. These regulations in most cases give more power and discretion to the management to operate the company rather than laying the power with the hands of shareholders[37]. This theory is supported by civil law doctrine.

19 ***Institutional theory.*** Another classical theory emerged as a counter reaction to the former theory and influenced by German law. It identifies the company as an organization that justifies the will and object to create an institution; it further justifies the rule of majority in terms of the internal control, management and representation[38]. This theory was criticized on legal technical grounds. The notion of the sustainability of the institution cannot be imposed on shareholders as they can at any time decide to dissolve the partnership and liquidate the company.

20 ***Positive law perspective.*** The legislatures do not necessarily take one side or the other between the classical theories. For example, the French legislature was neutral and shifted between the two theories in the definition of the company provided under civil code[39]. The French jurisprudence further supported this approach through producing decisions at one hand supporting the institutional theory and others supporting the contractual one[40]. The company in France is created as a contract and acts as an institution. It is neither a pure contract nor a pure

[36] Aurélien Bamdé, 'La Notion de Société' (27 septembre 2016) < https://aurelienbamde.com/2016/09/27/la-notion-de-societe/ > Accessed 10 april 2018

[37] Passive shareholders may be a counter argument to this statement. In some cases investors look for an entity to invest without the will to participate in the social life of the company such as the cases of the contributions in Public Limited Companies

[38] Edmond-Eugène Thaller, *Traité élémentaire de Droit Commercial* (3rd ed, 1904) ; Maurice Hauriou, 'L'Institution et le Droit Statutaire' (1906) 2 Récueil de Législation de Toulouse p. 134

[39] C. civ., art. 1832

[40] CA Paris, 26 mars 1966; Cass. 1er Civ., 15 juill. 1999, n° 97-13.303

institution. The company is an entity within which coexists contractual rules and intuitional ones. As for the Jordanian legislature, the approach was more pro-contractual. The Jordanian Civil Code defined the company as a contract[41]. The consequential relations and outcomes resulting out of its creation are governed by the theory of contracts.

21 ***Modern theories.*** Legal doctrine continued the research for another inclusive theory of the company. A new notion was introduced called 'contract-organization'[42]. This notion addresses the originality of company's contract as it does not create reciprocate obligations. The company is a contract that has as its main aim the organization of an economic activity. Later in legal research, the progress of notions such as corporate governance and the economic analysis of law favored theories such the agency theory that considers the management and the shareholders as having a contractual link based on the agency concept. This notion does not directly address the nature of the company as a contract or institution. Rather it addresses post-creation relations resulting out of the establishing of the company. The most favorable example of the application of this theory is portfolio investment vehicles. They act in the interest of their different investors in the process of investment optimization. The management is expected to present the best performance and create value. This theory is one of the most theories referred to in our research throughout this part.

22 ***Reason for creation***. Why do individuals desire the creation of the company? The answer is the advantages resulting out of this creation. These advantages may be legal (the creation of separate financial patrimony of the company than that of the shareholders), economic and financial (maximizing capital without the need to seek loans and limiting the financial burden to percentage of participation), fiscal (depending on the fiscal policy of the country of incorporation) or social (particularly the management of the company having the right to access social security benefits)[43]. The choice of this research is the open-end company. Open-end financial institutions allow the investment in various portfolios in order to diversify the risk over participating investors in addition to minimizing the chance of the investors missing their

[41] Article 582 Jo. Civil Code
[42] Paul Didier, 'Le Consentement Sans l'Echange : Contrat de Société' (1995) 11 Revue de Jurisprudence commerciale p. 74
[43] Deen Gibirila, *Droit des Sociétés* (5th ed, Ellipses 2015) pages 21 and 22

investment[44]. The variability characteristic of the capital of the corporate form of CIS offers options to shareholders that are usually not available under the standard forms of Public Limited Companies. One key characteristic when creating a company is the interest mainly financial interest. The objective of the shareholders is maximizing their wealth with minimum risk and loss rates.

23 ***Plan.*** Throughout this part, we address the interest of shareholders beginning with its legal birth. The incorporation of the corporate form of CIS requires following a nationally set incorporation process designated by the law of its home country. The incorporation takes two steps. The first step is the initial registration (Title one). Two main forms of registration one with the company controller of its country of choice (Chapter 1) and the other with the competent securities commission (Chapter 2). The second step relates to the operation of the company and the means through which investors contributions are made (Title two). Therefore, addressing financial market requirements (Chapter 1) and the daily operation of the company (Chapter 2).

[44] Edward Davis and John Pointon, *An Introduction to Corporate Finance: Finance and the Firm* (OUP 1994) Page 100

Title One: Prior Establishment Requirements: What Shareholders Need to Know when Incorporating a Company

24 ***Incorporation.*** Individuals that decide to establish a company adhere to a list of regulatory requirements and complete the registration formalities stated by law. The formalities are legal procedures that give birth to a juridical person. Consequently, the company is granted a moral personality. This personality allows the company to act, own, dispute and perform its objective be it civil or commercial. It offers the company the protection of their name, domicile, reputation and correspondences nonetheless; it does not offer the company the right to a private life as physical persons do[45]. The personality is complemented with a separate financial patrimony from that of its shareholders. Companies depending on the activities they exercise may be required to obtain further approvals or authorization of authorities other than the company controller departments.

25 ***Personality of Investment Companies***. Investment Companies are generally incorporated in the same manner, and following a similar form and procedure to that of other Plc. They also have access to capital markets and can offer their shares for sale to the public through a recognized stock exchange. They can also issue advertisements offering any of their securities for sale[46]. Having particular financial activities provide these companies with more structure related choices than other Plc. They are also required to obtain a prior initial approval from competent securities authorities ahead of registering at the company controller department[47]. ICs and other financial services providers before commencing their financial activities including among other things portfolio investment, issuing shares or investment management, are required to obtain a prior approval of the competent domestic securities authority. The approval requirement takes various forms depending on the applicable national rules. The requirement

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[45] Cass. 1re civ., 17 mars 2016, n° 15-14.072; Xavier Dupré de Boulois, 'La Personne Morale, la Vie privée et le Référé', Cass. 1er civ., n° 15-14.072, RDLF, 2016, chron. 16; Didier Poracchia, 'Une Société n'a pas une Vie Privée', Cass. 1er civ., n° 15-14.072, Revue de Droit et Partrimoine, 2017 (268), p. 60 ; business name : Cass. com., 12 mars 1985,n° 84-17.163; Cass. com., 12 févr. 2002, n° 00-11.602, domicile : Cass. crim., 23 mai 1995, n°94-81.141, correspondances : Cass. crim., 26 oct. 1967, n° 66-92.255 and reputation: Cass. crim., 12 oct. 1976, n° 75-90.239; Cass. 2e Civ., 5 mai 1993, Bull. II n°167

[46] 'PLC – Public Limited company Incorporation' <http://www.fletcherkennedy.com/plc.html> Accessed 17 November 2015

[47] Article 98 JSL of 2017

might be a mere registration (such as the registration at the SEC)[48], an authorization (such as the case of choosing a MS in the EU)[49], or a license (the case of incorporating in Jordan)[50]. The following two chapters address the incorporation process of the IC in two stages. Firstly, registration at the company controller (chapter 1) and secondly fulfilling the securities related requirements (chapter 2).

[48] Section 8 (a) Investment Company Act of 1940
[49] Article 5 UCITS Dir. 2009/65
[50] Article 3 Licensing Regulation of 2005; article 3 Licensing Bylaw of 2018

Chapter 1: Organizational Requirements

26 ***Corporation.*** The corporation is a legal framework by which individuals conduct business in a more modern and structured manner[51]. A convenient legal entity enters into contracts, owns property, and may be a party in legal disputes. The corporation differs in size; from a publicly held one to a one-person business. Considered a creature of law (legal construct)[52].

27 ***Role of Corporation.*** Corporations enable their participants and components to practice their freedom of choice and contract, in addition to customize the structure of their relationships. The structure is based on a statutory framework addressed under domestic legal rules and judicial norms.

28 ***Necessity of organizational form.*** There is a legal perception that states that, for a business to be successful it requires the corporation mystique, meaning undertaking the corporate form. The core issue lays in the choice of the most appropriate organizational form that best suits the needs of the business and the interests of its components. The organizational form determines legal relationship, financial rights, responsibilities and liabilities. The organizational form adversely affects the corporation's performance and is connected to conflicts of interest, corporate governance and fiduciary duties[53]. It commonly falls under the agency theory (looking at conflicts of interests between shareholders and members of management); it is clearly noticeable in the management structure of the corporation.

29 ***Choice of organizational form.*** The choice is the first step in the incorporation process. Meaning, choosing the most appropriate organizational form. It is a multistep process. The first and most common step, legally addressed, is the initial domestic registration of the business as a legal entity under one of the structural forms provided in national norms[54]. This step constitutes of the legal incorporation of the business where the different initial participants choose the form

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[51] Dominique Terré, 'Le Mythe de la Gouvernance' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015) page 797

[52] Alan Palmiter, *Corporation: Examples and Explanations*, (6th ed, Wolters Kluwer 2009) page 3

[53] Alfred Joseph Warburton, 'The effect of organizational form of firm performance' (DPhil thesis, University of Michigan 2009) Page 4-5

[54] C. com., art. R. 210-1

they want to follow and as a result, they become shareholders enjoying rights and exercising duties. The business in our case the IC follows on to the second step that relates to the choice of another structure; the management body. The second step involves a list of conditions should be fulfilled within the timeframe provided in domestic rules.

30 ***Opening.*** IC is a business established in a similar manner to that of other businesses, taking into consideration the particularity of the activities this Company exercises. It is domestically incorporated in its country of choice; it follows the form designated by national rules (to be further explained in Section A). Shareholders of the IC cannot directly run the Company; due to various reasons that relate to the form of incorporation, the activities it exercises and the notion of separation of ownership and control, therefore the Company assigns the management to a separate body (to be further addressed in Section B). IC adheres later, as part of its organizational steps, to special financial procedures that relate to its activities.

Section A: Incorporation Requirements: Founding an Investment Company

31 The term ***Incorporation*** describes the process of structuring a new business that consequently becomes a recognized entity or legal person under the law of incorporation[55]. Once created, this new legal entity is treated separately from its components, potentially reducing the liability of the business's shareholders while gaining at the same time other benefits that could help the business grow and thrive long term[56]. When the IC is the place of concern, the governing legal rules require as part of the incorporation process the registration of IC at national companies' registry of its country of incorporation[57].

32 ***Definition of Public Limited Company.*** Domestic legislations stipulate that when an IC is incorporated, it take the form of a Public Limited Company. These legislations include but are

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[55] The Merriam-Webster Dictionary (11th edn, Merriam-Webster Mass Market 2004)

[56] Mark Hayes, 'You Inc. The Benefits and Costs of Incorporating your Business' (14 December 2012) <https://www.shopify.com/blog/7037600-you-inc-the-benefits-costs-of-incorporating-your-business> Accessed 17 November 2015

[57] Articles 7.h & 209.a JCC; C. com., art. L. 210-6; C. com., art. L. 228-10; USA: Registration with SEC is required under the Investment Company Act, Section 8(a) filing a notification for registration takes the form N-8A, within three months file a registration statement Section 8 (b) – Rule 8b-5 takes the form N-1A (mutual fund registration form)

not limited to French and Jordanian company related legal rules[58]. The reasoning behind this condition is found in the definition and the object of this form of company. Plc. is the company whose capital consists of shares owned by a number of founders who are liable for loses in that proportion of their shares' theses shares are negotiated on regulated markets[59]. The objects of Plc. differ from one company to the other; nevertheless, one of its most common objects is providing financial services. To be further illustrated later on in this work the object of the IC. As it falls under the scope of financial services.

33 ***Plc. rules applicable to IC***. The IC subject matter of this thesis formed a topic of major interest in various legal systems. Legislations when addressing this form of company took a short and convenient approach in generally applying the rules governing Plc. while introducing at the same time special rules that either exempt or produce some sort of leniency in the applicability of Plc. rules. The necessity of these alterations are traced back to the activity this company exercises comparing to other Plc. The alterations form the scope of application of the general rules over the IC. This Section and the following one will explain further this scope.

34 ***Terminology***. When referring to national laws that address the IC, it was noted that the Jordanian legislature faced an issue in using a single terminology to address this form of company. The Jordanian law provides various definitions to the IC; this difference broadened the scope of activity this Company is legally permitted to exercise. The IC was referred to under the former Securities Law of 2002 as both an IC[60], and Collective Investment Company (CIC)[61] creating discrepancies in defining the applicable rules. Despite the difference in the terminology, the definitions of both terms are similar and can be applicable to the IC subject matter of this work. The new Securities Law of 2017 removed the term investment company and replaced it with the term CIC[62]; meanwhile proposing an identical definition to that mentioned in Company's Law. The Collective Investment Regulation stipulated both terms (IC and CIC) and made the distinction between them. The Regulation linked the term CIC to the one mentioned under the JCC, further it addresses our Investment Company as CIC. As for the

[58] Fawzi Sami, *Sharikat Tijaryeh: Ahkam Ammah wa Khassah* (Dar Thakafeh 2010) page 578
[59] Collins Dictionary of Business 2005, n (5); Article 90.a JCC; C. com., art. L. 225-1
[60] Article 2 JSL of 2002; article 2 Collective Investment Regulation of 1999
[61] Article 3 Collective Investment Regulation of 1999; article 209 JCC
[62] Article 2 JSL of 2017

term IC, the Regulation connects it to the term defined by the former JSL of 2002. The definition the JSL of 2002 mentions provides objectives and purpose similar to those addressed in JCC. Prior to 2017, the law offered one of two solutions: the use of both terms when referring to the IC or applying the term Financial Services Company[63], to the IC (as provided for in the JSL). For the purposes of this thesis, the term Investment Company shall be used and shall cover the different terminology used by the Jordanian Legislature[64]. This section illustrates the initial registration of the IC. The registration addresses first the formation pre-requirements (form and registration procedure) (Sub-section 1). Then it extensively explains the content of the Articles of Association (Sub-section 2).

Sub-section 1: Formation of the Company

35 ***Founding shareholders.*** The IC fulfills a set of general conditions as other forms of companies. It registers domestically at the competent company controller department of its country of choice. In order to have a complete initial registration the IC, among other things, chooses a legal form (from those introduced in the governing legal rules) and incorporation structure, provides the required information and documents, submits the incorporation application while at the same time meet the minimum number of founding shareholders set for companies with similar form. Founding shareholders also known as principal shareholders are those considered the initial owners of a company[65]. Usually they are the owners of the greatest percentages of company's shares, and they hold the largest stake in company's success and loss. Company rules impose a minimum number of founding shareholders (two shareholders) on all the legal forms the company may undertake, with an exception in particular cases to possible incorporation of a company with a sole shareholder. The French *code de commerce* designated a minimum number of founding shareholders that should not be less than seven for companies that trade their shares on regulated markets[66].

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[63] Article 2 JSL of 2017

[64]The French *code de Commerce* faced a similar issue when it introduced two mandatory forms for the incorporation of the Investment company (*SICAV*). This matter is further illustrated in the subsequent subsections when addressing the list of forms the IC can choose from at the moment of incorporation; C. mon. fin., art. L. 214-7; C. com., art. L. 227-1

[65] Jo. Cass. Civ., 25 July 2000, n ° 470/1999

[66] C. com., art. L. 225-1

36 ***General vs special rule***. The general rule for minimum number of founding shareholders in Plc. and subsequently the IC is having two shareholders unless the exception applies[67]. This general rule was later amended to correspond to the particularity of the IC; therefore, the applicable legal rules state a maximum ownership threshold and a minimum number of founding shareholders[68]. The amending rules linked the two thresholds together by requiring their coexistence at the moment of incorporation, further it limited the application of this content to banks and financial companies.

37 ***Scope of Special rule.*** Two main issues rise in this regard; the first relates to the definition of the financial company and its applicability over IC. The Second issue relates to the possibility of distinguishing between a private and public company when referring to this threshold. Neither the JCC nor the Securities Law stipulate a definition for the financial company, the closest definition to a financial company found under the Securities Law is the Financial Services Company[69] that may be applicable to IC. The lack of definition lays down two arguments; either the application of the thresholds after considering the IC a financial company or the non-application of the thresholds if it was assumed that the IC is not covered under this term. The preferred and most acceptable argument is the one that includes the IC in the definition of the Financial Company. The reason behind this preference is traced back to the type of activities and purposes of this form of company and the similarities between them and those of the Banks. The second issue relating to the distinction between private and public company[70]. Generally, seen as the attempt of the Jordanian Legislature to limit the Plc. to its public form. This issue is closely linked to the different incorporation structures Plc. has such as being incorporated with or without an IPO, as this distinction is explicitly stipulated under the French law[71]. The obvious reasons behind laying down a minimum number of shareholders are similar in the different legislations; the particularity of the activities exercised by investment companies (portfolio investment and risk sharing). Pooling assets and diversifying the risk

[67] Article 90.a JCC; Article 90.b JCC
[68] Article 99.a JCC
[69] Article 2 JSL of 2017
[70] Attila Kovacs, '*Hungary*' in Michael J Munkert *& others* (eds), *Founding a company: Handbook of Legal forms in Europe* (Springer 2010) Page 96
[71] Mads Andenas & Frank Wooldridge, *European Comparative company Law* (Cambridge 2009) Page 64

requires a sum of assets that usually retail investors do not own individually therefore fulfilling the collectivity character.

38 ***Plan.*** In order to comprehend fully the formation procedure of the IC, this sub-section is dedicated to the extensive analysis of the different available structural forms the IC may choose to undertake; while taking into consideration the different terms used to address this form of company (Paragraph 1). Further, this sub-section lays down the various stages of the initial registration process (Paragraph 2).

§1: *Choice of Structure*

39 ***Structure Options.*** The laws governing ICs provide a list of forms the IC may choose from when incorporated while permitting at certain levels the conversion from one form to the other[72]. The choices stated by law can be classified into two main categories one depending on the capital structure and the other depending on the offering of initial shares. When referring to the first category we note two main forms: the open-end and closed-end Investment Companies[73]. Nonetheless, a mixed structure can be further introduced; in which part of the capital is fixed and the other part is variable[74]. As for the second category, it includes the choice in offering Investment Companies' shares through an Initial Public Offering (IPO)[75] or that without an IPO[76].

40 ***Open-End Investment Company.*** The OEIC is an investment vehicle where its capital is variable fluctuates increasingly and decreasingly throughout the performance of the company without being restricted to legally required procedures; hence, it is constituted of a pool of funds collected from various investors for investing in securities. The managers of this company invest the collected capital in an attempt to produce capital gains and income for these investors at the same time, the company's portfolio is structured and maintained to match the investment

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[72] Article 210 JCC

[73] Aziz Akili, *Alwaseet fi Qanon Tijari* (Dar Thakafeh 2008) page 426

[74] Pedro Simoes Coelho and others, '*Collective Capital Investment Schemes*' (2009) IFLR 28 (6) <http://heinonline.org/HOL/Page?handle=hein.journals/intfinr28&div=134&start_page=71&collection=journals&set_as_cursor=29&men_tab=srchresults> Accessed 24 September 2015 Page 71

[75] C. com., art. L.225-2

[76] C. com., art. L. 225-12

objectives stated in the company's prospectus[77]. These companies have no predetermined limit on size or membership and the shareholders have the right to redeem their shares anytime at their net asset value.

41 ***Closed-end investment company.*** A publicly traded investment company raises a fixed amount of capital through an IPO[78]. Then it is structured, listed and traded like stock on a stock exchange[79]. This type of company has limited available shares. Further, it has set limits and generally, the entrance is limited to purchase from a present owner. Shareholders, unlike in open-end companies, do not have the right to force the company to redeem shares at their net asset value[80].

42 ***Incorporation with IPO.*** IPO is the first sale of stock by the company to the public[81]. This form of incorporation includes issuing securities (in the form of shares, bonds, or any other financial instruments) and allocating a threshold for subscription and a period for the underwriting by the public. In this form, the IC acquires two types of shareholders founding shareholders and shareholders by way of underwriting[82]. Both types of shareholders subscribe to the company yet following different manners. The founding shareholders subscribe to the company when fulfilling the incorporation requirements upon the registration at the company controller[83]. The shareholders by way of underwriting subscribe after the company issues an IPO. This difference does not generally affect the rights of shareholders connected to their shares; nonetheless, it grants the founding shareholders certain powers and competences up to

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[77] Kent Thune, 'What is a Mutual Fund? Definition, Basics, Advantages and Types: A Simple Explanation' (24 September 2016) <https://www.thebalance.com/what-is-a-mutual-fund-2466580> Accessed 28 September 2016

[78] American Heritage Dictionary of the English Language (5th edn, 2011)

[79] SEC, 'Invest Wisely: An Introduction to Mutual Funds' (2 July 2008) <https://www.sec.gov/investor/pubs/inwsmf.htm> Accessed 28 September 2016

[80] John Michael Webb, 'Of Banks and Mutual Funds: The Collective Investment Trust' (1966) Southwestern Law Journal 20 (2) < http://heinonline.org/HOL/Page?handle=hein.journals/smulr20&div=28&collection=journals&set_as_cursor=4&men_tab=srchresults > accessed 22 September 2015 Page 336

[81] C. com., art. L. 225-4; the Public offer was defined by the *AMF* as the offer of financial instruments communicated to a large public (notably the communication through the internet) requiring the preparation of a prospectus that is submitted to the review and approval of the AMF with an amount that meets the set threshold (*AMF* Recommendation DOC-2010-20); Hubert de Vauplane, 'Droit des Offres Publiques le Cadre Reglementaire et Institutionnel' in Guy Canivet, Didier Martin and Nicolas Molfessis (eds), *Les Offres Publiques d'Achat* (Litec Lexix Nexis 2009) page 1

[82] Article 90.a JCC

[83] Article 99 JCC

the moment when the underwriting period is over and the first General Assembly Meeting takes place[84].

43 ***Incorporation without IPO.*** In this form of incorporation, the company does not issue an IPO. The subscription to the issued shares is either performed privately by the founding shareholders[85]or a private offer is made targeting exclusive groups of investors[86].The concept behind this form includes the case of raising capital without promoting the sale of shares to the public[87].

44 ***Different legislative perspectives.*** Despite the multiple options the different legislations provided for the legal form of ICs, this choice is slightly restricted by the legislatures. When referring to the French legislation we note that the French legislature addresses all the previously mentioned legal frameworks[88]. In the second book of the French *Code de Commerce,* the legislature explicitly distinguished between the Plc. (*SA*) that is established with an IPO and that established without an IPO. As for other legislations such as the EU regional UCITS Directive, it does not explicitly address the legal form the IC should take; this matter was left to be nationally determined by MS[89]. On the other hand, the Directive limited its scope of application to OEICs who raise their capital by promoting the sale of their shares to the public[90]. When we refer for example to the US legislation particularly to the Investment Company Act of 1940 we note that a distinction is provided under Section 5.a, between the open-end (referred to as mutual funds) and closed-end investment companies.

45 ***General Jordanian Perspective.*** The Jordanian legislature approached the legal form of the IC in a similar manner to that of other legislations with minor differences on certain levels. The JCC introduces the IC as a special form of Plc. The code provides two legal forms for the

[84] Article 94.b JCC; article 97 JCC; C. com., art. L. 225-7
[85] C. com., art. L. 225-13
[86] Article 2 JSL of 2017
[87] Article 3.b UCITS Dir. 2009/65
[88] The incorporation with or without IPO: C. com., art. L. 225-2, C. com., art. L. 225-12; the capital structure: Closed-end (*SICAF*) C. mon. fin., art. L. 214-127, Open-end (*SICAV*) C. mon. Fin., art. L. 214-4
[89] Article 27 UCITS Dir. 2009/65
[90] Article 3.b UCITS Dir. 2009/65

IC; it can be incorporated either as an open-end or closed-end company[91]. As for the other category provided by the French *Code de Commerce* (the incorporation with IPO), neither the JCC nor the JSL explicitly made a distinction between an IC incorporated with an IPO and that without an IPO. Nevertheless, when referring to the general rules governing the underwriting of Plc. shares stated in the JCC and those relating to the public offering addressed under the JSL, it can be deduced that an implicit restriction was imposed on Plc. when raising their capital. The restriction can be traced back to the second category (form of offering shares) of the suggested legal frameworks.

46 ***Restrictions on raising capital.*** The Jordanian Securities Law defined the Public Offer as an offer for the sale of securities targeting more than thirty persons of the public; this offer includes both the public issuing and the initial public offering[92]. This definition is general to all the undertakings governed by the JSL. Yet the legislature in the law of 2002, when stipulating the applicable rules to the Investment Fund, introduced and for the first time two forms of offers for the sale of securities; the public and the private offer without further explanation or definition to the private offer[93]. The private offer is any offer that does not meet the conditions of the PO. Hence, the private offer is an offer for the sale of securities oriented towards a group of persons that do not exceed thirty[94]. The JCC further addresses issues relating to the threshold of underwriting. The subscription threshold was limited for founding shareholders to a restricted threshold, which cannot be exceeded. Two thresholds are addressed; one concerns banks and financial companies (the maximum permitted threshold is 50%) as for the other it generally concerns all the other Plc. with a maximum permitted threshold of 75 %[95]. The link between the threshold and the IPO is traced back to the remaining unsubscribed shares; they require future shareholders to underwrite them. The most obvious reasoning behind this threshold is connected to the duty to safeguard minority shareholders; the fact that the company is publicly traded proves the existence of more than one major shareholder. However, this restriction may be

[91] Article 210 JCC
[92] Article 2 JSL of 2017
[93] Article 98.b JSL of 2002 ; under the newly adopted Securities Law of 2017 no such introduction is made, the law refers to a bylaw to be implemented for purposes of regulatory framework of the IF
[94] Article 2 Issuing Regulation of 2005
[95] Article 99.a JCC; Article99.b JCC

derogated from if certain conditions are fulfilled; meaning to cover the remaining unsubscribed shares by the founding shareholders after the underwriting period is over[96].

47 ***Most appropriate form.*** It is noted that the different legislations have generally similar approaches when addressing the structural options of ICs, where the similarity is found more in the capital structure category rather than in the offering of initial shares. The capital structure category is addressed by all the previously referred to legislations. As for the second category it is approached differently, it has been noted that the French legislature was the only legislature to explicitly address this category and provide a distinction between the incorporation with or without an IPO in the *Code de Commerce*. In order to define the most appropriate form the IC should take and hence reform the JCC and JSL to meet this form; first, we note that the focus of this thesis is the OEIC. Therefore, from this point onward, the first category of the suggested structures will be viewed as having been concluded and no further argument will be presented. As for the second category, it is linked to the debate on whether or not the OEIC is considered as an issuer (later explained in title two of this part). The choice of whether or not an IC should be incorporated with an IPO was made relatively simple under the French and EU related legal provisions. The link between the French and the EU legislation is essential; due to the influence EU law, has on the domestic rules in its MS. French rules governing OEIC are stemmed from and coherent with the European regional UCITS directive[97]. As previously mentioned UCITS Directive limited its scope of application to open-end undertakings that offer their shares for public sale. The same scope exists in the French financial and monetary code[98]. This code introduces the OEIC, known as *SICAV (Société d' Investissement à Capital Variable)*, further it states that the shares of this company are subscribed to either by founding shareholders or by subscribers (shareholders by way of underwriting). It can be deduced from this statement that the *SICAV* under the French legislation; should be incorporated with an IPO. When referring to the Jordanian related legal provisions it was noted that the legislature's approach to this structure, though it is implicit and similar to the French and European one, is the most appropriate form the OEIC can take. The reasoning is traced back to the purpose behind this type of company. The aim of this company is to invest in portfolios, therefore diversifying the

[96] Article 99.c JCC
[97] C. mon. fin., art. L. 214-2
[98] C. mon. fin., art. L. 214-4

risk of shareholders. To fulfill this aim, the company cannot be limited at the time of incorporation to a small number of subscribers in order to pool the largest amount of assets and have rich financial resources. This statement is accurate only if this investment originally targeted retail investors and not professional ones. Hence, that brings us to the conclusion that the Jordanian legislature's approach was in its place, while having in mind the later to be mentioned debates under which the OEIC is treated as an issuer. Nonetheless, it must be noted that more positive outcomes could come out of this approach for both the future incorporated OEICs and shareholders, if it is addressed explicitly under the rules governing OEICs and not the general rules applicable to all Plc. The structure chosen for the IC for the assessment introduced in this thesis is the OEIC that raises its capital publicly by offering its initial shares for sale. The choice of the structure alone is not enough; the structure should be realized through a formal registration of the company at its choice of domestic company registry.

§2 : *Domestic Registration*

48 ***National Company controller Department.*** The *SICAV* is the most widely spread vehicle to incorporate open-end funds in civil law countries, it may be public or private. The OEIC should be registered domestically at the company controller of its country of choice[99]. National company controllers prepare a special registry that includes the details of all the registered OEICs[100]. This form of registration is not limited to the OEIC, companies in general, despite their form, should register with the company controller[101]. The company controller or the relevant national authority in every country has a competence over the initial registration procedure[102], briefly explained in this paragraph and later linked to the administrative supervision in part II. The governing legal rules address the registration obligation and the different stages of the registration procedure[103].

49 ***Registration application***. The different legislations impose the registration obligation with general application requirements. Generally, the national legislations extensively point out

[99] C. com., art. L. 210-6; C. mon. fin., art. L. 522-10 ; article 7.h JCC
[100] Article 7.h JCC; Article 209.a JCC
[101] Article 4 JCC
[102] Article 6 JCC
[103] CA Paris, 5-8, 24 janv. 2017, n° 16/15840; Didier Oudenot et Edouard Fournier, 'Création des Entreprises' in Jean-Marc Bahans 'Actualité du Registre du Commerce et des Sociétés (2016-2017)' (2017) 9 Bull. Joly Sociétés 555

the content of the AOA and MOA in addition to the supplementary documents without mentioning the actual content of the registration application[104]. The governing legal rules merely mention a form that is provided for this purpose[105]. This application is linked to the AOA and MOA. The link is found in the legal rules addressing the supplementary documents, whereas both the AOA and MOA under the JCC should be joined in the submitted initial registration application[106]. The French *Code de Commerce* provided the same link[107], as for the UCITS Directive no such reference is found, as we previously mentioned the Directive left all that concerns the initial registration of the company to the discretion of the MS. The application further relates to founding shareholders. These shareholders have prior registration responsibilities, including electing the founders committee, which supervises the incorporation of the company. The link between founding shareholders and registration can be traced back to the supplementary documents, as they should attach the minutes of meeting of the first GAM (of founding shareholders) to the application[108]. The supplementary documents should include the names of shareholders[109]; at this stage, they include one of the two forms of Shareholders meaning founding shareholders. Further, the documents include the name of the auditor the company chose for its incorporation period[110]. The founding shareholders sign the application once completed. Before the company controller, a notary or a licensed lawyer[111].

50 ***Result of application.*** Company controller exercises certain powers over the different stages of the initial registration. Part of this power is the decision it takes following the submitted registration application. Neither the *Code de Commerce* nor the Jordanian Company Code granted the company controller a direct competence to issue the final decision on the initial registration application. The Jordanian company controller files his recommendation of the complete and signed submitted application, within a set period of time, to the Minister of Industry and Commerce, whereas the later has the competence to decide whether to approve or refuse the registration of the company within the time limits designated by law. The failure to

[104] Article 3.c Companies Bylaw No. 77 of 2008
[105] Article 92.a JCC
[106] Articles 92.a (1) & 2 JCC
[107] C. com., art. L. 210-7
[108] Article 92.a.4 JCC
[109] Article 92.a.3 JCC
[110] Article 92.a.5 JCC
[111] Article 7.o JCC

issue the decision within the permitted period by the Minister, results into the automatic approval of the registration[112]. As for the French legislature, states that the clerk (*Greffier*) of the competent tribunal (*Tribunal de Commerce*) is the competent authority in deciding to approve or refuse the registration of the company at the company registry[113].

51 ***Company Controller powers[114]***. The importance of the role of the Company Controller extends to post-registration period. Nonetheless, this role is limited in terms of the final step in the registration that is the approval or rejection of the incorporation. The JCC did not undermine the role of the Company Controller as solely the final decision is left to the Minister the review and recommendation of the application forms an integral part of the powers of the Company Controller. The Legislature went beyond the decision and provided the controller with powers that relate to the disclosure of information and record keeping. The disclosure addressed under the powers of the Company Controller relates to the discretion given to the department to disclose the information relating to the company except for those relating to the accounts and the financial statements[115]. Another power was granted to the Company Controller is the legal value attributed to the electronic copies of its issued documents, as it is linked to the responsibility to archive all related statements and documents of registered companies[116]. The company controller or the *greffe* is not considered the owner of the information they keep or collect[117].

52 ***Competent authority approving registration.*** The fact that the Company Controller Department merely reviews the initial registration applications then recommends the ones that fulfill all the required legal conditions, and holds the registry for the company is in a way limiting the powers of this department. The need for the Minister of Industry and commerce resolution to register a company such as the OEIC can be argued both positively and negatively. The downside of having such stage in the registration procedure may present the incorporation

[112] Article 94.a JCC
[113] C. com., art. L. 210-7
[114] Jo. Co. admin., 31 Jan. 2007, n° 534/2006; Jo. Co. admin., 31 Jan. 2007,n° 535/2006
[115] Article 6.c JCC
[116] Article 6.d JCC
[117] CE, 6e et 1er ch. Réunies, 12 juill. 2017, n° 39-7403; Sophie Roussel, 'Les Greffiers des Tribunaux de Commerce, le Registre National du Commerce et des Sociétés, l'INPI et Infogreffe', CE, 6e et 1er ch. Réunies, n° 39-7403, *Gazette du Palais*, 2017 (44), p. 34

procedure under the Jordanian legal system as long, time consuming, dependent and undermining of the competence of the individuals of the company controller department. On the other hand, interpreted positively for the investors to safeguard their interests in case the Company Controller may overlook certain non-mandatory requirements due to their minor influence. Hence this step is a form of supervision over the recommendation of the department and separate from the control exercised by the administrative courts. This power is bestowed on Company Controller in relation to the companies (in the form of private or public limited companies) that do not list their shares on regulated markets. The JSL of 2017 introduces new prior registration power to the JSC. A requirement that conditions the registration at the company controller to an initial written approval of the JSC[118]. This prior action provides a higher level of protection for future shareholders. In terms of the experience and expertise of the JSC's staff in securities and financial market requirements and needs. Therefore, the IC undergoes a specialized preliminary examination ahead of creating its legal personality. Further, the law transferred the exercise of administrative and organization powers of the company controller mentioned under the JCC, to the JSC[119]. The council of JSC exercises the powers of the Minister and the director of the Council exercises the powers of the company controller. In this regard, the approval and refusal of the initial registration application remains with the Minister, as it does not form part of the organizational and supervisory functions.

53 ***Argument more pro-shareholder.*** The option provided by the French legislature sounds more acceptable than the Jordanian general one. Involving the judicial authority in the incorporation steps of the company provides more confidence in the registration decision; nonetheless, this is merely an administrative stage. It raises the same concerns previously mentioned of having a longer incorporation process. If the procedure stated under the JCC is maintained, while taking into consideration the short time limits in issuing the decision imposed by the JCC, the argument relating to the length of the process may be put aside. The reason relates to the auto-registration in the case of no-response by the Minister of Industry and Trade within the set period, therefore making the maximum period to issue a decision of incorporation sixty days[120]. This exception defies the non-competence and supervision arguments; hence, the

[118] Article 98.a JSL of 2017
[119] Article 111 JSL of 2017
[120] Article 94.a JCC

necessity for the Minister's resolution is irrelevant as the legislature moves in circles to state implicitly the importance of the Company Controller's recommendation. Within the scope of the new power attributed to the JSC, the role of the company controller is quasi in existing later on in the life of the IC. This approach is positive in terms of having an extended supervisory power of the JSC. The activities the IC exercises requires such extension. Yet, transferring the powers can be negative as it puts the entire registration and later license with the JSC where no time limit is introduced for their written approval.

54 ***Overview.*** The OEIC is incorporated under the Jordanian Law as a Plc. with an IPO. It should have a minimum number of founding shareholders who subscribe to its shares with a threshold not exceeding fifty percent of the initial capital. This Company should follow a two-step incorporation process; the first step includes the choice of structure and the domestic registration in the company registry of its country of incorporation. As for the second step, it includes the registration in the relevant financial market. To cover all the bases of the initial incorporation (the first step), the content of the registration application should be further explained. Therefore, the following sub-section 2 exhaustively address the content of the AOA.

Sub-section 2: Content of Articles of Association

55 ***Definition AOA***. The AOA is a document that specifies the regulations for companies' operations. Its main role is allowing the constitution of the company[121]. AOA defines the company's purpose and lays out how tasks are accomplished within the organization, including the process for appointing directors and how financial records should be handled. A definition stemmed out of the legal rules designating the content of the AOA. The AOA is the internal rulebook that every incorporated organization acquires and adheres to. It is a future contract entered into between members of the company (shareholders) and company's future management in addition to being an actual contract between the members themselves. The AOA sets out the rights and duties of both members of management and shareholders, individually or in meetings, certain statutory clauses in addition to other clauses chosen by shareholders to draft the bylaw of the company[122]. The AOA may be limited in content to the minimum possible.

[121] Pierre Mousseron, *Les Conventions Sociétaires* (2nd ed, LGDJ 2014) page 77
[122] http://www.businessdictionary.com/definition/articles-of-association.html Accessed 3 December 2015

Professionals to restrain as possible the statutory modifications requiring a GAM, seek this approach.

56 ***Definition of MOA.*** The Memorandum of Association is the charter or the statute of the company; it contains all the fundamental information of the company including defining the object of the company. The MOA is considered a contract between the company and third party. It must be drawn up at the incorporation. In some legislation, it constitutes part of the official documents attached to the initial registration application[123].

57 ***Difference between AOA and MOA.*** Both documents are supplementary to each other and inter-link; nevertheless, there is a difference between them. In most cases where there is ambiguity or silence on the part of the MOA, the AOA interferes to explain or supplement the MOA[124]. The basis for comparison between the two documents generally relates to the meaning (content), importance (mandatory or not), regulation (nature) and alteration. The MOA contains all the fundamental information required for the incorporation of the company, including the powers and the object of the company, as for the AOA, it contains all the rules and regulations governing the company (internal administration, the procedures to achieve the object). Both documents are important and mandatory when a Plc. is concerned, yet the MOA has a primary importance and the AOA has a secondary one. The MOA defines the relation of the company with the rights of its members, also establishes the relationship of the company with the members. The AOA is more of a procedural document that defines the relation between the members themselves. In terms of alteration the MOA can only be altered in strict manner requiring special resolution and prior approvals, the AOA requires merely a special resolution that can be made during a GAM[125].

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[123] Johnathon Law (ed), *A Dictionary of Finance and Banking*, (5th edn, OUP 2014)

[124] Difference between Memorandum and Articles of Association <http://www.preservearticles.com/201104085066/memorandum-and-articles-of-association.html> Accessed 7 December 2015

[125] Mirza Saab, 'Difference or Distinction between Memorandum of Association and Articles of Association'<http://studypoints.blogspot.com/2011/06/difference-or-distinction-between_1617.html > (11 June 2011) Accessed 7 December 2015; Surbhi S, 'Difference between Memorandum of Association and Articles of Association' <http://keydifferences.com/difference-between-memorandum-of-association-and-articles-of-association.html> (15 April 2015) Accessed 7 December 2015

58 ***Jordanian Law Perspective.*** The Jordanian Law addresses both documents the Articles and Memorandum of Association. The difference between these documents is invisible under the JCC. The Legislature put both in the same level in terms of their legal value, content and importance[126]. The alteration of either of the two documents requires a resolution made in an Extraordinary General Assembly Meeting[127]. Building on the indifference between the AOA and MOA stipulated in the JCC, whenever the term AOA is addressed in the current Sub-Section or elsewhere in this paper; the term shall refer to the constitution of the company and shall consist of both documents.

59 ***Shareholders Agreement.*** Shareholders may decide on a set of ground rules over and above the basic legislation that will govern their behavior[128]. A Shareholders' agreement might then be in place, therefore, it is considered a private contract, or a simple partnership entered into between different shareholders containing the rules relating to managing and owning the company[129]. Shareholders' Agreements closely relate to company's AOA. All companies have AOA but companies are not legally required to have a Shareholders' Agreement. This form of agreement is based on the freedom to contract[130]. The question that rises in this regard: what is the legal value of shareholders agreement? Does it coexist with the AOA? Shareholders Agreement is a contract entered into between shareholders not necessarily including the entirety of the assembly[131]. In most cases the content of which is not reported to the Company Controller. Therefore this contract is a private discreet agreement, generally relate to the sale and purchase of shares, the distribution of profits, share dilution (may contain an anti-dilution clause). The content of this agreement confirms with the law, AOA and the common interest of the different components of the company. The existence of a shareholders' agreement may be beneficial. Providing shareholders with further protection in terms of containing more details

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[126] Article 92.b JCC

[127] Article 175.a(1) JCC

[128] Mike Volker, 'The Shareholders Agreement' (2008) Business Basics for engineers <http://www.sfu.ca/~mvolker/biz/agree.htm 1/> Accessed 2 December 2015

[129] Mackenzie Law, 'Shareholders Agreement and Articles of Association' <http://www.mckenzielaw.co.uk/how-we-help-business/companies-and-shareholders-agreements/> Accessed 7 December 2015

[130] Jean-Jacques Ansault, 'Les Pactes Extrastatutaires sous la Surveillance de l'ordre Public sociétaire' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015) page 1

[131] Ibrahim Sattout & Gladys Doubet, 'Reform of the Kuwaiti Companies Law: Simplification and Innovation to Encourage Investments' (2015) 2 Revue de Droit des Affaires Internationales Page 153

than those mentioned in the AOA. Protecting minority shareholders from the behaviors of majority shareholders[132] (restrict powers of directors and majority shareholders' harmful decisions cannot be forced) further to minimizing any potential business disputes[133]. Shareholders' agreements generally remain private and confidential, they are not open to the public as the AOA, and therefore the co-existence may not be an issue. Shareholders should stipulate all the rules regulating the relation between them in the AOA without having to refer to any extra outsider agreement that may reflect a bad faith on their part. The French law permits this type of agreement and considers it as a simple contract governed by contract law rules in the civil code[134]. Further, the French law considers this agreement as having a lesser legal value than the statutory provisions (AOA)[135]. When this agreement pertains a listed company (such as the *SICAV*), the French *Code de Commerce* obliges the company to disclose this agreement to the *AMF* within five days following its execution[136].This agreement is indefinite in duration and has binding effect solely among its signatories[137]. The question rising in this regard relates to the enforceability of this agreement towards third party. The general rule states that extra statutory agreements are obligatory *inter partes*[138]. Nonetheless, article 1199 of the French civil code limits this statement of obligatory nature of contracts towards its parties by stating the necessity of the neutrality of contracts towards voluntarily non-participating third party. Therefore, applying the principle of enforceability of contracts by the parties over third party[139]. The enforceability in this regard is interpreted based on the hypothesis of implicit acceptance of contracts. Therefore, the resulting liability of the breach of this contract is dealt with based on

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[132] The French company rules state that shareholders in publically traded companies may form associations to represent their interest within the company as long as they meet the set conditions including: (1) the shares have been registered for at least two years, (2) they hold at least 5% of the voting rights (C. com., art. L. 225-120)

[133] Jonathan Lee, '8 Reasons why Companies should have a Shareholders Agreement' (23 May 2013) <http://www.jonathanlea.net/2013/8-reasons-why-companies-should-have-a-shareholders-agreement/> Accessed 7 December 2015

[134] C. civ., art. 1128

[135]Frederic Ichay, 'France' [2012] IBA Guide on shareholders' Agreements <https://www.google.fr/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&cad=rja&uact=8&ved=0ahUKEwiF_L0l7TPAhUKLsAKHZbqD40QFgg2MAQ&url=http%3A%2F%2Fwww.ibanet.org%2FDocument%2FDefault.aspx%3FDocumentUid%3DF7E7F4B3-A308-498E-8218-BEB66C0F6B7E&usg=AFQjCNFLd3EQ-eRFfH1QASN-ne0YhJ2z5Q> Accessed 29 September 2016

[136] C. com., art. L. 233-11

[137] C. civ., art. 1103

[138] Cass. 1er civ., 15 nov. 1994, n° 92-18.981

[139] Cass. 1er civ., 12 oct. 2004, n° 01-03.213

tort rules and not contractual liability[140]. The Jordanian Law did not explicitly address this form of agreement, yet implicitly limited the regulating rules to the MOA and AOA, when the law required a registration formality to the AOA and MOA during the initial registration of the company in addition to the following modification of these documents[141].

60 ***Preparing AOA***. Who is responsible for the preparation of the AOA? In the process of incorporation, the founding shareholders are responsible for the preparation of the AOA. The different legal rules stipulate this responsibility including the French *code de Commerce*[142].To prepare the AOA the founding shareholders should follow the list of minimum contents stated in the governing legal rules. The list contains two forms of requirements to be included in the AOA; the general foundation conditions that are required by all companies despite the form they choose to undertake (Paragraph 1) and the special conditions that are customized to meet the particularity of the Investment Company (Paragraph 2).

§1: *Foundation Conditions: General Conditions of Investment Companies and Beyond*

61 ***General information.*** AOA is a document that forms the constitution of the company. The document introducing the initial rules structuring the consents of founding shareholders. As any constitution this document should contain a specific set of information that defines the different details of the company specially those relating to the operational process of the company's daily course of work (differs from the internal policy). These details are essential to the incorporation and post-incorporation stages. In terms of being able to assess the financial standing of the company, its market history and its fitness for long-term investment goals. Furthermore, these details provide a clear view of the location of the company particularly, if the investments are performed outside its country of incorporation or the company being a foreigner in the investors' home. Therefore, shareholders' in this case can easily identify the geographical jurisdiction for their claims and challenges if such cases arise. The AOA contains among other things a set of general information that the applicable domestic rules require from all companies despite the form they choose to undertake. They include that information provided at the incorporation and stipulated specifically in the provisions of the domestic

[140] Gaetan Marain, 'L'Opposabilité des Pactes d'Actionnaires' (2017) 10 Revue des Sociétés p. 542
[141] Article 7 JCC
[142] M. Andenas n (71) Page 65

company codes. The information relate to the commercial name of the company, shareholders details and ownership percentage, the term (duration) of the company, identifying the headquarters, the form of management, the signatories and possibility of having a language requirement[143].

62 ***Company name.*** Company name permits clients, third party and public to identify the company from the moment of its incorporation and throughout its existence; this name distinguishes one company from the other. The name referred to is the business name (*Dénomination Sociale*[144]) of the Plc. and subsequently the IC; it should include distinctive signs and derive from the objectives of the company. In some exceptional cases, the business name may include the name of one or more of the company's founding shareholders, for example the case when the company's main purpose is to invest in a patent[145]. When choosing the business name the companies should avoid using a name that is assigned to an incorporated company or similar thereto that might lead to confusion or be deceptive. Further, the name should not be chosen for fraudulent or illegal objectives[146].

63 ***Headquarter vs seat***. The seat corresponds to the judicial domicile of the company. It is the place where the effective management and the functioning of the different organs of the company occur. The seat may differ from the place where the company exercises its activities. The necessity of a defined seat is traced back to identifying the competent court for the disputes in which the concerned company is involved. Further, the seat determines the nationality of the company and the applicable law[147]. Nevertheless, the Jordanian law used a different term to

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[143] Article 92.b JCC; C. com., art. L. 210-2

[144] The French Legislature made the distinction between two forms of names the company may be required to have. The first form is called the *raison social* and the other called *denomination sociale*. The difference between the two forms is found in the type of activity exercised by the company. If the company exercises civil activities then the company should have a social name (*raison social*) and if it exercises commercial activities, it should have a business name (*denomination sociale*); see: <https://www.infogreffe.fr/societes/informations-et-dossiers-entreprises/dossiers-thematiques/creation-entreprise/la-denomination-sociale.html> Accessed 4 December 2015

[145] Article 90.c JCC

[146] Article 5.a JCC

[147] C. com., art. L. 210-3
C. civ., art. 1837 ; https://www.infogreffe.fr/societes/informations-et-dossiers-entreprises/dossiers-thematiques/vie-de-entreprise/transfert-de-siege.html Accessed 4 December 2015

address the same functions and role of the seat, the law used the term headquarters[148]. The term headquarters is not defined in the law but is identified as the place of incorporation and is linked to the nationality and the applicable law[149], further the term headquarter was considered the main element in defining the domicile of the legal person[150]. The French legislature made the distinction between two forms of seat the statutory seat and the real seat[151]. The distinction between the two forms is difficult. The statutory seat may be identified through various criteria including the form of the company, the place of registration and the place of incorporation as for the real seat it may be determined as the place where the effective management is, and where the business decisions are presumably made[152]. A similar distinction is implicitly addressed under the Jordanian Law, in the cases relating to identifying the applicable law to foreign companies that has their headquarters outside the kingdom; therefore, the place where the activities are exercised is taken into consideration[153].

64 ***Definite or indefinite term***. The term or duration of the company, means the period during which the company is expected to remain active and exercise its activities. The different legal regimes grant shareholders the right to decide the exact term of the company, in some cases this right is limited to a maximum number of years. The perfect example is the approach of the French legislature. The *code de commerce* stipulates a maximum term of ninety-nine years that cannot in any case be exceeded[154] but can be renewed to an equivalent period[155]. The reasoning behind the limit on the duration of the company finds its place in general contract law rules. Under the French rules, the notion of indefinite contracts or eternal ones does not exist. All contracts have fixed terms even though the term ninety-nine is long enough yet it is not eternal. As for the Jordanian legislature he took a different but common approach of providing

[148] Article 4 JCC
[149] Article 51.1(d) Jo. Civil Code; Cass. com., 19 févr. 1991, n° 89-13997
[150] Article 18 Jo. Code of Civil Procedures
[151] This distinction is mostly addressed in cases involving a transfer of seat, particularly when the transfer is executed from MS to the other. The newly issued 'Polbud' decision on an EU level confines to the existence of both forms of seats yet it leaves the distinction to be internally dealt at MS level and it considers merely the statutory seat for purposes of transfer; Gilbert Parleani, 'Arrêt Polbud : Nouvelle Faveur (Temporaire ?) à « l'Optimisation » des Transferts de Sièges Sociaux dans l'Union Européenne' (2018) 1 Revue des Sociétés p. 47
[152]Cass. com., 19 Févr. 1991, n° 89-14000; Cass. crim., 31 Jan. 2007, n° 02-85089; Cass. crim., 31 Jan. 2007, n° 05-82671
[153] Article 12.2 Jo. Civil Code
[154] C. com., art. L. 210-2
[155] C. com., art. R. 210-2

the shareholders with two options for the choice of duration. The company is incorporated with a definite or an indefinite term. The legislature further left the shareholders with full consent to determine the two extreme ends of the duration. The JCC stipulated that the Plc. is *de facto* incorporated for an indefinite term unless the objective behind its incorporation is to exercise a certain activity then it seizes to exist once the activity is performed[156].

65 ***Other general information***. The company should also include in its AOA all the details that relate to its founding shareholders. These details include the name, address, nationality and the number of shares they hold. These details are later added to shareholders' registry where a copy thereof should be provided to the company controller. The AOA should include the management form the company chooses to follow (in some legislation the company has a list of management structures that could choose from, one or two tier management). Further, the AOA states the signatories, meaning the persons eligible to sign on behalf of the company. The signatories are assigned for a limited period of time, from the incorporation and up until the moment the first GAM is held[157]. When an OEIC attaches its Articles and Memorandum of Association to the incorporation application, it should, while taking into consideration the restriction provided by law, contain among other things the name of the company, the headquarters, founding shareholders' details, the term if necessary, the form of management, the signatories and the GAM method of convening[158]. The AOA contains alongside the previously mentioned general information, special customized information the minimum requirement of which differs from one company to the other depending on the form it undertakes. This form of information includes defining the capital, the purpose or activities of the company, the method of sum distribution and the redemption of shares all of which shall be addressed in Paragraph 2.

[156]Article 90.d JCC
[157] Article 92.b(8) JCC
[158] Article 92.b JCC; French Law requirements: <https://www.infogreffe.fr/societes/informations-et-dossiers-entreprises/dossiers-thematiques/creation-entreprise/dossier-immatriculation-au-rcs.html?onglet=2> Accessed 5 December 2015; *AMF*, régl. gén., art. 422-4

§2: Customized Content: What an Investment Company should Acquire

66 ***Scope.*** AOA of the OEIC includes specially customized information that distinguishes the OEIC from other Plc. All Plc. requires them yet the restrictions surrounding them differ in the case of the IC due to the specificity of the activities it exercises. The customized content covers primarily capital requirement, purpose and company's activities, distributable sums and the redemption of shares. The legal provisions applicable to this special content is not necessarily limited to the company code, they are found in the monetary codes and their related regulations.

67 ***IC object.*** The constitution of the company (AOA/ MOA), stipulates the object clause. This clause states the purpose and the range of activities for which the company is established. Explains the purpose behind the incorporation. The content of this clause, whenever the Investment Company is concerned, is restricted to a specific purpose and certain activities. The common and unanimously approved main object of the IC is the collective portfolio investment in securities or transferable securities. The different regimes that are referred to mentioned an identical object for the IC, including but not limited to the European Union[159], United States[160], France[161] and Jordan[162]. The activities that the IC could exercise relate to the licensing requirement imposed on this company.

68 ***Activities permitted vs prohibited.*** IC exercises its activities in the limits of its object[163]. Therefore, the governing legal provisions make the distinction between permitted and prohibited activities. What is covered under both categories of activities? The answer differs depending on the legislation to which we are referring. Under the regional EU law, the UCITS Directive states that the undertakings falling within the scope of this Directive should not be incorporated for purposes other than the collective investment of the capital raised from the

[159]Article 1.2(a) UCITS Dir. 2009/65
[160] Certain entities were excluded from the definition of the Investment Company in Section 3 (b) (1) of the Investment Company Act of 1940 (if they are primarily engaged in a business other than investing, reinvesting, holding or trading securities)
[161] C. mon. fin., art. L. 214-7
[162] Article 209.a JCC
[163]Recital 48 UCITS Dir. 2009/65

public according to the rules laid down in the Directive[164]. The Directive further limits the activities of the concerned undertakings to those mentioned under the definition of UCITS[165]. The Directive states further restrictions by explicitly mentioning the activities the UCITS is allowed to exercise; including investment management, administration[166] and marketing[167]. The Jordanian Legislature took a similar approach to that of the EU legislature, he limits the main activity of the IC to the portfolio investment in securities[168], the legislature later stipulates the main purpose of the company that is the investment of its assets and the assets of its clients in the different forms of securities[169]. In order for the IC to remain within its object under the Jordanian law, it exercises certain activities including the investment management[170], and issuing securities[171]. As for the prohibited activities, both the UCITS Directive and the Jordanian Law took similar approaches. The UCITS Directive prohibited any undertaking covered under its scope from acting as both an investment MC and depository[172]. A similar prohibition is mentioned in the Collective Investment Regulation[173]. The two legislations did not limit the prohibition to these activities; they extend the scope of the restriction to include investment thresholds and other forms of financial services[174]. These prohibitions relate to the essential obligation of the company to maintain a clean and sustainable market[175], protect

[164]Recital 48 UCITS Dir. 2009/65
[165]Article 28 UCITS Dir. 2009/65
[166] The administration activity includes the following functions: '(a) legal and fund management accounting services; (b) customer inquiries; (c) valuation and pricing (including tax returns); (d) regulatory compliance monitoring; (e) maintenance of unit-holder register; (f) distribution of income; (g) unit issues and redemptions; (h) contract settlements (including certificate dispatch); (i) record keeping'
[167]Annex II UCITS Dir. 2009/65
[168] Article 3 Collective Investment Regulation of 1999
[169] Article 6 Collective Investment Regulation of 1999
[170] Article 26 Licensing Regulation of 2005; article 10 Licensing Bylaw of 2018
[171] Article 98.h JCC
[172]Article 35 UCITS Dir. 2009/65
[173]Article 31 Collective Investment Regulation of 1999
[174]Article 102.b JSL of 2002; the newly adopted securities law of 2017 does not mention such constraints over the investments of CIU, the prohibition remains applicable in accordance with Collective Investment Regulation of 1999 (Article); Article 89 UCITS Dir. 2009/65 (No uncovered sales of transferable securities)
[175] Prohibiting investments that exceed the thresholds stipulated in the law, in order to avoid any dominant position or later market manipulation: Article 102.b (2-5) JSL of 2002, remains applicable according to Article 32.a,c,d,o Collective Investment Regulation of 1999

shareholders interest especially minority shareholders and most importantly hinder conflicts of interest[176].

69 ***Minimum capital requirement.*** The initial share capital refers to the initial shares issued by the IC for the purposes of setting up the scheme before shares are offered to prospective investors[177].The general rule states that all companies must meet the minimum capital requirement when incorporated. The initial capital in the case of the IC is required to safeguard shareholders' interests and secure a level playing field in the market[178]. As other Plc. the IC should meet the minimum capital threshold mentioned in the governing legal rules. IC may take the form of an open or closed end company, this form is related to the type of capital this company might have. Therefore, the capital of the IC may be variable (in the open-end form) or fixed (in the closed-end form). The variable capital refers to the possibility to issue, redeem and purchase further shares at any time during the life of the company without having to follow the general rule on increasing and decreasing the capital. Companies with this form of capital are usually exempted from having or maintaining, on the long run, the minimum capital requirement. The fixed capital refers to having a fixed number of shares traded on regulated markets, can only be sold on the market and not back to the company; the shares of this capital cannot be redeemed at the mere request of shareholders. Unlike companies with variable capital, these companies are expected to retain valid the initial capital it provided in its AOA[179], unless they decide to perform an increase or decrease following the process provided by law.

70 ***General legal rule.*** The JCC stipulates the minimum amount of the initial authorized capital for all Plc. (five hundred thousand JOD[180]) and the minimum amount of the capital to be

[176] Borrowing more than 10% of the value of its assets: Article 32.b Collective Investment Regulation of 1999; Lending or being a guarantor on behalf of others: Article 88 UCITS Directive 2009/65

[177] I. Sattout n (131); Article 2.1.k UCITS Dir. 2009/65; article 57.a,b Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions [2006] OJ L 177/1

[178] Recital 25 UCITS Dir. 2009/65

[179] The French rules designated a set of rules to govern the process of collecting the initial capital (C. com., art. L. 225-3 and following) the *SICAV* was exempted from the scope of these articles (C. mon. fin., art. L. 214-7-3); On a European level the UCITS Directive addresses the minimum capital requirement when discussing the obligation of appointing a MC (Article 29)

[180]Approximately 572,000 Euro (Exchange rate of 2018)

underwritten on the market (one hundred thousand[181] JOD or twenty percent of the authorized capital whichever is more)[182]. The Plc. when exercising financial services should acquire a license permitting them to perform such services, the licensing application requires a minimum capital different than and exceeding that addressed under the JCC. When applying the licensing requirement in the case of the IC a question arises: is the IC covered in the scope of application of the Licensing Regulation? The IC fulfills the conditions designated for applicants for the license (shall be further explained in Chapter 2 and is connected to the argument of whether or not the IC is considered an Issuer). IC is a Plc. and performs financial services. Its activities include investment management; this activity is considered a financial service according to the Jordanian rules. The minimum capital requirement for this form of activity is one million JOD[183]. According to this explanation and due to the type of activity the OEIC exercises, it should have a minimum initial capital of one million JOD instead of half a million as states the JCC. This amount applies as long as the OEIC does not exercise any other licensed activity that requires a higher initial capital than the investment management[184].

71 ***Exemption.*** Another issue arises in the course of applying the minimum capital requirement; the law exempts the OEIC from this requirement, the reason is the variability of capital. The variability requires flexible legal rules that allow the redemption and issuing of shares without having to go through the long procedures of increasing or decreasing the capital commonly followed by Plc[185]. Meaning allowing the fluctuation of the capital without violating the law[186]. What can be deduced from this reasoning is that the OEIC is merely exempted from meeting the minimum capital requirement in post-incorporation stages (once it commences exercising its activities), therefore limiting the scope of application of the exemption. The legislature did not leave the exemption unrestricted. The *AMF* requires a minimum asset amount that should be acquired at all times by the OEIC (*SICAV*) that is equal to three hundred thousand Euros. Consequently, the non-compliance with this restriction and in case the amount falls

[181]Approximately 114,000 Euro (Exchange rate of 2018)
[182] Article 95.a JCC
[183] Article 4.c(3) Licensing Regulation of 2005; Approximately 1,114,000 Euro (Exchange rate of 2018); article 4.d (4) Licensing Bylaw of 2018
[184] Article 4.d Licensing Regulation of 2005; article 4.h Licensing Bylaw of 2018
[185] Article 209.b (3) JCC
[186] C. com., art. L. 231-1 (related to the fact that *SICAV* can be *SAS* or *SA*); Article 209.b (2) JCC

below the prescribed one the redemption of shares is suspended[187]. The Jordanian rules imposed a similar obligation on the IC; nonetheless, the law did not define a fixed minimum liquidity. The required liquidity is estimated as a percentage of the net value of Company's assets that is sufficient to cover the redemption requests; this percentage is defined by a special decree issued by the Securities Commission's Council for this purpose[188].

72 ***Stating capital in AOA***. OEIC should include the amount of its initial capital in its AOA[189]. The mere mentioning of the amount in the AOA is a form of indirect guarantee of the financial standing of the company. Further, the law states the obligation of providing a proof of the deposit of the said amount. The French legislature calls the deposit proof as "initial capital certificate". The legislature grants the founding shareholders a limited period to effect the deposit. This period was shorter under the French Law than the Jordanian one. The *AMF* requires the company to provide the certificate immediately and maximum within one hundred and eighty days following the date of authorization[190]. As for the Jordanian law, it grants the founding shareholders three years to subscribe to the authorized initial capital[191]. This restriction is waivered to OEIC[192]. This waiver leaves a loophole in the law. The OEIC is not restricted to subscribe to the shares within a set period. It has the discretion to do so within its own timeframe.

73 ***Other customized content***. The AOA of OEIC stipulates the principles for distributing the distributable sums, subscribing procedures of shares, and redemption procedure, when applicable mention the rights attached to the different classes of shares this company might have[193]. The prospectus may also address the distribution procedure[194]. The AOA is the reference in the cases where the internal policy does not provide sufficient solutions. The role of the AOA in the company is the same as the constitution to other forms of legislations (considered the base reference, cannot be contradicted as it expresses the will of shareholders).

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[187] *AMF*, régl. gén., art. 411-21
[188] Article 47 Collective Investment Regulation of 1999
[189]Article 92.b(5) JCC
[190]*AMF*, régl. gén., art. 422 -9
[191] Article 95.b JCC
[192] Article 209.b(2) JCC ; C. mon. fin., art. L. 214-7-3
[193] Article 13 Collective Investment Regulation of 1999
[194] *AMF*, régl. gén., art. 422-6

The content of the AOA is divided into two main categories (general and special conditions). This categorization is not found in the actual existing samples of the AOA. Domestic legal rules may provide a sample or a minimum content of the AOA that include the most important clauses, which shareholders have the right to take into consideration or discard such as the sample provided by the *AMF*.

74 ***Language requirement***. Due to the importance of the AOA, the law might impose a language requirement. This requirement is requested in the course of protecting shareholders' interest especially in cases where the company provides its services in multiple countries. In this case, prospective shareholders may not speak the same language as the language of the country of incorporation, or the case of having the target of the company as retail investors. Therefore, the AOA is provided in the language of the country of incorporation or exceptionally in the customary language in financial matters[195]. The language requirement is linked to the obligation of communicating the AOA to shareholders[196]. The incorporated OEIC ensures that its AOA contain the least the list of mandatory information provided in the law, if any of the previously mentioned information is not provided the company is considered in violation of the law[197]. The AOA contains a clause pertaining the chosen management structure by the company. The following Section B extensively address this clause.

Section B: Management Conditions and the Proper Running of the Company

75 ***General Rule.*** The fact that every corporation is characterized as a moral and not a physical person and despite the imposed responsibilities and obligations, the characterization refrains the company from exercising its business activities without a representative functioning on its behalf. These representatives are appointed as members of management or staff.

76 ***Models***. The organizational structure of management may take several forms when it is process-oriented. The doctrine identified various types[198]: process organization where the organizational structure is aligned alongside the process. This organization maximizes the

[195] *AMF*, régl. gén., art. 422-66
[196] C. com., art. R. 225-2
[197] C. com., art. L. 210-7
[198] James Chang, *Business Process Management Systems: Strategy and Implementation* (Auerbach Publications 2006) page 34

performance but creates duplication in functions. The other suggested type is the network organization; it functions like a matrix the aim is to be multidimensional when focusing on customers[199]. This organization includes the case where management organizations are persons in lower positions that report the transactions to case managers. Further horizontal organization that creates two dimensions the functional department and the process[200]. Adopting one type of these organizations especially the network organization requires the company to have expert and sophisticated management and clear allocation of responsibilities in order to avoid the confusions made in terms of roles and responsibilities.

77 ***Part of AOA.*** Generally, the AOA exhaustively addresses the choice of the organization and structure of the management body. The IC is covered in this general rule. The AOA dedicates a part to the management body; relates to their appointment and chosen structure.

78 ***Role of Management.*** The general duty of the management includes determining the broad lines of the company's activities and ensures their implementation[201].The broad line is determined through the implementation of an internal policy and control mechanism[202], while adhering to the obligations imposed by law (including preparation of financial statement and reports)[203]. The management further ensures the proper execution of the decisions of the board[204].

79 ***Types of management***. The typical pattern in managing stock portfolios affects its performance. Present two styles of management depending on the performance approach: passive and active. The distinction between the two styles might be possible though sometimes the line separating between the two becomes fuzzy. Both styles have more an economic aspect to them than a legal one. Hence, we shall generally introduce both styles and specify the closer of them to our case. The need to explain the styles arises from the nature of the IC and the fact

[199] J. Chang, n (198) page 35
[200] Ibid
[201] C. com., art. L. 225-35; M. Andenas n (71) Page 289
[202] Article 151 JCC
[203] Article 140 JCC
[204] Article 152.a JCC

that risk and financial management form an integral part thereof. The quality of management is a key element in any successful operation

80 ***Active management.*** Includes a thorough analysis and an exhaustive process that are used to beat the market[205].This type of management has a long-term performance record depending on the knowledge, expertise and qualifications of its different members. This style uses various strategies throughout its performance such as performing technical and fundamental analysis to select securities or timing the market[206].

81 ***Passive management.*** Occurs when the portfolio mirrors and matches the market[207]. The simplest case of this passiveness is the fund, which is designed to replicate a well-defined index of stock[208]. This type of management does not require skilled and highly qualified management members. Passive management minimizes the risks to the lowest and in some cases it eliminates potential risks[209].

82 ***Plan.*** This Section explains the reason behind considering the active management as the favorable form of management for IC. The choice of management of the IC includes following a process of several stages, beginning with the choice of the management structure (Sub-Section 1) and ending with fulfilling competence and expertise requirement (Sub-Section 2).

Sub-section 1: Choice of Management Body

83 ***Preview***. Despite the followed model in managing a corporate through an inside or outside intervention, the model in most of the cases is plotted on a spectrum that is shareholder oriented. The management acts in the best financial interest of shareholders and the company[210].

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[205] Richard Loth, "Active Vs. Passive Management", (2014) Investopedia <http://www.investopedia.com/university/quality-mutual-fund/chp6-fund-mgmt/> accessed 11 July 2014

[206] M.A.I Aameri, *Investment Portfolios Management* (1st edn, Ithraa Publishing and Distribution 2011)

[207] Richard Grinold and Ronald Kahn, *Active Portfolio Management: A Quantitative Approach for Producing Superior Returns and Controlling Risks*, (2nd Edn, McGrow Hill 2000) page 1

[208] Edwin Elton, Martin Gruber, Stephen Brown and William Goetzmann, *Modern Portfolio Theory and Investment Analysis,* (8th edn, John Wiley & Sons 2011) page 698

[209] Lary Swedroe, Kevin Grogan and Tiya Lim, *Active versus Passive Management* (John Wiley & Sons 2010)

[210] Bryan Horrigan, "Comparative corporate governance developments and key ongoing challenges From Anglo-American perspective" in Stephen Tully (eds), *Research Handbook on Corporate Legal Responsibility,* (1st edn, Edward Edgar Publishing Limited 2005).

The governance structure differs depending on different regulating systems. The used notion is influenced by the governing domestic rules but might be combined with notions from other legal systems. The aim is to provide the most appropriate regulatory structure to a company that has the financial risk management as one of its main activities. The different notions are stated in order to cope with this company's different financial needs.

84 ***Separation of ownership and control.*** In companies such as the Investment one or generally Plc, the number of shareholders is larger than having the option of direct control and management of the company. Generally, the more shareholders the company has the more difficult it becomes for them to directly manage the company, therefore the need for a separate management body emerges. The control is not lost or transferred but merely divided. Shareholders remain in control and exercise a form of direct supervision and control over the management body. The concept usually paralleled with the need to assign a management body in Plc; is the separation between control and ownership[211]. Berle and Means have pointed out that, in the corporate system: *the 'owner' of industrial wealth is left with a mere symbol of ownership, while the power, the responsibility and the substance which have been an integral part of ownership in the past are being transferred to a separate group in whose hands lie control*[212]. The logical outcome of this concept and the corporate development in general is having an ownership of wealth without appreciable control and a control of wealth without an appreciable ownership[213].

85 ***Appointing management.*** Having the concept of separation of ownership and control in mind, the IC remains a Plc. that follows a certain structure when appointing the management body. The structure constitutes of a set of general and specially customized conditions and requirements that members of the management in any Plc. should hold when hired. The different conditions stipulated in the governing legal rules relating to the appointing of the management body are illustrated in this Sub-Section. The approach is divided into two phases;

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[211] R. Brealey n (1) Pages 5, 865

[212] Berle and Means, *The Modern Corporation and Private Property,* originally published in 1932 (1991 ed.) (New Brunswick: Transaction Publishers) page 65; Clarke Blanaid, '*Corporate Responsibility in the Light of the Separation of Ownership and Control*' (1997) Dublin University Law Journal 19 (50) <http://heinonline.org/HOL/Page?handle=hein.journals/dubulj19&div=6&start_page=50&collection=journals&set_as_cursor=3&men_tab=srchresults> Accessed 17 December 2015

[213] Berle and Means pointed out this logical outcome in their book "The Modern Corporation and Private Property"

the first phase emphasizes on the domestically offered management structures (paragraph 1) as for the second phase it builds on the first one and explains the general required conditions in the chosen members (paragraph 2).

§1: *Available Forms of Management*

86 ***Structures***. The management of an IC is usually depicted. Though companies often turn to simple legal structures, however the complexity arises from the type of relation existing between members of the management and the company. A question imposed in this regard; who can be a manager/ director of a Plc. and particularly of the OEIC? Domestic company rules answer this question and state the general conditions and qualifications that need to be present in the persons elected to management membership. The rules define the number of persons forming the management of the company. They address generally the Plc. with some exceptions and derogations to cope with the particularity of the IC. The management of the IC includes a general body. This body has various forms depending on the governing legislation. The forms include a board of directors, general manager, supervisory board or executive committee. Further, there are complementary or auxiliary members that include the financial advisors, they are appointed to cope with the specificity of the IC's activities[214]. The management may be individual or severable depending on the type and size of the company[215].

87 ***French Law Perspective.*** In the relevant French company rules the *SA* (*Société Anonyme*) can choose to be managed in one of two forms. A board of directors (*Conseil d'administration*)[216] or an executive committee and a supervisory board[217] (*Conseil de Surveillance et Directoire*)[218]. The French commercial code gave every Plc. the discretion to choose between the two provided methods of management simply by stipulating the chosen method in its AOA. As a result of this stipulation, the company is exempted from complying

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[214] Yvon Dreano and Vincent Netter, "France" in Alessandro Varrenti and Fernando de las Cuevas (eds), *Company Directors: Jurisdictional Comparison* (1st edn, Sweet & Maxwell 2012) page 169

[215] David Hillier and others, *Corporate Finance*, (2nd European edition, McGraw Hill 2013) Page 40-42

[216] C. com., art. L. 225-17

[217] C. com., art. L. 225-58; C. com., art. L. 225-68

[218] Henry Lazarski, "France" in Christian Campbell (ed) *Legal Aspects of Doing Business in Europe Volume II* (Yorkhill law publishing 2009); M. Andenas n (71) Page 286

with the rules governing the other method[219]. Consistently the *AMF* General Regulation affirmed these components of management and referred to them as the senior management[220]. Due to the sensitivity of the business activities exercised by Plc. in general; the governing legal rules state the possibility to appoint another physical person to undertake the duties of a general manager of the company[221]. This position may be disregarded by the company and it may be held by the chairman of the board of directors[222]. The appointment of a chairman is obligatory when choosing the board of directors as the general management body of the company. The French company rules define the common duties that should be exercised by the management of any Plc. Further, they identified more special duties to be executed by the management of the IC[223].The common duties the board of directors is responsible for; include determining the broad lines of the company's business activities and ensures their implementation[224]. The chairman on the other hand organizes and oversees the work and reports issued by the board, further assures the functioning of the management structure of the company[225]. The general manager is entrusted to act on behalf of the company in all circumstances[226]. Consistently, when the other method of management is applied the executive committee exercises its powers and functions under the supervisory board[227]. The supervisory board is responsible for exercising all permanent supervision over all the activities of the company. It evaluates the financial statements of the company and the proposals of the management[228]. The supervisory board elects same as the board a chairman who is responsible among other things for; calling for meetings and conducting the discussions[229]. The executive committee has the broadest powers to act on behalf of the company[230]. Members of management under the French company rules whether a director or member of the supervisory board can have several forms. These forms

[219] C. com., art. L. 225-57
[220] *AMF*, régl. gén., art. 313-5
[221] C. com., art. L. 225-51-1
[222] C. com., art. L. 225-47
[223] *AMF*, régl. gén., art. 313-6
[224] C. com., art. L. 225-35
[225] C. com., art. L. 225-51
[226] C. com., art. L. 225-56
[227] C. com., art. L. 225-58
[228] Dreano & Netter n (214) page 169; C. com., art. L. 225-68
[229] C. com., art. L. 225-81
[230] C. com., art. L. 225-64

include being a natural person or an entity[231]. The natural person can be an employee (especially the case of having shares owned by employees)[232] -they are not taken into consideration when calculating the number of board members for companies that list their shares on regulated markets- shareholder or outsider. Members of the management represent the company; this representation includes that before third parties[233].

88 ***Individual management***. Notwithstanding the previously mentioned methods of management accorded to the IC, these options were not exhaustive. In the *AMF* General Regulation, portfolio Management Company is entitled to derogate from the rules regulating the management of Plc. and choose to be effectively managed by a single person[234]. The *AMF* sets the conditions under which a single person may direct the company. Measures and arrangements shall be specified to ensure sound and prudent management.

89 ***Jordanian Company rules***. To some extent, they are similar to the options covered by French rules. The difference lays in providing a sole method of management a board of directors[235] and a general manager[236]. The board elects a chairman and a vice chairman from amongst its members. In addition, it is possible to elect more members to sign on behalf of the company jointly or severally (signatories)[237]. Similarly, the Jordanian rules defined the general duties and responsibilities of the chairman including considering the chairman as the representative of the company before third parties and the authorities, further the chairman shall be responsible for implementing the resolutions issued by the board[238]. A general manager is appointed, from board members [239]or an outsider, the appointed person should be qualified and has the necessary competences to exercise the activities invested to him by the board[240]. When the general manager is appointed in a Plc. that trades its shares on regulated markets, the

[231] C. com., art. L. 225-20; C. com., art. L.225-76
[232] C.com., art. L. 225-22 ; C. com., art. L. 225-71
[233] C. com., art. L. 225-64; C. com., art. L.225-66
[234] *AMF*, régl. gén., art. 312-7
[235] Article 132.a JCC
[236] Article 137.a JCC
[237] Article 152.a JCC
[238] Article 152.a JCC
[239] Article 152.c JCC
[240] Article 153.a JCC

appointment should be reported to the market[241]. Members of the board under the JCC may solely be natural persons, in this case, the legal person is a member yet a natural person represents it[242].

90 ***Size of management.*** Appointing the different members of the management is limited in terms of the minimum and maximum number. The governing legal rules did not leave the full discretion to companies in appointing members of management, in order to restrict any excess of powers and hinder any over-appointment of members that may exhaust the resources of the company with their high remuneration fees or disorganized decisions. The necessity of a set number for management is stemmed from the reason why companies have a management body. If the law did not limit the size of the management body, the company may have more managers than it needs who might hamper the course of its daily activities (especially longer decision-making process). Further, the large number of management body may incur the company higher operational costs and possible excessive remuneration. This restriction is closely linked to the concept of separation of ownership and control, the reasoning is that the more shareholders the company has the more difficult it is for them to directly control the company. Therefore, the need for a management body emerges, the more efficient and competent and lesser (yet sufficient) the management is the faster and more closely risk-free decisions are. Under the French company rules the board of directors should have members who are not less than three and do not exceed eighteen[243], as for the management in the second method the number of members for Plc. with shares traded on a regulated market should not exceed seven[244]. The supervisory board should consist of minimum three members and maximum eighteen[245]. As for the Jordanian governing rules, they stipulate that the board of directors should consist of members not less than three and not exceeding thirteen[246]. No exceptional number of board members is provided to companies that trade their shares on regulated markets. This leaves the number thirteen high in comparison with the French approach.

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[241] Article 153.c JCC
[242] Article 136 JCC
[243] C. com., art. L. 225- 17 ; C. com., art. R. 225-35 (stated in the MOA or decided by the supervisory board)
[244] C. com., art. L. 225-58
[245] C. com., art. L. 225-69
[246] Article 132.a JCC

91 ***Term of management.*** The management body is appointed for a limited term of office. The management cannot be appointed for an unlimited term or throughout the life of the company, despite the rights granted to the GA in terms of dismissing the management and the possibility of being reelected. The fact the management is not eternal and is changeable makes the members keener to provide better performance that is shareholder oriented and beneficial especially if they would like to be reelected (provides a form of incentive for effective conduct). The French company rules provided a very balanced system when addressing the term of office. Before the amendment of 2012 French rules provided two possibilities of office terms depending on the method used in appointing the directors or members of supervisory board. If the directors or members are appointed in the MOA their term should not exceed three years yet if they were appointed by the GA the period should not exceed six years[247]. Currently the appointing is performed in GAM despite its form. The term should be stated in the statute and it should not exceed six years. Members of the management of the second structure shall be appointed for a term between two and six years if the term is stipulated in the MOA, and four years in case the MOA lacks this provision[248]. The reasoning behind the previously implemented options is traced back to the protection and control the *Code de Commerce* implicitly offered the shareholders who join this form of company in later stages. The French legislature further states that the management body may be reelected without stating a limit on the number of times they can be reelected[249]. The Jordanian legislature was simpler in his approach, the governing rules stipulate the maximum term four years without mentioning any minimum period or the possibility of reelection[250]. In legal sense, the absence of the reelection explicit permission does not hinder or impose such a restriction on board reelections.

92 ***Age Limit.*** The French Legislature was unique in its approach; he addressed the age limit of members of management and the percentage of the members who exceed a certain age. The importance of this requirements lays in having a management that is up-to-date with recent and innovative investment approaches, in addition to having diversified decision-making processes (not old school ones) all of which adapted to market needs and while providing better return to

[247] C. com., art. L. 225-18; C. com., art. L. 225-75; C. com., art. L. 225-29
[248] C. com., art. L. 225- 62
[249] C. com., art. L. 225-75
[250] Article 132.a JCC

shareholders' investments. Nonetheless, members of certain ages provide long experience in the investment field that junior and younger members do not enjoy. The age limit should be primarily addressed in the AOA if the AOA lacks this clause then the limits provided by law applies. The common used age limit was seventy and the threshold of members with this age should not exceed third the board[251], sixty-five years is the age limit for the chairman[252], the general manager[253], and members of management in the second structure[254]. Members of the supervisory board their age limit is seventy years without exceeding third of the members[255]. French rules also addressed the equality in gender representation on the board[256]. Introduced in 2011, representing an obligation on companies that trade their securities on regulated markets[257]. The choice of structure and all that relates to it in terms of the term and size when appointing the management body is affected by other general and specially customized conditions that relate to every member of the management. Every member of the management meets the general conditions. The following paragraph 2 illustrates these conditions.

§2: *General Appointing Conditions*

93 ***Guarantee the independence.*** The management of the company in theory seeks the satisfaction of shareholders expectations. This is a vice versa relation where shareholders depend on the management to achieve their goals in maximizing their wealth. To achieve the mutual aim, the governing legal rules stipulates general conditions that the management of the Plc. fulfils and consequently the IC. These general conditions relate to two legally imposed obligations on the IC that aim at hindering conflicts of interest and ensuring a transparent

[251] C. com., art. L. 225-19
[252] C. com., art. L. 225-48
[253] C. com., art. L. 225-54
[254] C. com., art. L. 225-60
[255] C. com., art. L. 225-70
[256] C. com., art. L. 225-69; C. com., art. L. 225-17; Institutional Shareholder Services 'Gender Parity on Boards Around the World' (Harvard Law School Forum on Corporate Governance and financial Regulation, 5 Jan. 2017) < https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/ > Accessed 11 April 2018
[257] Loi Copé Zimmermann, Loi n° 2011-103 du 27 Janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle; Bénédicte François, 'Quota de Femmes dans le Conseil d'Administration : Premier Bilan Négatif' (2017) 10 Revue des Sociétés 606; Bénédicte François, 'Mixité au Sein des Conseils : Lancement de l'Indice Zimmermann' (2017) 4 Revue des Sociétés p. 260; Bénédicte François, 'Parité au sein des Instances Dirigeants des Sociétés Cotées' (2018) 4 Revue des Sociétés p. 275

disclosure. These conditions further guarantee to some extent the independence and proficiency of the different members of management[258].

94 ***Ownership of shares.*** Members of management generally own shares in the Plc. they direct. The ownership is effective before commencing the functions and duties. The required percentage is determined usually in the AOA[259]. This general rule is applicable to all Plc. including the IC under the JCC. As for the French rules, they exempt the *SICAV*[260]. This exemption finds its reasoning in the specialized conditions and requirements imposed on IC in terms of skilled and expert management (further explained in Sub-section 2). The requirements may not exist in one of the shareholders. Individuals usually resort to the investment in *SICAV* at the aim of maximizing their long-term wealth and lifetime savings. *SICAV* forms one of the most proper places to invest and take that long-term step. The investment decisions are made on behalf of the individuals meanwhile they are being consulted and informed of the performed activities. Theoretically speaking the company is supposed to be properly and efficiently operated. Achieved by having professional, prudent, accountable and credible members of management. The theory says who better save one's interests than one himself. Therefore, the domestic legal rules designate the share ownership as a condition to management appointing, hence better protection and awareness of the financial situation is provided due to the existence of a financial motive.

95 ***Reasoning for requirement.*** The desire to secure and protect the interests of shareholders and their investments are one of the main grounds and basis to the implemented domestic company rules. The fact that a member of management owns shares in any related or competing company to the concerned IC is significant therefore; the member is obliged to disclose this ownership upon holding the position. Concurrently, any agency model followed in the company includes balancing between the interests of both shareholders and management. Members of

[258] Vikramaditya Khanna, Han Kim and Yao Lu, 'CEO Connectedness and Corporate Fraud' (2015) 70 (3) The Journal of Finance p. 1203
[259] C. com., art. L. 225-25; Article 133.a JCC
[260] C. mon. fin., art. L. 214-7-3

management are entitled to compensation, in some companies the compensation is conducted through share ownership schemes[261].

96 ***Connection to Disclosure.*** Accordingly, domestic legal rules address the disclosure of any shares or stocks owned in a Plc. or any other company, subsidiary or parent, performing similar activities, or related to the concerned IC as long as the shares are listed for trading on a regulated financial market[262]. This connection and the effect of this ownership further explained in the Section addressing Conflicts of Interest. On the other hand, the ownership alone may not affect the interests of shareholders as much as the membership and involvement in the management of other companies does.

97 ***Membership in other boards.*** General company rules do not require member of management to be fully available to direct and operate any IC[263]. To ensure effective, proper and efficient management the rules limit the maximum number of managing positions held by members in other companies. For example in Germany, members of the supervisory boards are permitted to have multiple memberships in different supervisory boards[264]. Under the relevant French rules, the natural person may not hold more than five positions as an administrator in different Plc. existing on the French soil[265]. As for the managing positions including being a director or a general manager, a sole position is allowed[266]. Overall, the number of held positions should not exceed five positions whether as a director, general manager or member of the supervisory board[267]. Notwithstanding the limitation provided for by the French rules, different rules were provided for the *SICAV*. The natural person may hold simultaneously up to five positions of management in different *SICAV*s established on the French territory[268]. Notably the rules governing the *SICAV* partially complied with the general rules by not exceeding the number of positions stated under which and derogating from applying the limit of administrative

[261] *Chapter 1 Review : Ownership and management*, (7 August 2014) http://www.competitionrx.fr/documents/MG%20PhD%20files/4%20-%20Chapter%201%20-%20Ownership%20&%20Management.PDF

[262] C. com., art. L. 225-109

[263] It is possible under the JCC. The Director in this case is granted further remuneration (Article 152.b JCC)

[264] P. Mantysaari, *Comparative Corporate Governance: Shareholders as Rule-maker* (Springer 2005) page 262

[265] C. com., art. L. 225-21

[266] C. com., art. L. 225-67; C. com., art. L. 225-54-1

[267] C. com., art. L. 225-77; C. com., art. L. 225-94-1; C. com., art. L. 225-94

[268] C. mon. fin., art. L. 214-7-2 4°

and directing members. The positivity of derogating from the general rule is debatable as the degree of accountability, efficiency and productivity of management of the IC may be influenced when managed by occupied members, hence increasing the risk facing the interests of shareholders. To hinder this risk, the JCC prohibited the management of Plc. from holding management positions in any company that carries out similar activities or is a competitor to the concerned IC[269]. Further, the management is prohibited from exercising any activity that competes with that exercised by the company[270]. As for the board members, the law stipulates the maximum number of offices they are allowed to hold (three memberships in their personal character and three as representatives of entities without exceeding five memberships in both characters)[271]. The Jordanian company rules address the issues related to the independence and accountability of members of management profoundly by preventing any person holding a public position from becoming a member of management unless this person is a representative of an authority or a public corporation[272]. Further, the company rules prohibited the management members from holding a job in the company they are directing unless otherwise permitted in the AOA (example the case of permitting employees to be members of the board)[273]. Limiting the number of held management positions may not be enough to safeguard the interests of shareholders and ensure an effective operation; the Securities Commission imposed a disclosure obligation -on members of management- of the held management positions in other Plc.[274]. Even the disclosure may not be enough. The multi-membership may end up by having a management that is part of all the big corporations in the concerned market. The corporate governance rule insists on the concept of independence and having outsider non-senior management directors.

98 ***Reputation and moral conditions.*** The potential and actual members of the board are required to maintain clean criminal record (including any felony or misdemeanor involving bribery, embezzlement, theft, forgery, abuse of confidence and others)[275]. Further the members

[269] Article 153.a JCC
[270] Article 148.b JCC
[271] Article 146.a JCC
[272] Article 148.a JCC
[273] Article 153.d JCC
[274] Article 75 Licensing Regulation of 2005; no such disclosure is requested in the newly implemented licensing bylaw of 2018
[275] Article 134 JCC

are expected to hold a good professional reputation, the JSC have the right to request any information or documents that relate to the biography, record and the links the applicant has with other companies in order to verify the professional reputation[276].

99 ***Arguments for conditions***. It is argued that the level of ownership of a manager indicates the degree of confidence in the investment plan. The fact that a manager does not own any shares does not undermine his involvement in or care about company's performance. In addition, domestic rules required the disclosure of membership in other management bodies. Aimed at helping shareholders to deduce the real incentives of managers and predict potential conflicts of interest particularly when managers are involved in the management of other companies[277].

100 ***Transition.*** The IC when incorporated lays down its AOA, in which it specifies the management method. The method includes the choice of the management structure in addition to designating the signatories amongst the management members. The AOA defines the appointing procedure of the members of management. Upon their appointing, they fulfill the conditions and requirements stated by law and company's AOA. The requirement list include; meeting the share ownership threshold, meeting the limit of memberships in other similar companies and most importantly hold the required competence, experience and expertise to exercise the activities of the IC. The following Sub-Section 2 shall extensively address the competence and expertise requirement.

Sub-section 2: Management Competence

101 ***Preview***. Creative management of a corporation requires thought and action to reach an effective management. The enlightened management participates in creating a culture of leadership that provides long-term vision and policy thinking, which improves the quality of governance, where, the performance, suitableness and the effectiveness of the various members

[276] Article 48.a Licensing Regulation of 2005; article 5.s/bis Licensing Bylaw of 2018

[277] Securities and Exchange Commission, 'Disclosure regarding portfolio managers of registered management investment companies' (December 2004) <http://www.sec.gov/rules/final/33-8458.htm#P113_25577> accessed 7 August 2014

of the management are continuously monitored[278]. When the matter of management is related to a company that faces risks and pools assets as the IC, the importance of the qualifications of these members emerges. The separation of ownership and control in the company is connected to the impact the performance of the controlling body, in our case the management, and the changes in this body have on the overall performance of the company.

102 ***Competence requirement***. Portfolio investments require skilled and experienced management, slightly more than other forms of companies. Any company that trades in financial instruments and asset management require a management body consisting of members that have economic and financial background to operate efficiently the company and achieve its goals, and set targets. Unspecialized and inexperienced persons cannot generally manage a financial services provider. The management in the IC is expected to make investment and other financial decisions that concern the assets managed by the company. The management speculates on where and when to invest. Therefore, domestic company and securities rules regulate the professional experience requirement for directors of this company. The requirement consists of presenting sufficient and adequate experience and reputation when performing the duties of management[279]. The aim of which is to ensure prudent and most appropriate management[280]. The experience requirement extends to include the natural persons who have direct or indirect influence over the management of the company, meaning acting on behalf or under the authority of the company[281]. The requirement includes the most appropriate experience, qualifications and knowledge to carry out the duties adhered to by these natural persons[282]. These persons include the salesperson, asset manager or the head of financial instruments[283]. Corporate governance codes went in the same direction by requiring this competence as it forms a key aspect in the governance[284].

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[278] V. Balachandran and V. Chandrasekaran, *Corporate governance, ethics and social responsibility (*2nd edn, PHI learning 2011) page 115
[279] C. mon. fin., art. L. 421-7
[280] *AMF*, régl. gén., art. 312-6
[281] C. mon. fin., art. L. 421-9
[282] *AMF*, régl. gén., art. 313-7-1
[283] *AMF*, régl. gén., art. 313-7-2
[284] Benjamin Hermalin and Michael Weisbach, 'Understanding corporate Governance through Learning Models of Managerial Competence' [2014] National Bureau of Economic research Working Paper no. 20028 < http://www.nber.org/papers/w20028 > Accessed 11 April 2018 page 1

103 ***Effect on job opportunities***. The management body of the IC must be sufficiently good reputed and be sufficiently experienced in relation to the type of business pursued by the Company[285]. This requirement has external affect; it can be noted in the opportunities section in the financial press. The job ads require skilled management that meets the minimum level of knowledge required in the domestic legal rules. As an example of the statement in one employment opportunity for a management position in a large European company, the ad stated that *the position requires the individual whose business acumen, financial aptitude and professional initiative enable them to improve the organization's performance and enhance the effectiveness of the individuals within. Financial aptitude and analytical skills need to translate into insightful corrective actions and proactive business improvement*[286]. For the thorough comprehension of the competence requirement, this Sub-Section addresses this requirement in two stages. The first stage relates to the process of examining the competence and expertise (paragraph 1), as for the second stage it relates to the special members of management the IC assigns to facilitate the exercise of its activities and enhance the results (paragraph 2).

§1: *Examination of Competence*

104 ***Mandatory reporting of expertise.*** The individuals concerned in this thesis are shareholders of ICs, who are required to deal with financial instruments and risk management. A regular manager, director or board cannot handle the management of the OEIC. The particularity of this form of company requires the specialization, qualifications and specific qualities to exist in the person acting on Company and shareholders' behalf. Members of management of the IC are to some extent obliged to possess a vast economic and financial background and credentials, based on thorough and appropriate theoretical education and practical experience. This background promotes reaching a successful and profitable operation. As an example of the domestic rules requiring the expertise and competence, the Jordanian legislature requested from the applicant company the relevant and necessary information that demonstrate possession of the necessary skills, expertise and qualifications by members of management in the IC in order for them to professionally perform their duties. It is evident that real knowledge by the management is needed to reach effective and successful business

[285] Article 29.1(b) UCITS Dir. 2009/65
[286] D. Hillier n (215) Page 5

operation. The competence requirement is a general obligation that covers all Plc.[287]. As for the expertise and special qualifications, it is an exclusive obligation imposed on the part of Plc. that provides financial services such as the OEIC. The IC is obliged to inform the JSC and provide it with a list including the names, positions and qualifications of senior management[288]. Further, the IC when submitting its licensing application should provide the Commission with sufficient evidence that the management of the Company holds the necessary experience, competence, reputation and knowledge to exercise its activities[289]. The expertise and qualifications include that of the staff and extends to proving the possession of professional equipment and capabilities that permits efficient exercise of the business[290]. The French domestic rules that relate to the skilled management are mainly stated under the *AMF* general regulation. The affirmation of this requirement is made in various places in the general regulation confirming every time the need for professional management. The professionalism was required for the different members involved in running the company, such as the compliance officer, and the directors of the company. To ensure the effective and efficient management to which the *AMF* general regulation stipulates mandatory compliance rules[291]. The professionalism required by the *AMF* seeks proving that natural persons acting on behalf of or under the IC hold sufficient reputation, experience, expertise and knowledge in financial matters[292]. To verify the existence of the required qualifications the *AMF* rules create a board that certifies that these natural persons hold the minimum knowledge requirement to fulfill the conditions of the positions they are expected to hold or the activities of the Company. The board is called the "Financial Skills Certification Board"[293]. The FSCB provides the *AMF* upon its request with opinions addressing the level of knowledge possessed by the relevant members of management. The FSCB specifies the minimum required level of knowledge.

105 ***Professional license***. The expertise and competence requirement does not stop at the level of mere disclosure to the JSC or the *AMF*. The competent authority exercises a form of

[287] Article 153.a JCC
[288] Article 11 Disclosure Regulation of 2004
[289] Article 4.h Licensing Regulation of 2005; article 4.o Licensing Bylaw of 2018
[290] Article 8 Licensing Regulation of 2005; no such obligation is mentioned in the newly implemented Licensing Bylaw of 2018
[291] *AMF*, régl. gén., art. 312-6
[292] *AMF*, régl. gén., art. 313-7 -1
[293] *AMF*, régl. gén., art. 313-7-3

control in this area through issuing professional licenses or requiring a special registration to the management and the remaining natural persons working for the IC. The governing Jordanian rules state that a registration is made at the JSC. The registration includes two forms administrative and technical. The administrative registration covers the persons who are hired to exercise administrative and management activities including board members, managers and any employee whose position is linked to handling securities[294]. As for the technical registration, it is linked to financial exercises including among other things investment managers or depository, intermediaries and issuers[295]. The registration procedure commences with submitting a written request with the securities commission supplemented with all the necessary documents[296], while at the same time meeting all the conditions (possessing the required educational degree, having legal capacity and passing the technical exam)[297].The *AMF* issues a professional license to the persons acting on behalf of the *SICAV*. For the License to be issued the applicant should fulfill all the professional requirements set in an *AMF* Instruction[298]. The verification of existing skills and appropriateness of the concerned person is conducted in advance internally by the company itself[299]. Further to that through an examination supervised by the *AMF*. The company ensures that the possessed knowledge is current and updated; otherwise it seeks the organization of training programs with themes that include, but are not limited to, financial instruments and marketing methods, financial instrument advice and business conduct of financial investment advisers[300].

106 ***Technical exam.*** The registration with the JSC and the issued license by the *AMF* are obtained once the applicant undergoes the technical examination conducted at the securities commission[301], or undertook and passed at the *AMF*. This examination ensures that the person who is expected to perform the functions within an investment services provider (IC) has all the

[294] Article 44.b(1) Licensing Regulation of 2005; no such explanation is provided in the newly implemented Licensing Bylaw of 2018
[295] Article 44.b(2) Licensing Regulation of 2005
[296] Article 47 Licensing Regulation of 2005; no such requirement is addressed in the newly implemented Licensing Bylaw of 2018
[297] Article 45 Licensing Regulation of 2005; article 20 Licensing Bylaw of 2018, this article does not distinguish between administrative and technical registration
[298] *AMF,* Instr. 2013-07, "*Requirements relating to the Professional Competence of Financial Investment Advisor, the updating of their knowledge and reporting to the AMF by their associations"*
[299] *AMF,* Instr. 2013-07, art. 1
[300] *AMF,* Instr. 2013-07, art. 2
[301] Article 45.b(3) Licensing Regulation of 2005; article 20 Licensing Bylaw of 2018

necessary and sufficient level of knowledge and qualifications to conduct these functions. The *AMF* instructions, general regulation, and the Jordanian Licensing Regulation provide a possibility to exempt certain persons from this obligation or waive the right to conduct the examination[302]. The procedures and process of the examination is stated in the general regulation and its related instructions. This examination consists of interviewing the applicants by a specialized and impartial jury designated by the *AMF*[303]. The jury proposes to the *AMF* to whom the professional license is issued; when it deems that, the applicant met the required conditions[304].The Jordanian rules do not stipulate any details concerning the content or procedure of the examination. The legislature merely imposes the responsibility for the preparation of this exam by the JSC. The conclusion is that the management of the IC should be competent and experienced enough to manage the daily business of the Company, be able to make the necessary investment decisions while evaluating the percentage of risk and acquiring a sufficient knowledge of the type of activities exercised by the company particularly a comprehensive knowledge of financial instruments[305]. Nonetheless, the governing legal rules impose on the IC, alongside the expertise and competence requirement and due to the form of activity this Company exercises, an obligation to appoint specialized persons as consultants or advisors. A detailed explanation in the following paragraph 2.

§2: *Specialized Management Components*

107 ***Appointing an investment consultant.*** The specificity of the IC requires adequate, efficient and effective management of the investments. There is a need for professional and independent individuals. They form part of the management of the company and aim to ensure the proper exercise and implementation of the professional obligations imposed on financial services providers such as the IC. This need emerged from the type of business activities exercised and the risk faced during the performance of the financial activities. This need results into imposing an obligation to assign an investment consultant or advisor to be stated in the AOA. The importance of this person lays in his/her independence. The independence grants shareholders complete and clear financial analysis and advice clean of conflicts of interest or

[302] *AMF*, régl. gén., art. 313-40; article 45.c Licensing Regulation of 2005; article 20.c Licensing Bylaw of 2018
[303] *AMF*, régl. gén., art. 313-42
[304] *AMF*, régl. gén., art. 313- 44
[305] Alain Rechtschaffen, *Capital Markets, Derivatives and the Law* (2nd ed, OUP 2014) Pages 354, 355

certain influential factors resulting in unequal treatment or favoring the interest of one participant over the other. The consultant or advisor works for its clients therefore in our case he/she works for the company and not the management.

108 ***Specifications of investment consultant***. The investment advisor is any person, group or entity who directly through management of client assets or indirectly via written publications, makes investment recommendations (advisability in purchasing, investing or selling of securities) or conducts securities analysis in return for compensation[306]. The investment advice or recommendations the investment advisor provides form an integral part of the investment services attached to the financial instruments[307]. Both the Jordanian[308]and French[309]legislature imposed an obligation on the OEIC to appoint an investment advisor. Under the French governing rules, the investment advisor is defined as the person exercising activities including among other things investment advice and recommendation as an investment service and the advice on the supply of investment services[310]. The Jordanian governing rules stipulate the conditions for the appointing of financial advisors[311]. The investment advisor once appointed remains independent and is prohibited from accepting financial instruments from its clients[312].

109 ***Form.*** The question that arises in this regard; should the investment advisor assigned in the AOA of OEIC hold a certain form, structure or qualifications? The governing legal rules address this question in various places. The domestic French and Jordanian rules stipulate the form and structure of the investment advisor, as they limit the structure to either a legal entity or a natural person.

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[306] Section 202.a(11) Investment advisors Act of 1940; The Jordanian Securities Law provides a definition for the financial advisor (Article 2) that is similar to that provided under the Investment Advisors Act of 1940
[307] C. mon. fin., art. L. 321-1 5°
[308] Article 209.b(1) JCC
[309] The AMF general regulation mentions the position of an asset manager; this position is distinct from the investment advisor further it can be excluded when the OEIC is involved. This position primarily concerns the management of an individual investment mandate; meaning when the CIS takes the form of a contract (*AMF*, régl. gén., art. 313-7-2)
[310] C. mon. fin., art. L. 541-1
[311] Article 2 JSL of 2017
[312] C. mon. fin., art. L. 541-6

110 ***Jordanian rules.*** Limit the option solely to legal entities to be assigned as investment advisors to the IC. This exclusiveness is implicit but repeatedly referred to in the JCC, the Collective Investment Regulation (CIR) and the Financial Services Licensing Regulation. The JCC and the CIR both stipulate that the IC assign in its AOA an investment advisor that is licensed as an investment manager and investment trustee[313]. The legal rules in the earlier legislation emphasize that the investment advisor is "licensed" and not registered. This emphasis leads to the limit of structure of the investment advisor. The reasoning behind this implicit limit is traced back to the Financial Services Licensing Regulation. This Regulation made the distinction between who is licensed and who is registered under the JSC. The registration merely covers natural persons working under the IC or the licensed company under this regulation[314]. As for the licensing; it includes the legal entity that exercises one of the activities covered in this Regulation; they include among other activities investment management and trusteeship[315]. Being a legal entity that is licensed under the Licensing Regulation, the investment advisor follows an incorporation and licensing process similar to that of the IC.

111 ***French rules.*** French rules provide both options for the investment advisor legal entity or natural person[316]. The investment advisor registers at the special registry in the market authority[317]. The investment advisor further is a member in the association of investment advisors and belong to a sole association[318], this association defends the interests and rights of investment advisors; it is authorized by the *AMF* to perform this function[319]. The *AMF* website provides a list of the authorized associations for the consultation of interested investment advisors[320].

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[313] Article 209.b(1) JCC; Article 13.b Collective Investment Regulation of 1999
[314] Article 44 Licensing Regulation of 2005; article 19.a Licensing Bylaw of 2018
[315] Article 4 Licensing Regulation of 2005; article 3 Licensing Bylaw of 2018
[316] *AMF*, régl. gén., art. 325-12-2
[317] C. mon. Fin., art. L. 541-1-1
[318] C. mon. fin., art. L. 541-4
[319] *AMF*, régl. gén., art. 325-2
[320] Examples of the authorized associations: AACIF - Association Des Analystes Conseillers En Investissements Financiers, ANACOFI-CIF - Association Nationale Des Conseils Financiers-CIF, CCIFTE - Compagnie Des Conseillers En Investissement, Finance Et Transmission D'entreprise and CNCIF - Chambre Nationale Des Conseillers En Investissements Financiers

112 ***Qualifications.*** The investment advisor once licensed or registered commences the exercise of its activities and functions. The governing legal rules request an ongoing compliance to the rules stipulating organizational and professional qualifications and competence the investment advisor should hold and acquire. The non-compliance with any of the qualifications puts the investment advisor at risk of losing his license[321]. The investment advisor whether as a natural person or the persons it appoints to carry on its business (case of legal entity[322]) should demonstrate that he/she holds the specialized education, the professional training or the professional experience to exercise the functions attributed to this position[323]. Further, every year they undergo a training course adapted to their activity and experience[324]. The investment advisor ensures at all times that it holds organizational qualifications including those necessary procedures and resources to perform its activity (such as sufficient technical resources and secure data storage)[325] and manage conflicts of interest[326].

113 ***Process of business conduct.*** The investment advisor when creating a relation with a client provides the client with a document referencing the essential details the client might need in verifying the status of the investment advisor. The document includes among other things the name of the investment advisor, place of registration (case of legal entity), the name of the authorized association the advisor belongs to and any other status the advisor holds[327]. The advisor later provides the client with a letter of engagement that stipulates the acknowledgement of the client that he received the document of status[328]. Following this organizational procedure, the advisor commences its activities and provides the client with specialized advice. The advice is formalized in writing and includes the advisor's proposals and the statement of the advantages and risks facing the client[329]. The information provided in the advice should be clear fair and non-misleading[330]. Further, the advisor is prohibited from disclosing to others any of the

[321] Article 6 Licensing Regulation of 2005; article 8 Licensing Bylaw of 2018
[322] *AMF*, régl. gén., art. 325-10-1
[323] *AMF*, régl. gén., art. 325-1; C. mon. fin., art. L. 541-4
[324] *AMF*, régl. gén., art. 325-12-2
[325] *AMF*, régl. gén., art. 325-10
[326] *AMF*, régl. gén., art. 325-8
[327] *AMF*, régl. gén., art. 325-3
[328] *AMF*, régl. gén., art. 325-4
[329] *AMF*, régl. gén., art. 325-7
[330] *AMF*, régl. gén., art. 325-5

information relating to its clients[331]. There is a presumption that the advisor is regarded as acting honestly, fairly, professionally and in the best interest of the client[332].

114 ***Jordanian approach.*** The Jordanian governing rules merely states the license requirement with no further emphasis on the duties or qualifications. Nevertheless, the business conduct and duties of the investment advisor can be found in the provisions addressing the financial activities of the investment manager[333] and the investment trustee[334]. These duties are general, relate to the daily course of business of the advisor, and do not necessarily govern the relation between the advisor and the IC.

115 ***Overview.*** The IC is incorporated and initially registered as a Plc, while at the same time adhering to the specially customized incorporation conditions that relate to its future activities and objectives. Under the JCC, the incorporation of the IC is covered in the general rules governing Plc. Yet these conditions are not at all times exhaustively explanatory or tailored to meet the necessities of the IC. The company accommodates between the competence of its management and their share ownership. The co-existence of both conditions urges the debate on the level of simplicity faced when appointing a member of management. Can the Company find an expert and competent manager among its shareholders? The issue is mostly visible in ICs providing their services to retail investors. Retail investors usually seek the professionalism in the management to compensate the lack on their part[335]. The legislature aim is to protect the non-experienced investors by granting them access to professional investment schemes and the right to control the destiny of their investments. The parallel existence of both the competence and ownership requirement may be difficult to achieve but cannot be derogated from under the Jordanian law. The French rules on the other hand offered a way-out of this dilemma, when the *AMF* general regulation provided the investment services provider with the option of discarding

[331] *AMF*, régl. gén., art. 325-9
[332] *AMF*, régl. gén., art. 325-6
[333] Article 26 Licensing Regulation of 2005; Article 28 Collective Investment Regulation of 1999; article 10 Licensing Bylaw of 2018
[334] Article 23 Licensing Regulation of 2005; Article 25 Collective Investment Regulation of 1999; article 11 Licensing Bylaw of 2018
[335] The *AMF* general regulation distinguishes between two forms of investors; Retail and professional, further, it provides different incorporation related rules for each category of investors. It is a distinction based on the level of knowledge and experience of the investor in the financial market

the management structure stated in the *Code de Commerce* and appoint an individual non-shareholder manager[336]. This option is considered the solution if the Company faces a difficulty in finding an experienced shareholder who is competent enough to run the company. Yet the individual management may raise issues on the level of the accountability, efficiency and effectiveness. The following Chapter 2 thoroughly explains other forms of requirements ICs meet due to their close connection to financial markets and financial services.

Chapter 2: Financial Services Requirements

116 ***Preview.*** The industry of investment funds and companies generally occupies a specific and often an underestimated role. The funds and companies are viewed by the different components of the investment and financial markets as considerably boring, full of rules limiting creativity and real moneymaking, further full of administrative and legal constraints. Regulators view ICs as in need for heavy tailored regulation that provides protection to retail investors and hinders the chances of them losing their money. These companies are vehicles through which people with different financial levels connect; they connect those who have money with others who need it[337].

117 ***Post incorporation requirements.*** Generally, once the company is fully incorporated with national company controllers it should be able to commence exercising its activities without further restraints. The application of this rule may be limited depending on the type of activities the incorporated company states in its AOA. When considering the IC that has as its sole objective portfolio investments, the exercise is not automatic following the incorporation -even though a prior approval from securities authorities may have been issued- it is restricted; an authorization or license is issued which permits the Company to fulfill its object.

[336] *AMF*, régl. gén., art. 312-7

[337] Charles Muller and Alain Ruttiens, *A Practical Guide to UCITS Funds and their Risk Management* (Edi-Pro 2013) page 5

118 ***Exercise activities.*** As any business activity, there must be a market within which the IC exercises its activities. There is always a connection between the relevant market[338] and the activities exercised or the product traded. The IC provides financial and investment services, therefore the market place is the financial market where investment decisions are taken. Various complementary questions rise in respect of the financial services prerequisites, they include: the freedom to choose the market. The accessibility to the market. Whether there are exceptions to and exemption from these financial requirements. Therefore, the following Sections address financial licensing (section A) and define the concerned local market (section B).

Section A: Licensing and Authorization

119 ***Necessity of licensing.*** Most legislations lay down rules that oblige Plc. when incorporated to obtain a prior authorization or license to function within any intended financial market, to guarantee the coordination and to safeguard the later resulting rights and interests. Prior authorization and licensing in the context of incorporating an OEIC refers to the process of obtaining an approval from a local administrative department, concerned with companies, financial, securities and commercial issues, which permits the applicant company to commence its business activities. This authorization differs from one legislation to the other, though in some cases it is similar in terms of the required conditions. The reason behind requiring a prior authorization to exercise financial services is not explicitly addressed in the governing legal rules. The main legal explanation for the existence of this requirement is the protection of investors' interests, particularly in our case shareholders, therefore ensuring that the participants are adequately resourced and trained to provide financial services[339]. The JSC, *AMF* and other domestic securities authorities supervise the incorporated company and insure the fulfillment of all the requirements related to securities transactions; including issuing, purchasing, selling or other forms of trading. Registering in the company registry alone might not be sufficient to incorporate a company that exercises financial services. This situation calls for the investigation of the financial standing and credibility of the applicant company in order to avoid fraudulent

[338] The term relevant market used in this thesis does not relate in any way to the notion of relevant market addresses thoroughly under completion law rules. The thesis uses the same wordiness in the process of addressing the concerned financial market

[339]Marcus Best and Jean-Luc Soulier (eds), *International Securities Law Handbook* (3rdedn, Kluwer Law International 2010)

insolvency or bankruptcy. Nonetheless, the governing legal rules confirmed and made an explicit statement on the need to maintain valid all the conditions of the license or the company risks its revocation.

120 ***Application to IC***. The emergence of a financial license or authorization arises from the particularity of the IC; it holds most of the time the savings of retail investors. These investors generally lack the experience, knowledge and information relating to the secure placement of savings or entering into the investment market[340]. The questions that arise in this regard include the following: what are the activities requiring a license? Is licensing a general rule or is it an exception? Why is it requested? To properly address the questions this section is divided into two sub-sections discussing first the forms of financial licensing (sub-section 1), then the legal consequences resulting out of obtaining such a license (sub-section 2).

Sub-section 1: Forms of Financial Licensing

121 ***License.*** A license is the legal document giving official permission to do something, it may be considered as a permit despite the difference in their legal consequences. From a more concise legal point of view, the license is a permission granted by a competent authority to exercise a certain privilege without which, the exercise would be considered as an illegal or unlawful act[341], generally the privilege is granted in return for a fee[342]. The license is permanent by nature, nonetheless no person holds the absolute right to a license; in some legislations the license is limited to a certain number of years or connected to the existence of a character or certain conditions. The license is conditional and restricted in nature.

122 ***Authorization.*** An authorization is permission. From a legal standpoint, it is used to empower a person with the legal right to perform an action[343]. The Authorization is a process that constitutes of endowing or conferring a person with legal power to perform a specific action

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[340]Jean Degand, *Les Sociétés d'Investissement Mobilières et Immobilières Les SICAV* (DUNOD Paris 1969)
[341]*West Encyclopedia of American Law* (2008) edn 2<http://legal-dictionary.thefreedictionary.com/license> Accessed 20 January 2016
[342] Bryan A Garner, *Black's Law Dictionary* (10th edn, 2014)
[343]*West Encyclopedia* n (341)

or activity. It could refer to a document that gives some right such as a legislation authorizing the operation of a person for a specific period[344]. The authorization is temporary in nature.

123 ***An authorization vs. a license.*** License and authorize may be used as synonyms despite the existing differences between them. From a mere legal point of view, they are similar. They differ in their legal consequences[345]. In our case, the debate emerges in the difference of the terms used to address the second stage of the registration process of ICs, whether the Company is authorized or licensed to commence its financial services. The different legislations use different terms to address a roughly identical procedure. French and EU approaches use the same terminology, the legal rules address an authorization as for the Jordanian rules they state the term "license". The previously mentioned definitions of both the license and the authorization appear to be similar nonetheless in the legal concept the license may be more restrictive and general than the authorization. The US approach for example was different and to some extent simpler; the IC does not require an authorization or a license to commence its financial services the Company merely files a notification for registration[346] with the SEC followed by a registration statement[347].

124 ***Appropriate term.*** The main activity of the IC is portfolio investments therefore constituting a financial service. The risk associated with this form of services is at high stake, in the process of providing a solid protection for shareholders the license appears to be the most suitable option, if merely the legal restrictions, conditions and consequences are taken into consideration. Nonetheless, if the question is to protect shareholders while at the same time have an efficient but slightly faster registration process then the authorization avails as the suitable option. As will be further explained later in this sub-section despite the difference in the terms the procedure was nearly identical in both systems. This similarity provides the possibility to use both terms as synonyms whenever the financial registration stage of the IC is concerned. IC follows a financial registration procedure embodied in a financial license or authorization

[344]Authorization Law and Legal Definition <http://definitions.uslegal.com/a/authorization/> Accessed 21 January 2016

[345] Ransford Pyle & Carol Bast, *Foundations of Law: Cases, Commentary and Ethics*, (6th edn, Cengage Learning 2016)

[346] Section 8(a) Investment company Act of 1940

[347] Section 8(b) Investment company Act of 1940

issued by the domestic securities authority. The procedure is administrative therefore, it consists of several phases including filing an application and issuing an administrative decision. In this sub-section, the general organization of licensing application is illustrated. The sub-section introduces the scope of application of the financial license (paragraph 1), in addition to the application framework (paragraph 2).

§1: *The Organization of the Financial License*

125 ***Scope of application.*** As was earlier emphasized the IC is required to obtain a prior authorization from the competent authority to commence its activities. This authorization finds its reasoning in the type of activities ICs exercise. The IC is a form of institutional investment through which investors (in our case shareholders) pool their funds and hire professionals to manage their investments (expert management body), with each investor entitled to a proportional share of the net benefits of its ownership[348]. Therefore, the importance of the investor protection emerges as a major objective of the financial sector. The activities of the IC involve risk taking, the role of the public policy and jurisprudence is to establish and ensure a fixed and solid framework to control and predict future risks. An essential part of this framework is the preventive measures embodied in a form of prior authorization of the financial standings, professionalism and credibility of the institutions expected to provide financial services.

126 ***Authorized management.*** In order to exercise efficiently its activities, the IC employs internal components (staff and management) who are competent and hold the necessary experience, knowledge and expertise to fulfill their duties[349]. The investor protection takes the form of a supervision that is practiced by an external body ensuring the existence of the said competences and expertise in the appointed components. Consequently, to the external

[348] Directorate for Financial and Enterprise Affairs, *Governance of Collective Investment Schemes* (Discussion draft for comment – OECD, 2004) page 3

[349] Article 3.b Licensing Regulation of 2005; article 3.c Licensing Bylaw of 2018

supervision the scope of application of the financial authorization extends to include the management and the specialized personnel the IC wishes to appoint[350].

127 ***General authorization obligation.*** Different domestic securities and financial rules address financial authorization requirement. The Jordanian legislature follows a similar approach in its securities rules. The rules impose a licensing obligation on all the companies that have as their main activity financial services[351]. These rules prohibit the exercise of financial activities without obtaining a prior license from the JSC[352]. The French legislature follows a similar approach and imposes an authorization obligation on the part of the ICs. The obligation is general and covers any company that has as its primary business portfolio management for third parties as is provided in the *Code Monétaire et Financier*. These companies obtain a prior authorization from the *AMF*[353].

128 ***Financial Services***. Financial services constitute of all the activities that qualify as needing a prior financial authorization. The term "service" means a task that an individual performs or provides for another. The "financial service" means the process of acquiring the financial good[354]. The domestic securities and financial rules provide a definition for the financial services by stating the activities considered as part thereof. Financial services include activities and services relating to financial instruments[355], or those activities exercised by intermediaries, trustees, investment managers, financial consultants, issuers and other similar undertakings[356]. These activities and services may be primary or secondary. Primary activities constitute of the services of receipt, transmission and execution of orders on behalf of third

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[350]This matter was previously addressed in Chapter 1 of this Title, whereas it was illustrated that the competent authority issues professional licenses or requires a special registration from the management and the remaining personnel working for the IC

[351] Article 4.a Licensing Regulation of 2005; article 4.a,b Licensing Bylaw of 2018

[352] Article 3.a Licensing Regulation of 2005; article 3.b Licensing Bylaw of 2018

[353] Preamble of *AMF* instr. DOC-2008-03, *"Authorization procedure for investment management companies, disclosure obligations and pass porting"*; *AMF*, Instr. DOC-2011-19, 'Procédures d'agrément, à l'établissement d'un DICI1 et d'un prospectus et à l'information périodique des OPCVM coordonnés français et des OPCVM coordonnés étrangers commercialisés en France'

[354] Irena Asmundson, 'What are Financial Services? How consumers and Businesses Acquire Financial Goods such as Loans and Insurance' (Finance & Development , IMF 2011) <https://www.imf.org/external/pubs/ft/fandd/2011/03/pdf/basics.pdf> Accessed27 January 2016

[355] C. mon. fin., art. L. 321-1; C. mon. fin., art. D. 321-1

[356] Article 2.a Licensing Regulation of 2005

parties, own-account trading, portfolio management, investment advice, underwriting, and others[357]. As for secondary activities, they include among other things custodianship and administration of financial instruments, granting credits and loans to investors, consultancy services provided to companies in relation to their capital structure or industrial strategy, investment research and analysis, and the services associated with underwriting[358]. As part of the financial activities that require a prior authorization or license are those related to intermediation, investment management, investment trusteeship, underwriting, safe keeper, margin finance and brokerage[359]. UCITS Directive did not provide a definition to financial services. When referring to other EU legislations we find that financial services are defined as any service of banking, credit, insurance, personal pension, investment or payment nature[360]. Another definition linked to the former one, yet addressed in different terminology relates to investment services and activities is mentioned under EU law. The investment services are considered as any service such as the previously mentioned primary activities[361], which relate to an instrument including transferable securities, units in CIU or money-market instruments[362].The UCITS Directive when addressing the object of the IC provided two categories of activities UCITS may exercise therefore requires prior authorization. They include a primary activity meaning the collective investment in transferable securities or in other liquid financial assets[363]. In addition to a secondary category, including services related to portfolio investment such as management of portfolios of investments including those owned by pension funds[364], and none-core services such as investment advice, safekeeping and administration[365].

129 ***Role of competent authority***. IC is required to obtain a prior authorization or license ahead of commencing its financial services and activities. The question that rises in this regard is; who issues this authorization or license? Domestic competent authorities are responsible for

[357]C. mon. fin., art. L. 321-1
[358]C. mon. fin., art. L. 321-2
[359] Article 3.a Licensing Regulation of 2005; article 3.b Licensing Bylaw of 2018
[360] Article 2 (Council Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services [2002] OJL 271/16)
[361] Section A - Annex 1 (Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJL 173/349)
[362] Section C- Annex 1 MiFID; Article 4.1.2 MiFID
[363] Article 1.2(a) UCITS Dir. 2009/65
[364] Article 6.3(a) UCITS Dir. 2009/65
[365] Article 6.2(b) UCITS Dir. 2009/65

reviewing the authorization or license application and they issue a decision regarding this application within a set period of time. Who is this competent authority? The competent authority means the public body that carries out the duties provided for in the securities regulations in addition to those authorities enjoying supervisory and administrative powers that are financial-services oriented[366]. The identification of the powers, activities and components of these authorities shall be further explained in Part II; for the purpose of this section, the competent authority means the domestic securities commission.

130 ***Vital Role.*** The competent authority has a vital role in the financial licensing and authorization process. National legislation addresses the scope of jurisdiction of this authority in both prior and post establishment stages. In terms of the prior establishment stage, the registration and licensing, the organization of the activities and the structure of the IC is governed by the competent authority[367].

131 ***Supervisory vs administrative power.*** The competent authority exercises various forms of powers that are stipulated in national securities regulations. These powers include among other things supervisory and administrative powers. As part of the supervisory powers, the competent authority enjoys; are organization and control of the licensed or authorized entities (including the IC)[368]. The authority supervises the activities and performance of the IC, further it ensures the companies' compliance with the governing legal rules essentially the authorization conditions. The supervision is complemented with an administrative, disciplinary and public enforcement powers.

132 ***Powers vs. Procedures.*** The authority receives the authorization or license application; it is then responsible for reviewing the application and issuing a decision[369]. In the process of reviewing the application, the competent authority enjoys vast power and discretion to request further information or documents it deems necessary[370]. The authority further imposes

[366] C. mon. fin., art. L. 621-1 ; Article 98 UCITS Dir. 2009/65 ; Article 7.a JSL of 2017
[367] Article 209.a JCC ; Article 15 JSL ; C. mon. fin., art. L. 532-9 ; Article 97 UCITS Dir. 2009/65
[368] Article 8.b(4) JSL of 2017
[369] Article 7 Licensing Regulation of 2005; article 5 Licensing Bylaw of 2018; *AMF*, régl. gén., art. 411-7
[370] Article 9.a Licensing Regulation of 2005; article 5.s/bis Licensing Bylaw of 2018; *AMF*, régl. gén., art. 411-6

application fees that applicant companies comply with[371]. Once the reviewing stage is over, the competent authority issues a reasoned decision. Decisions made by the competent authority include those related to licensing application and post authorization or licensing process[372]. In order to profoundly comprehend the licensing requirement the following paragraph illustrates the administrative procedure for financial licensing, most importantly it defines the content of the application, its conditions and the reviewing period.

§2: *Financial License Administrative Procedure*

133 ***Administrative process.*** The administrative process should be restricted and thoroughly addressed by domestic rules. This process is seen as the procedure by which the applicant company files the required documents with the competent authority revealing essential facts and information about its current financial standing, asset description and the illegibility for future investment activities[373]. The information is essential to investors when making their choice of the company they intend to invest in. As any administrative process, the financial approval requires a form or an application to be filed and a group of conditions to be met. The structure of the application and the medium of submission are slightly similar in the different domestic financial and securities rules. Due to the role of recent technologies and in the course of facilitating the administrative process, the domestic rules provides an electronic application option in addition to the paper based one[374]. What are the different procedural stages? Generally, the application procedure takes off with filling out the application form, attaching the required documents and full declaration of the requested information. The following stage is to submit the application with the competent authority and pay the application fees if requested. The application then enters into an 'assess and review' stage. Throughout this stage the competent authority evaluates the submitted application, ensures the existence of the entirety of the required documents and that the imposed conditions are fulfilled within a set period of time. The final stage is the decisions the competent authority reaches after reviewing the application.

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[371] Article 27.a(2) JSL of 2017

[372] Article 12 JSL of 2017; Articles 7 & 107 UCITS Dir. 2009/65

[373] Registration definition, <http://www.investopedia.com/terms/r/registration.asp> Accessed 3 February 2016

[374] The *AMF* stated in Book 4 of its GR that the authorization application of the *SICAV* is filed electronically (*AMF*, régl. gén., art. 411-6) therefore limiting the use of hardcopies, facilitating the administrative procedures and minimizing the risk of documents loss

134 ***First phase*** of financial licensing is submitting the application. In order to reach this point the applicant Company should first fill out the written form[375]; while at the same time include all the required information[376]. The applicant Company attests, in the application form, to the validity of the provided information[377]. The applicant attaches the application package along with the application form when filed with the competent authority. The application package should comply with the standard package referred to in the governing legal rules[378]. The package constitutes of different categories of information general, specialized, technical and precautionary. The information provides a detailed presentation of the company and its project. Therefore, it allows an efficient supervision by the authority over company's propositions; eventually reflecting the standing of the company before potential future investors.

135 ***General Information***. The application should include, general information identifying the applicant. The name of the applicant (name of the Company) and the person responsible for the preparation of the authorization form in case the application is filed on behalf of the Company. The form of the company and its initial registration number (including a proof of deposit of the initial capital[379]), the purpose of the application, the general information concerning headquarters, branches, offices, senior management and their domicile, shareholders and their holding percentages, in addition to any additional information the competent authority may request[380].

136 ***Packaged specialized information.*** Oriented to provide sufficient financial background on the applicant company and its components. They are essential for the establishment of a solid basis for future provided financial services. Among other things, this category of information includes the scope of the program of activity. The program constitutes of the form of management self or outsourced, the authorized instruments within the scope of activity of the applicant and the targeted investors within its scope (retail or professionals). In addition to, collective management strategies (asset allocation, stock picking, directional risks), the

[375] C. mon. fin., art. R. 532-10; Article 47 Licensing Regulation of 2005
[376] Article 48.a JSL of 2017
[377] Article 7 Licensing Regulation of 2005; article 5 Licensing Bylaw of 2018
[378] *AMF,* instr. DOC-2011-19, art. 1; *AMF,* instr. DOC-2008-03, art. 1
[379] *AMF*, régl. gén., art. 411-8
[380] Article 7 Licensing Regulation of 2005; article 5 Licensing Bylaw of 2018; Article 8.1, 2 UCITS Dir. 2009/65

compliance and internal control guide and the investment process (including the role of the persons in charge, the decision-making procedures and traceability). Further to the description of the circuit used to channel orders, defining and updating the best execution and/or best selection policy, risk management, conflicts of interest policy (including persons or departments in charge of drafting the policy, the validation process, and the frequency of assessments and updates). The program addresses instruments valuation, data retention and record-keeping organization, financial information (preliminary assumptions for companies under establishment, development assumptions) in addition to a forecast of the financial statements[381].

137 ***Technical resources.*** The information that are linked and related to the management (portfolio monitoring, risk valuation, development and market data input procedures and other related tools and software)[382].

138 ***Precautionary information.*** The applicant Company should provide as part of its activity program an Anti-Money Laundry and Terrorist Financing (AML/TF) risk policy. This policy should define the persons in charge of implementing the AML/TF system, identifying and positioning the activities forming Money Laundry or Terrorist Financing in the organization chart and internal control policy, the scope of business covered within this system and the AML/TF procedures[383]. The competent authority may require as a precautionary measure, to provide unconditional financial guarantees to guarantee the legal commitments and responsibilities towards future clients[384]. Furthermore, the applicant company should provide the necessary information to clarify its reputation, records and links with other companies[385].

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[381] Article 7.h-s Licensing Regulation of 2005; article 5.i Licensing Bylaw of 2018; Annex 1.1 Standard Authorization Application Package of the AMF Instruction DOC-2008-03, 7 August 2015; Article 7.1.c UCITS Dir. 2009/65

[382] Article 8 Licensing Regulation of 2005; the newly implemented Licensing bylaw of 2018 does not address this form of resources. This requirement is important to prove applicant company's preparation and capabilities to provide the activities requiring the license; Annex 1.1 Standard Authorization Application Package

[383] Annex 1.1 Standard Authorization Application Package; Article 2.c (Scope of application includes Investment Companies) Anti-Money Laundry and Terrorist Financing Regulation of 2010; Article 6 (main obligations) AML/TF Regulation of 2010

[384] Article 50 JSL of 2017

[385] Article 9.a Licensing Regulation of 2005; the newly implemented Licensing Bylaw of 2018 does not address such an obligation. This legal silence is interpreted negatively in terms of leaving investors' interest at stake of choosing to invest in a company that does not meet the standards or hinders conflicts of interest that may result in a breach of securities rules or harming investors and incurring them losses

139 ***Conditions.*** Alongside the information package, the applicant company should meet certain conditions to reach an all-star complete licensing application. The conditions relate, generally, to the initial registration at the company's registry. The competent authority designates the conditions that allow full incorporation of a financial service provider[386]. The first condition addressed under domestic rules is the one that ensures fulfillment of the minimum capital requirement. Previously explained that the OEIC is obliged to meet the minimum capital requirement only at the moment of incorporation[387]. The possession and proof of deposit of the amount of capital set in the AOA of the IC reflects the dependence of this stage of organization on the earlier one (initial registration), the capital related information highlights the financial standing of the applicant and provides a sufficient liquidity for later cash-outs. The other conditions are connected to the expertise and reputation of the management body[388], the payment of the application fees[389], and providing financial guarantees[390].

140 ***Application fees.*** The licensing or authorization granted to the IC is not complementary nor is it free of charge. As any administrative procedure, the financial licensing requires the applicant to pay a fixed administrative fee differing from one financial service to the other. The fees may also differ depending on the nature of the filed application (initial application or supplementary documents)[391]. Both the Jordanian and French securities rules imposed a fixed application fee on the applicants. The Jordanian rules provided an exclusive fee for the investment fund[392], and disregarded the IC (if IC is considered as a financial services company consequently it is covered in the fees applying to these companies)[393]. Nonetheless, it remains obliged to pay licensing fees according to licensing Regulation.

141 ***Role of competent authority.*** Once the applicant prepares a complete application including the packaged information and the supplementary documents, the application is filed

[386] C. mon. fin, art. L. 214-5
[387] Article 4.c, d Licensing Regulation of 2005; article 4.d,h Licensing Bylaw of 2018; Article 7.1.a UCITS Directive 65/2009
[388] Article 4.h Licensing regulation of 2005; article 4.o Licensing Bylaw of 2018; Article 7.1.b UCITS Dir. 2009/65
[389] Article 4.o Licensing Regulation of 2005; C. mon. fin, art. L. 621-5-3
[390] Article 4.z Licensing Regulation of 2005; article 6 Licensing Bylaw of 2018
[391] C. mon. fin., art. D. 621-27
[392] Article 8 Securities Commission fees Bylaw of 1999
[393] Article 6.a Securities Commission fees Bylaw of 1999

with the competent authority. The competent authority in its turn follows certain steps before it issues the final decision. These steps constitute the processing and evaluation period.

142 ***Necessary vs. excessive requirements.*** The administrative procedure of financial licensing and authorization is similar to other administrative procedures; long and require a lot of paper work. The questions emerging in this regard: Are the required information excessive? What form of effect does this requirement have on the period of preparation and review: is it negative or positive? Previously noted that the main object of ICs is portfolio investment based on risk sharing. The main object is a financial service; in this form of service, the administrative body seeks a balance between the interests of both poles of the services (provider and recipient). To ensure the interests of recipients of financial services governing legal rules impose strict conditions and requirements that provide a thorough overview of the provider's background. The strictness is derogated from when the recipient is a professional in financial services field. Deciding whether the financial licensing requirements are excessive or necessary is debatable. The financial background is important to predict future performance of the provider using current or assumptive numbers. The requirements may be considered excessive yet they are necessary to the decision of the competent authority. How else could the authority tell that the applicant is eligible to provide financial services? The effect on the length of the prior licensing procedure is not entirely negative nor positive. The applicant company when preparing the licensing or authorization application is in fact drafting a proposal to their insight and view of the business. The governing legal rules in mitigating the length of the administrative procedure may limit the application to an electronic form (such as French ones). As for the legal consequences of the licensing or authorization application, they are explained in the following sub-section.

Sub-section 2: Post-Licensing Consequences: Maintaining a Valid License

143 ***National perspective of evaluation***. Applicant companies prepare a complete authorization or licensing application and files it with the competent authority. This statement draws us back to the role of the competent authority. The authority exercises a preliminary control that detects any inaccuracies or ambiguity the company may be in, ahead of commencing the performance. Therefore, having a key role in hindering anti-shareholder

interest actions. The main role of the authority commences at the official filing of the application, therefore it is embodied in evaluating and assessing the application leading to a reasoned decision. The *AMF* states in its general regulation multiple steps that it follows during this period beginning with the receipt of the application and verification of its components and resulting in a final reasoned decision. Once the *AMF* verifies the complete compliant application it issues an acknowledgement or receipt showing that the application package is officially filed[394]. Following that, the *AMF* reviews the application. During this stage, the *AMF* may request additional information; the processing stage generally ends with a decision[395]. The JSL did not provide a similar thorough explanation to the processing and evaluation stage. The JSL merely provides the period during which the JSC should issue its decision[396]. The designated period is sixty days following filling a complete application without providing the measures in case the decision was not taken on time[397]. The *AMF* provides a slightly shorter period; one month following the filing of the application[398]; if the IC appoints a MC otherwise the response is made three months following the submission of the application with the power to extend this period to three additional ones[399].

144 ***Restricted control***. The *AMF* is granted a restricted control over the authorization decision in the case of *SICAV* with outsourced management. The restriction is the *de facto* authorization of the *SICAV* if the *AMF* does not respond to the application a month following issuing its acknowledgement of receipt[400]. Further, a shorter processing timeframe is imposed by the *AMF* rules in case the applicant company was comparable[401], to a UCITS that was

[394] *AMF,* instr. 2008-03, art. 2; *AMF,* instr. 2011-19, art. 3
[395] *AMF,* instr. 2008-03, art. 5; *AMF,* instr. 2011-19, art. 4
[396] Article 48.h JSL of 2017; Article 9.c Licensing Regulation of 2005;the newly implemented Licensing bylaw of 2018 does not address the period
[397] Previously noted that in the initial registration of the Investment Company, the JCC states that in case of time lapse with no decision of approval of initial registration made by the Minister of Industry and Trade the company is *de facto* registered. In connection with the financial licensing no such exception was provided
[398] *AMF*, régl. gén., art. 422-7
[399] *AMF*, régl. gén., art. 422-7; *AMF,* instr. 2008-03, art. 2; *AMF,* instr. 2011-19, art. 4
[400]*AMF*, régl. gén., art. 411-6 (I); *AMF*, régl. gén., art. 422-7 (I) "The acknowledgement of receipt stipulates a new deadline for authorization, which cannot be longer than the one previously referred to."
[401] Known as *agrément par analogie.* The *AMF* assesses the comparability by referring, among other things, to: both undertakings are managed by the same MC, the reference UCITS was authorized less than eighteen months prior to the date of application, the reference UCITS did not undergo any changes and both undertakings have similar investment strategy, risk profile and operational rules; Olivier Douvreleur, 'La Nouvelle Procédure d'Agrément « par analogie » des OPCVM' (2008) 1 RTDF 80

previously authorized by the *AMF* (eight business days)[402]. This restriction may be viewed as an approach facilitating the authorization of IC, and urging the rapidity in administrative decisions; yet the investor protection should be taken into account. No similar exceptions, restrictions or distinction is provided under the JSL.

145 ***Evaluation period over.*** The main outcome of the evaluation period is the decision the competent authority reaches. This decision is followed by legal consequences and actions that the then authorized company should perform and comply with. What types of decisions the authority issues? What are the legal consequences of these decisions? To be answered in the following paragraphs.

§1: *Legalities of the Licensing Application*

146 ***Types of decisions.*** The obvious outcome of the evaluation period is a decision that the competent authority issues; based on the content of the application and the program of activity. Generally, the decisions issued by the competent authority may be negative or positive. The positive outcome is to grant the authorization or license, as for the negative one consists of refusing to authorize or license. The question emerging in this regard: why would the competent authority choose one decision over the other? What legal consequences this choice imposes?

147 ***Positive decision.*** Granting the authorization requires the competent authority to examine among other things the AOA, the investment strategy, shares classes, the choice of depositary and the choice of a MC[403]. The reasoning behind this examination is ensuring that there is no legal impediment preventing the IC from exercising its activities within the regulated market. The competent authority when deciding to grant the authorization should notify the applicant company. The letter informing the then authorized company should include the authorization number, the date of the authorization and most importantly the scope of the authorization[404]. The scope of the authorization is based on the content of the program of activity the company filed with the authority.

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[402] *AMF*, régl. gén., art. 411-6 (II); *AMF*, régl. gén., art. 422-7 (II)
[403] *AMF*, régl. gén., art. 411-7 ; *AMF*, régl. gén., art. 422-8
[404] *AMF,* instr. 2008-03, art. 4

148 ***Notification of authorization.*** The letter notifying the acceptance of the authorization to the applicant company is issued within the timeframe designated by law. It also includes the information previously mentioned and often might be conditional. The competent authority may include a specific requirement in the notification. The requirement is aimed at safeguarding the balanced structure of the IC. As an example of the conditions included in the authorization are those relating to the effective establishment of the Company or providing the evidence that the application conditions are met within the given time. In case these conditions are not met, the authorization lapses. Once the authorization becomes effective, the Company references itself as an authorized IC, along with its authorization number, in its publicly available documents. This reference shall not, in any way be understood as a seal of quality or guarantee. The reference is merely for transparency and investor protection reasons. Where potential investors may verify the actual authorization of the company and its validity using these referencing numbers. The notification is made by the *AMF* for French ICs; no such explanation is mentioned under the JSL or the Licensing Regulation. The Jordanian legislature do not provide details in connection with the approval of licensing. The law merely addresses the time limit.

149 ***No decision on time***. What happens if the JSC does not issue the decision within the timeframe the securities rules designate? The period within which the license should be issued is a mere regulatory framework; meaning the licensing decisions issued after the time lapse stated by law (sixty days) does not in any way affect the validity of the decision. Under the general rule of administrative law the applicant company has the right to contest the absence of the administrative decision (what is also known as passive administrative decision) before administrative courts post submitting a written request to the authority to issue the decision[405]. The JSL, on the other hand, designated the court of first instance as the competent court[406]. The application of this designation is restricted to the cases the term competent court is used in the law, such as the case of conflict resolution (in terms of the compensation, penalizing and damages and cases of securities rules infringements). This restriction creates a debate over the actual competent court in the matters that relate to the JSL. The arguments revolve around the possibility to extend the scope of application of the term to include all the conflicts and

[405] Article 8.h Administrative Justice Code of 2014
[406] Article 2 JSL of 2017

inconveniences resulting from the application of the JSL. For the purposes of this section, the competent court in matters relating to the absence of decision shall be the administrative court. Therefore, the general rule is applicable.

150 ***Negative decision***. The competent authority may refuse to authorize the applicant company[407]. The different legal rules address the general reasons for the refusal. Generally, a refusal is issued by the securities authority as a result of filing an incomplete application with the authority whether in connection with the initial application or the failure to present the supplementary documents. The authority may choose to send back the non-compliant or incomplete application to the applicant company; while including a reasoned decision[408]. The securities rules provide other specific reasons for the refusal to authorize; they include the case of absence of designation of a MC without meeting the exception capital threshold[409]. The non-compliance with the conditions and requirements of the licensing by a member of the management in the applicant company results in a refusal[410]. In other cases the securities rules mixed between the reasons for annulment and refusal of licensing. The JSL provides the same reasoning for annulment and refusal in an approach that covers the post-licensing violations and non-compliance. An example of the reasons addressed in the JSL the violation of the securities rules, providing inaccurate information in the licensing application and providing evidence that the applicant is in fact unqualified to exercise the financial activities[411].

151 ***Reasoned decisions***. The refusal decision in particular and other forms of negative decisions in general that are issued in connection with the implementation of the securities rules or the exercise of the competent authority's powers should be reasoned when communicated to the applicants[412]. The UCITS Directive explicitly state that any decision taken under the laws

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[407] Article 48.h JSL of 2017; Article 9.c Licensing Regulation of 2005; In connection with the financial registration of the staff and management: Article 48.c Licensing Regulation of 2005; The general rule under the UCITS Dir. 2009/65 states that the authorization of the IC is domestically determined by MS (Article 27), nonetheless the Directive introduced case example of the refusal to authorize (Articles 29 and 107); in the newly implemented licensing bylaw of 2018 no such power is mentioned

[408] *AMF,* instr. 2008-03, art. 2

[409] Article 29.1 UCITS Dir. 2009/65: the exception threshold is holding a minimum initial capital of three hundred thousand Euros

[410] Article 58 JSL of 2017

[411] Article 60 JSL of 2017

[412] Article 107.1 UCITS Dir. 2009/65; *AMF,* instr. 2008-03, art. 4; Jo. Co. admin., 06 Oct. 2010, n° 421/2010

and regulations adopting this Directive is subject to a right of appeal in the courts[413]. Neither the JSL nor the Licensing Regulation explicitly state such a right; nonetheless the absence of an explicit rule cannot be interpreted as having a securities commission that issues final conclusive decisions that cannot be contested. The absence is positively interpreted meaning: the existence of a right to contest an administrative decision before administrative courts in accordance with general rules of law[414].

152 ***Legal consequences of decision.*** As a natural legal consequence of the positive decision is considering the applicant company as an authorized or licensed IC, therefore it may commence the exercise of its activities and functions[415]. The competent authority should inform the company with the authorization or license[416], in addition it should inform the licensed company in writing with its right to commence its activities[417]. Previously mentioned that the *AMF* communicates a letter to the IC informing it of the authorization and its related conditions and content. The medium of communication is not limited in the *AMF* general regulation on the other hand the Jordanian securities rules limited the communication to the written form. The right to commence the activities is addressed under the JCC and is granted to the Company Controller to communicate it in writing to the Plc. once the controller verifies the completion of the incorporation procedures[418]. This article applies to the IC nevertheless; the complete incorporation of the IC requires the licensing under the JSL. The fact that the IC solely exercises the activity of portfolio investments extends the application of this rule to the moment of granting the financial license due to the inability to exercise the main activity prior to the license. Taking into consideration the recent amendment of the JSL that transfer organizational and supervisory functions of the company controller to the JSC; the power to issue such notification may be transferred to the JSC instead of the company controller.

153 ***Creating a supervisory power.*** The other legal consequence resulting from the authorization or licensing decision is granting supervisory and administrative powers to the

[413] Article 107.2 UCITS Dir. 2009/65
[414] Article 5 Administrative Justice Code of 2014
[415] Recital 12 UCITS Dir. 2009/65
[416] *AMF,* instr. 2008-03, art. 4; *AMF,* régl. gén., art. 411-6
[417] Article 19 Collective Investment Regulation of 1999
[418] Article 108.c JCC

competent authority. The competent authority is not an administrative decision-maker involved solely in the pre-licensing decision. The role of the authority extends to post-licensing stages. The authority exercises supervisory and administrative powers over the licensed or authorized companies (to be further explained in part II). These powers include laying down rules of conduct that authorized companies observe; these rules ensure the compliance of company's activities with duties and measures set by law[419], in addition, the authority draws up prudential rules[420]. More or less, prudential rules represent a precautionary and minimum requirement that market participants should respect they do not hold a strong obligatory nature as that of the regulatory rules. The authorized or licensed company complies with securities rules, competent authority supervises this compliance and enjoys intervening and investigatory powers in connection with any suspected action that threatens the stability of the financial market or increases the risks of investors[421]. The supervision is further exercised through imposing communication and reporting obligation on the Company of material changes in the information filed earlier with the authority[422]. The main concern of the following parts shall be oriented towards the positive decision. It was discussed in this paragraph the natural legal consequences to the licensing decision (commencing of activities and supervisory power), all of which positively influences investor interest whether the investor is a founding shareholder or potential future shareholder. The list of consequences is ongoing and includes continuous and renewable ones. The following paragraph illustrates generally the requirements and the conditional nature of the license or authorization.

§2: *Ongoing Post-Licensing Conditions*

154 ***Maintain valid conditions.*** The authorization or license creates a continuous legal effect in the form of a continuous supervision over the Company. Meaning the authorization or license is conditional; therefore the Company complies with the conditions otherwise the authority intervenes with its administrative power and issues disciplinary decisions. The IC is required to fulfill a list of conditions to be issued a financial license or authorization. These requirements

[419] Article 14 UCITS Dir. 2009/65
[420] Article 31 UCITS Dir. 2009/65
[421] Article 82 Licensing Regulation of 2005; Article 60 JSL of 2017
[422] Article 80 Licensing Regulation of 2005; the newly implemented licensing bylaw of 2018 does not address the disclosure obligation; *AMF,* instr. 2008-03, art. 10; *AMF,* instr. 2011-19, art. 6

impose on the IC an obligation to maintain the conditions valid at all times[423], in addition to holding valid the requirements during the life of the license[424]. The validity of the conditions and their existence is crucial to the licensing procedure and post-licensing stages. The inability of the applicant company to provide complete information and documents at the time of application results in voiding the submitted application[425]. As a natural consequence to maintaining a valid license or authorization is the reporting obligation imposed on the Company. This obligation forms an inseparable part of the general reporting obligation ICs are requested to fulfil during their legal existence[426]. The reporting obligation consists of formally informing the domestic securities' authority of any change in the provided information, where this change may have an effect on the authorization or the license[427], therefore influencing investment decisions current and future ones. The reporting may take the form of a declaration or a notification; designated depending on the nature of the modified information or condition[428]. Some changes require a prior approval of the securities commission[429], as for others they need a mere notification of the current state. The *AMF* provides a procedure for the modification similar to that of the initial registration[430].

155 ***Modification procedure***. It is a two-step procedure regardless of the modified information; nonetheless, the *AMF* role differs from one case to the other. The *AMF* presents two forms of procedures for the modification: the prior approval (known as *mutations*) and the immediate declaration (known as *changements*)[431]. *AMF* instructions identify the modifications that require a prior approval; they include the modifications of the program of activity (including those relating to the management structure, and authorized instruments), this modification covers the case of the reorganization and restructuring of the company[432]. Further,

[423] Article 6 Licensing Regulation of 2005 (the same obligation applies to the management of the company Article 46, article 20.b Licensing Bylaw of 2018); article 8 Licensing Bylaw of 2018; Article 10.1 UCITS Dir. 2009/65
[424] Article 59 JSL of 2017; C. mon. Fin., art. L. 532-9
[425] Article 9.d Licensing Regulation of 2005 (the same applies for the management of the company Article 48.d)
[426] The general reporting obligation (Disclosure) further explained in Part II
[427] *AMF,* instr. 2008-03, art. 8; C. mon. fin., art. L. 532-9-1; Article 80 Licensing Regulation of 2005
[428] C. mon. fin, art. L. 532-9-1(II)
[429] Article 5.6 UCITS Dir. 2009/65 ; article 22 Licensing Bylaw of 2018
[430] *AMF,* instr. 2008-03, Title 2; *AMF,* instr. 2011-19, Chapter 1 section II (article 6 and following)
[431] *AMF,* instr. 2008-03, art. 8; *AMF,* instr. 2011-19, art. 6
[432] *AMF,* instr. 2011-19, art. 18

the prior approval is requested in modifications affecting merger and acquisition operations[433]. In addition to the modification of the investment policy and strategy. As for modifications that request solely an immediate declaration to the *AMF,* they include modification of company's identifications (name, contact details and statutes), the changes in the capital structure (share ownership, affiliates and others) in addition to the modification of the compliance officer system (risk controllers and company correspondents). The modification procedure begins with submitting a two copies application (courier or electronic) while attaching all the required documents (the *AMF* has the right to request any complementary information post this application)[434]. In case of declaration, the *AMF* provides a template for the declaration, the Companies send it filled out to the Authority[435]. Following this submission, the *AMF* verifies the complete documents or information then it issues a decision. The *AMF* decision contains an approval of the modification[436], or decides that the modification does not require any further observation on its part[437]. The *AMF* may decide to issue a reasoned refusal to the modifications, or a notification of the impact and the eventual consequences the modifications will have on the issued authorization. Consequently, affecting investors' level of protection and the investment environment. The *AMF* provides extensive explanation of the modification method in specific cases that relate to the change in capital ownership (major takeovers)[438]. In addition, the case where the IC delegates its financial management[439].The Jordanian rules state explicitly the notification form[440], and addresses the obligatory nature of the prior approval of the JSC for the modifications of the AOA[441]. As for other modifications, they are submitted with the JSC as a natural result the JSC reviews the submitted change and have the discretion to exercise its

[433] *AMF,* instr. 2011-19, art. 21
[434] *AMF,* instr. 2008-03, art. 9.I *AMF,* instr. 2011-19, arts. 15, 13.1
[435] *AMF,* instr. 2008-03, art. 10; *AMF,* instr. 2011-19, art. 17 (Declaration on GECO data base)
[436] *AMF,* instr. 2008-03, art. 9.II; *AMF,* instr. 2011-19, art. 15
[437] *AMF,* instr. 2008-03, art. 10
[438] *AMF,* instr. 2008-03, art. 9-1; *AMF,* instr. 2011-19, arts. 13-2, 13-3
[439] *AMF,* instr. 2008-03, art. 10-1; The Instruction addresses two cases: the modification of the assigned entity and that relating to the initial assigning (delegation is limited in criteria and conditions). Both cases require an update of the program of activity; therefore, a mere declaration is not enough (Articles 11 and 12); *AMF,* instr. 2011-19, art. 9
[440] Article 80 Licensing Regulation of 2005 states the modifications that are communicated to the JSC. These modifications include those relating to company details, AOA, capital, merger and acquisition in addition to the cases the Company is involved in disputes before courts (whether or not a sentence is rendered)
[441] Article 98.b JSL of 2017; the newly implemented licensing bylaw of 2018 requires a prior approval of the JSC to the changes in the AOA, place of exercising business or branches and the change in initial capital (article 22)

discretionary powers to suspend or annul the license when the modification crucially affects the validity of such or approve the modification[442].

156 ***Consequential measures.*** Supervisory power of securities authority resulting out of issuing a license or an authorization provides it with general powers and competences. It permits the authority to impose sanctions, in addition to undertake a form of precautionary and disciplinary measures against the suspected company in all that concerns the legal value of the license or the violation of securities rules[443]. The securities authority, depending on the form of violation, issues four main decisions or undertakes four main measures in connection with the license. These decisions or measures include suspension, restriction, revocation and withdrawal of license[444]. The decisions directly affect the activities of the company as the IC risk being suspended consequently affecting shareholders' interest and needs. The first three measures are addressed in the Jordanian Securities rules as for the French rules they address a sole form that is the withdrawal of the authorization (*Retrait d'agrément*).

157 ***Suspension***. JSC's Council[445] may decide to suspend the license of a registered IC as either a preliminary precautionary measure or a final decision when the securities rules are violated. The suspension as a preliminary or precautionary measure is resorted to in cases involving violations of securities rules, including incorrect information in the license application, performing a restricted activity or in case an evidence of the incapacity of the licensee is presented[446]. In addition to the case of having an IC, facing risks (generally financial ones) or the activities of which are threatening market stability[447]. The preliminary measure is taken prior to the official questioning of the concerned individual or entity[448], or as a precautionary measure until further action by the JSC is taken[449]. The suspension is further

[442] Article 49 JSL of 2017
[443] Article 12 JSL of 2017: This Article addresses the general powers of the JSC's Council
[444] Article 12 JSL of 2017
[445] The executive body of the JSC, this council is responsible for the management of the Commission and the supervision of its activities (Article 10 JSL of 2017)
[446] Article 60.a JSL of 2017
[447] Article 82 Licensing Regulation of 2005; no such statement is addressed in the newly implemented licensing bylaw of 2018
[448] Article 60.c JSL of 2017
[449] Article 82 Licensing Regulation of 2005

imposed following a formal investigation[450] or questioning[451]. The suspension is a temporary action by nature that puts the license out of service meanwhile a follow up decision is reached; of revoking, withdrawing, restricting or lifting the suspension off the license[452]. The suspension does not void the license; therefore, the license can be re-issued if a decision of lifting the suspension is taken hence reinstating the financial services capacities.

158 ***Restricting a License.*** The financial license may be restricted for reasons including the violation of the securities rules, evidence of committed fraud or deception and the conviction before courts of committing fraud or deception in transactions involving securities[453]. The restriction may be taken following a suspension towards an IC that faces financial risks, or whose activities threaten the stability of the market[454]. A restricted license is a conditional license. This restriction is generally issued when valid reasons present that the IC in question can no longer adhere to the same standards and requirements as other financial institutions. The securities commission introduces a restriction to a valid license that illustrates the activities that can be exercised[455].

159 ***Revoking a License.*** It is a mandatory restraint imposed on a valid license. The revoked license is an invalid license that cannot be re-issued. The revocation of the license is reached as a result of an evidenced violation. The violation might be in the securities rules, license conditions or losing one of them[456], exercising a prohibited activity, evidence of incapacity to exercise the licensed activity, or including invalid information in the license application[457]. The revocation of the license is generally taken as a final decision[458] following a preliminary procedure including an investigation, a questioning[459] or a suspension[460]. If the IC wishes to re-

[450] Article 21.d JSL of 2017
[451] Article 60.a JSL of 2017
[452] Article 109 JSL of 2017; Article 60.d JSL of 2017; Article 82 Licensing Regulation of 2005
[453] Article 109 JSL of 2017
[454] Article 82 Licensing Regulation of 2005
[455] The *AMF* restricts financial activities of an authorized IC in the period preceding the withdrawal of the authorization. The Company is then permitted to perform transactions that are solely necessary to safeguard the interest of the clients (C. mon. fin., art. L. 532-10, *AMF*, régl. gén., art. 311-5)
[456] Article 6 Licensing Regulation of 2005; Article 58 JSL of 2017; article 8 Licensing Bylaw of 2018
[457] C. mon. fin, art. L. 532-10 ; *AMF,* instr. 2008-03, art. 24
[458] Article 60.h JSL of 2017
[459] Articles 21.d JSL of 2017;60.a JSL of 2017

exercise the financial activities licensed under the former revoked license, a new financial license should be issued. It should be noted that the financial license could be auto-revoked upon the request of the licensed company. Whenever the Company decides to cease its financial activities, the commission should be informed with the decision hence a decision of revocation is issued[461]. Once the decision of revocation, suspension or restriction is reached, the JSC registers this decision in the financial licensing registry[462]. Potential investors benefit from this form of registered information, whereas; the company can no longer refer to itself as a licensed company nor can it continue exercising its portfolio investments on the market.

160 ***Withdrawal of authorization***. Granting the authorization by the *AMF* is subject to the risk of withdrawal[463]. Securities rules identify certain elements that evoke the withdrawal, including the case when the concerned company is facing a financial risk, its activities might endanger the stability of the financial market or stakeholders' interests or the Company no longer fulfils the authorization conditions[464]. The authorization may further be withdrawn for reasons relating to the exercise of activities. If the IC does not commence its activities within a maximum period of twelve months following the issue of the authorization or ceases the performance of its activities for a minimum period of six months; the *AMF* then has full discretion to withdraw the authorization. Meanwhile the withdrawal decision is in the making; the *AMF* undertakes preliminary procedures including placing the company under its supervision and control by assigning an administrator to manage the Company's performance, in addition to restricting the performance of the Company to those transactions strictly necessary to safeguard clients' interests[465]. During the withdrawal decision-making; the IC loses its character as a portfolio investment company; therefore the Company should change its business name (*Denomination Sociale*)[466]. The authority notifies the concerned Company of the

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[460] Article 82 Licensing Regulation of 2005 (When it appears that the IC is facing a financial risk or that its activities threaten the stability of the market)

[461] Article 61 JSL of 2017; The requirements and process for the self-withdrawal of the license are found in the Instructions of 24/03/2013 provided by the JSC for this purpose; French rules address the same form of withdrawal upon company's request (*AMF,* instr. 2008-03, art. 23)

[462] Article 60.h JSL of 2017

[463] Article 98.2.k UCITS Dir. 2009/65

[464] C. mon. fin., art. L.532-10; *AMF,* instr. 2008-03, art. 24; Article 29.4 UCITS Dir. 2009/65

[465] *AMF*, régl. gén., art. 311-5

[466] C. mon. fin., art. L. 532-10

reasoned decision of withdrawal[467]. The authority informs the public with the decision[468]. The *AMF* may impose other forms of sanctions on the defaulted IC[469]; the sanctions may result in deregistering the Company (*radiation*)[470].

161 ***Renewable authorization.*** The licensing of the IC is neither indefinite nor automatically renewed or extended. The license or authorization is valid for a specific period, following which the license is renewed (generally on a yearly basis) and the authorization is extended. The request to renew or extend is not automatic; it is issued upon the request of the Company and is subject to the discretion of the securities authority[471]. The request for both renewal and extension should be made in writing, preceding the expiry of the license or authorization[472], following the form provided by the securities authority while attaching all the complementary information and documents that the authority may require[473]. The securities authority examines the application and issues its decision (approval or refusal) within a considerable period of time[474], during which the securities authority may request complementary information[475]. The extension or renewal of the authorization and license forms part of the continuous control and supervision securities authorities exercise over the IC. It provides another level of investor protection by verifying the current standing of the company.

162 ***Connection licensing and financial market.*** The decisions issued by the securities authorities under both Jordanian and French rules are very similar. Nonetheless, the Jordanian legislature chose to implement multiple terms to address separate measures when in fact these

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[467] The notification should be made by registered mail with acknowledgement of receipt (*AMF*, régl. gén., art. 311-5), the Company shall have the right to submit an observation within a month of the notification

[468] *AMF*, régl. gén., art. 311-4

[469] C. mon. fin., art. L. 621-15

[470] C. mon. fin., art. L. 532-12

[471] Article 49.a.b JSL of 2002 addressed the renewable nature of the license; in the newly implemented JSL of 2017 no such referral is made. The license is not considered for life despite the gap in the new law. In applying the Licensing Regulation of 2005 the license remains limited in time and requires renewing on a yearly basis; the newly implemented Licensing bylaw of 2018 does not address the renewability of the license. The absence of a legal affirmation of this kind raises the debate on the eternality of the license issued by the JSC; *AMF,* instr. 2008-03, art. 11

[472] The IC is obliged to submit the renewal request thirty days before the end of the financial year according to licensing regulation (before December 31st of every year); Article 10 Licensing Regulation of 2005

[473] Article 10 Licensing Regulation; Article 49.a JSL of 2002; *AMF,* instr. 2008-03, art. 12

[474] *AMF,* instr. 2008-03, art. 14

[475] *AMF,* instr. 2008-03, art. 13; Article 10.c Licensing Regulation of 2005

measures form different stages to a single measure. The withdrawal of the authorization contains the suspension, restriction and the revocation stages. The Jordanian legislature does not provide different levels of consequences to the different measures it provides. All the measures have the same disciplinary impact. This approach undermines the legal effect of the measures. Further, the Jordanian legislature in its approach does not provide definitions distinguishing one measure from the other. The legislature is advised to provide a global process entailing the different procedures instead of stating terminology without clearly allocating their utility. The license and authorization permit the IC to exercise its activities that principally relate to portfolio investments on regulated financial markets. To be able to perform the said activity and have access to the relevant market; the IC should be admitted as a member in this market, further illustrated in the following section.

Section B: Registration in the Local Market

163 ***Preview***. The financial market has a vital role within any country's economy. The market enables both the government and the industry to raise capital and provide a market where existing investors can sell and prospective investors can buy[476]. Investors seek financial markets when making their investment decisions. They balance between the rewards and the risks connected to the decision. Investors require a stable investment process, high level of confidence and efficiency. Further, they aspire for a post-investment protection and continuous supervision despite their level of professionalism. Markets naturally fluctuate or change in value. Fluctuations are inevitable they may result out of a regular economic cycle or as a result of irrational selling or buying; nonetheless some investors find opportunities in crisis[477].

164 ***Regulation aims and concept***. The reliance of investors on an efficient financial market, in addition to the aim of ensuring the proper functioning of financial markets and investor protection require a regulatory approach. The main objective of the regulation is to facilitate efficient and fair performance of economic functions. The objective has three dimensions: the institutional efficiency (free access to the market), the operational efficiency (reducing

[476] Neil Stapley, *The Stock Market: A Guide for the Private Investor* (Woodhead Faulkner 1986) Page 16
[477] Museum of American Finance, Curriculum Guide: *The Financial Markets* <http://www.moaf.org/education/curriculum/curriculum-guide-financial-markets/_res/id=sa_File1/Curriculum%20-%20Financial%20Markets.pdf> Accessed 12 October 2016

transactions costs) and the allocational efficiency (transparency and disclosure resulting in investor confidence)[478]. The regulatory approach to financial markets differs in its base of establishment; it might be based on the concept of transparency (fair disclosure) or introducing a system of enforcement (internal, external or administrative). Therefore, the financial regulation may be divided into a prudential regulation (safeguarding the solvency of financial institutions) and a conduct of business regulation (ensures honest dealings in the markets)[479], similar to the regulatory approach of the EU.

165 ***Market Participants***. Market participants are those who perform directly or indirectly the functions of a market despite its form. Participants of a financial market are classified into three main broad categories according to their motive of trading: investors, brokers and dealers[480]. Investors own assets and are motivated by the returns from holding the assets. They include private individuals, pension funds, institutions and trusts. Brokers act as agents for investors they are motivated by the remuneration "commission fees" for their services. Dealers, those who are motivated by profiting from trading and not holding assets. In many markets exists a group of specialists that ensure smooth functioning of trading mechanisms, they are called "market makers"[481]. Depending on the component of the financial market, the participants may also include issuers (main participant of a capital market includes legal entities that issues or proposes to issue securities[482] and trades them on regulated markets[483]. Issuers include listed

[478]Rudiger Veil (ed), *European Capital Markets Law* (Rebecca Ahmlingtr, Hart 2013) page 18

[479] Eddy Wymeersch, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors' [2007] 8 (2) EBOR p. 237

[480] Roy Bailey, *The Economics of Financial Markets* (1st edn, Cambridge 2005) page 35; Alain Couret and others, *Droit Financier* (2nd edn, DALLOZ 2012) page 29

[481] Article 4.1.7 MiFID II defined market maker as "a person who holds himself out on the financial markets on a continuous basis as being willing to deal on own account by buying and selling financial instruments against that person's proprietary capital at prices defined by that person". The SEC defined the market maker as "a firm that stands ready to buy and sell a particular stock on a regular and continuous basis at a publicly quoted price".<https://www.sec.gov/answers/mktmaker.htm> Accessed 13 October 2016

[482]Article 2.1.j Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJL 345/64 (Prospectus Dir.)

[483] Article 1.1.d Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market; Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC [2013] OJL 294/13

companies, banks, funds, insurance companies and others), clearing houses[484], transfer agents[485], and others.

166 ***Market Access.*** The access to financial markets is the freedom to enter into the market and trade in financial goods. In financial markets, goods include financial instruments and securities. Investors as market participants, access financial markets directly or through investing in companies that perform investment on their behalf when they lack the necessary knowledge. A perfect example of such companies is the IC. The question asked in this regard is the following: how can market participants access the market? The main functions market participants exercise include issuing and trading in financial instruments and securities, therefore the participants access the market through issuing or admission to trade of securities (equity or debt)[486]. To be able to exercise the functions and freely access the financial market the securities law imposes a market membership requirement on market participants[487]. This membership is a form of control and supervision competent authorities exercise. In order to fully understand the access mechanism this section preliminary defines the proper form of financial markets ICs should be accessing (sub-section 1), in addition to illustrating the registration or membership conditions the relevant market requires the IC to hold (sub-section 2).

Sub-section 1: Defining the Local Market

167 ***Financial market.*** Savings flow between investors worldwide through financial markets. Generally financial services providers exercise as main activity financial services that include trading in and issuing securities and financial instruments within an intended financial market. ICs form part of these financial services providers. These companies perform portfolio investments and similar to other Plc. they might need cash therefore they choose to borrow or

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[484] A financial institution that provides clearing and settlement services for financial instruments may be considered as an intermediary between buyers and sellers of financial instruments. The SEC provides two forms of clearing agencies: corporations and depositaries <https://www.sec.gov/divisions/marketreg/mrclearing.shtml> Accessed 13 October 2016; The *AMF* addresses clearinghouses in Title IV of Book V of its general regulation

[485] They stand between issuer companies and securities' holders, they are the official keepers of records < https://www.investor.gov/introduction-investing/basics/how-market-works/market-participants>

[486] A. Rechtschaffen n (305) Page 46

[487] Articles 66 & 67 JSL of 2017; C. mon. fin, art. L. 421-17; *AMF*, régl. gén., art. 513-1

dilute a fraction of ownership[488]. The borrowing is performed through issuing what is called debt securities (contractual obligations to repay corporate borrowing) and the dilution is performed through issuing equity securities (ordinary or common stock that represent non-contractual claims to the residual cash flow of the company). The issued securities are then traded on financial markets. A financial market is the place where financial assets are issued and traded[489]. It is the forum for the exchange of financial products; this market might either have a physical location or an information system that can be accessed from distance that shares data and prices[490]. The financial market is the place where professionals and retailers take an active part in the different processes of the market.

168 ***Functions of market.*** The functions of the financial market are connected to the general economic definition of a market. From a pure economic perspective the market is that set of arrangements that enables its participants reach voluntary agreements[491]. The main elements constituting this definition point out three obvious functions of the market. These functions include promoting price discovery; provide a trading mechanism and enabling the execution of agreements[492]. The financial market fulfills these functions through disseminating information, putting in contact buyers and sellers and most importantly ensuring that the terms of the agreements are being honored and respected what is known as the settlement function.

169 ***Role of market.*** The clearest and most important role financial markets has; is channeling savings to real investments. When performing this role financial markets contribute to the well-being of individuals and the functioning of the economy. Financial markets offer payment mechanism, borrowing, lending, and pooling risk, further to, providing information[493]. The role and functions of financial markets are followed despite the form this market might take. What are these forms? What does the financial market consist of? What is the proper market for ICs? Questions that arise every time the term financial market is mentioned. It is important to

[488]D. Hillier n (215) Page 10
[489]R. Brealey n (1) Page 359
[490] Lindsey Fell, *An Introduction to Financial Products and Markets* (1st edn, Continuum 2000) pages 18 and 93
[491] Claude-Danielle Echaudemaison, *Dictionnaire d'Economie et de Sciences Sociales* (2nd edn, Nathan 2018) page 309
[492]R.E. Bailey n (480) Page 34
[493]R. Brealey n (1) page 365

understand the composition and different categories of financial markets in order to define IC's market (further addressed in the following paragraphs).

§1: *Composition of the Financial Market*

170 ***Types of financial markets.*** Financial markets are trading venues for financial assets of all their forms, they offer the place to the different counterparties of a transaction to meet or find each other[494]. Trading in financial markets is based on the general principles of supply and demand. The different forms of fungible and intangible assets that are traded on financial markets influence the composition of the market, therefore splitting it into various categories based on the type of instruments traded within (capital market, commodities market, derivative market and money market). The financial market can be further classified according to features of the services it offers (technical, advisory or administrative), trading procedure (electronic "forums", virtual "exchange" or physical "over-the-counter"), market participants (professionals, retailers, officials or institutions) and the origin of the market (domestic, cross-border or international)[495]. The financial markets when classified in accordance to the products or financial instruments they are trading and their maturity generally include capital market, money market, commodities market and derivatives market. What is the difference between these types? The difference lies in the characteristics of the traded assets and the targeted investor.

171 ***Capital Market.*** The capital market, or as referred to in some occasions the cash market, is that sector of the financial market where long-term instruments are traded. Long-term instruments meaning those that have a maturity of over one year[496]. The capital market as other types of financial markets is a trading venue[497]; where demand and supply meet therefore

[494] C. Echaudemaison n (491) page 312
[495] Beate Reszat, *European Financial Systems in the Global Economy* (John Wiley & Sons 2005) page 20
[496] D. Hillier n (215) Page 10
[497] The European law defines the trading venue as "the regulated market, MTF or systematic internaliser acting in its capacity as such, and where appropriate a system outside the community with similar functions to a regulated market or MTF". (Article 2 Commission Regulation 1287/2006 of 10 August 2006 Implementing Directive 2004/39/EC of the European Parliament and the Council as regards record keeping obligation for investment firms, transaction reporting, market transparency, admission of financial instruments to trading and defined terms for the purposes of that Directive [2006] OJ L241/1)

allowing its participants to borrow, raise and publicly trade in capital[498]. The borrowing of the capital is generally performed by issuing bonds and shares perform the raise (what is known as equity). From both an economic and legal perspectives, the capital market consists of primary and secondary markets, in some cases it may be divided into sub-groups bond and stock markets (equity and debt). The distinction between the markets, the primary and secondary, puts the capital market in the context of having two subsidiary component markets providing two main case scenarios for the negotiations of financial instruments. The first is having an investor purchasing a financial instrument directly from the issuer or its underwriter, the second is having an investor purchasing from another investor who may or may not have purchased the financial instruments directly from the issuer[499]. Therefore; the first scenario is fulfilled in the primary market; meaning it is the place where issuers directly offer their financial instruments for the first time or offer new issues, and the second scenario is witnessed in the secondary market; where existing instruments are resold[500].

172 ***Primary capital market.*** There are two types of sales, in which issuers are engaged within the primary capital market: public offering and private placements. Within this market, there is also two sub-groups of markets equity and debt. To access these markets issuers using public offerings register with the local regulatory authorities[501]. The issuers within the primary market may issue debt-based financial instruments[502] or equity-based ones[503] that are underwritten directly through the issuer or a syndicate of investment banking firms in return the issuer raises cash.

173 ***Secondary capital market.*** The secondary type of capital market, which is also known as the aftermarket, provides the means to transfer the ownership; it involves an owner or a creditor selling to another. There are two forms of secondary markets dealer and auction markets. The

[498] R. Veil n (478) Page 73
[499] A. Rechtschaffen n (305) Page 47
[500] I. Chiu n (27) page 13
[501] Later emphasized in Title 2 of this Part; previously mentioned and further explained in sub-section 2 that the investment services provider is required to become a member of the market in which it intends to list its securities. Further to the registration with securities market authority and the disclosure obligation resulting out of this registration
[502] Bonds, like those issued by sovereign entities such as governments. They are essentially loans that have their terms of interest and repayment
[503] Common Stock, grants the purchaser an ownership right. The perfect example are shares issued by corporations

dealer market or what is known as the OTC (over-the-counter market) is the place where non-listed financial instruments (usually those that do not meet the exchange requirement) are being traded directly between dealers either by phone or electronically[504]. The auction market or exchange market is the place where the majority of the exchange occurs (it is what generally investors refer to as the stock exchange). Investors at auction markets purchase at a price established by a previous sell order of another investor and sell at the bid price established by a previous buy order of another investor[505]. Therefore, investors in this form of market enter into series of competitive bids and orders.

174 ***Money Market.*** Money market is a short-term marketplace known as a wholesale market in which financial instruments have a maturity or redemption date that is equal to or less than one year at the date of issuance[506]. This market facilitates the transfer of short-term funds from those who have excess of it to those who lack it for short-term needs, therefore allowing financial institutions to execute different functions. Including fund raising, cash and risk management and providing access to price related information[507]. This form of financial markets constitutes of several segments that are defined in terms of the participants (interbank markets the market through which banks lend each other). Further to the products traded within. Therefore exists primary money market that absorbs the issues and enables the raising of new funds. Secondary money market redistributes the ownership of short-term securities. In addition, derivatives money market deals with financial contracts whose value derive from underlying money market instrument.

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[504] EU Commission Memo 12/232 on Regulation on Over-the-Counter Derivatives and Market infrastructures of 29 March 2012 <http://europa.eu/rapid/press-release_MEMO-12-232_en.htm> Accessed 1 November 2016

[505] Roger D. Huang and Hans R. Stall, 'Dealer Versus Auction Markets: A Paired Comparison of Execution Costs on NASDAQ and the NYSE' [1996] 41 Journal of financial Economics <https://www.acsu.buffalo.edu/~keechung/MGF743/Readings/F1.pdf> Accessed 2 November 2016

[506] A. Rechtschaffen n (305) Page 48; C. Echaudemaison n (491) page 312 ; Marcia Stigum and Anthony Crescenzi, *Stigum's Money Market* (4th edn, McGraw Hill 2007) page 1; Jens Forssbaeck and Lars Oxelheim, 'The Interplay between Money Market Development and Changes in Monetary Policy Operations in small European Countries 1980-2000' in David Mayes and Jan Toporowski (eds), *Open Market Operations and Financial Markets* (Routledge 2007) page 126

[507] Valdonė Darškuvienė, 'Financial Markets' (2010) Leonardo da Vinci programme project on the Development and Approbation of Applied Courses Based on the Transfer of Teaching Innovations in Finance and Management for Further Education of Entrepreneurs and Specialists in Latvia, Lithuania and Bulgaria <http://www.bcci.bg/projects/latvia/pdf/7_Financial_markets.pdf> Accessed 1 November 2016

175 ***Commodities Market.*** Commodities market is a public market where commodities are being traded. They are purchased or sold at a price agreed on between the counterparties for the delivery on a designated date (future commodities) or in direct physical trading[508]. What constitutes a commodity? The commodity is the marketplace item produced to satisfy the needs. Meaning it is a raw material or a primary agricultural product that is tradable[509]. The perfect example of these commodities include crude oil, rubber and coal[510]. This market may take several forms for both direct physical and derivative trading. These forms include the spot price (the prices and the exchange of the product occur in the present), futures (trading in future obligations taking delivery instead of the actual commodity)[511], forwards[512] and options[513].

176 ***Derivative Market.*** Derivative market is the place where different investors; trade using standardized or tailor-made contracts in derivatives[514]. The term derivative means that the product traded in this market is not the original asset but the product derived or obtained from it, therefore the value of this derivative depends on the value of the underlying asset[515]. Derivatives are financial instruments that consist of a contract entered into between a buyer and a seller to execute a transaction at a future point of time, where the value of this derivative fluctuates during the life of this contract[516]. Trading in derivatives market includes two segments: off-exchange (what is known as OTC) and the on-exchange (the standardized contracts). Financial

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[508]Commodities Market: an overview <http://shodhganga.inflibnet.ac.in/bitstream/10603/37257/3/chapter2.pdf> Accessed 6 November 2016

[509] An Approach on how to trade in commodities market <http://www.karvycommodities.com/Documents/AnApproachToHowToTradeInCommoditiesMarket130520 13.pdf> Accessed 6 November 2016

[510] For further explanation on the different commodities and their global indexes throughout the years; see World Bank Group report 'Commodities Market Outlook' dated October 2016 <http://pubdocs.worldbank.org/en/143081476804664222/CMO-October-2016-Full-Report.pdf>

[511]Carley Garner, *A Trader's First Book on Commodities: An Introduction to the World's Fastest Growing Market* (2[nd]edn, Pearson 2013)

[512] Forward contract is an agreement to buy or sell an asset at a designated time in the future and for a certain price

[513] Options give holders rights to exercise an action without imposing an obligation. There are two forms of options the call option (right to buy at a certain date and for a certain price) and the put option (right to sell at a specific date and for a designated price)

[514] John C. Hull, *Options Futures and other Derivatives* (8[th]edn, Prentice Hall 2012)

[515]Michael Chui, 'Derivatives Market, Products and Participants: An Overview' 35 IFS Bulletin <http://www.bis.org/ifc/publ/ifcb35a.pdf> Accessed 6 November 2016

[516]Deutche Borse Group, The Global Derivatives Market: An Introduction (2008 <https://www.math.nyu.edu/faculty/avellane/global_derivatives_market.pdf> Accessed 6 November 2016)

institutions usually use the derivatives as an insurance mechanism against the unwanted movements of prices, in addition to being used as an alternative investment method.

177 ***Other categorization of markets.*** Financial markets are generally in one way or another regulated. The main purpose of financial markets regulation is the protection of investors from improper and unfair practices. The level of supervision and control exercised and the conditional permissions granted by national securities authorities differs creating two forms of markets regulated and non-regulated ones.

178 ***Regulated market.*** Regulated market is a market for the financial instruments that functions regularly, and where its operation, the conditions for the access and those for listing, in addition to the conditions that should be met by the financial instruments traded within; is defined by regulations issued and approved by competent authorities[517]. This form of market further complies with the transparency and reporting requirements. The regulated market is seen as a: *multilateral system that is operated and/or managed by a market operator, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments in a way that results in a contract, in respect of the financial instruments admitted to trading under its rules and/or system*[518].

179 ***Transition***. After identifying the different forms and categories of financial markets, various questions arise in this regard including: which of the mentioned categories of markets fits best the needs of IC? Is it a sole market or does ICs have a choice? These questions and others addressed in the following paragraph.

§2: *Defining Investment Company's Market*

180 ***Structural organization.*** Nationally every country follows its preferred organization to the different categories of financial markets. The economic level, the available commodities and resources, in addition to any existing regional structures, may influence this organization. When referring to the main legal frameworks addressed in this paper: French and Jordanian ones, we

[517] Article 1(13) Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field OJ L 141/27; This definition was further referred to in Article 2 (1)(J) Prospectus Dir.
[518] Article 4 (1)(21) MiFID II, this definition was referred to in Article 9(1) UCITS Dir. 2009/65

note that the structures were close, nonetheless the EU structural proposal influenced the organization of French financial markets.

181 ***French structure.*** On a French level, the fifth book of the *AMF* general regulation defined the constitution of the financial market. This book states that the market consists of five main forms that include regulated markets, multilateral trading facilities (MTF), systematic internaliser, clearing houses[519] and the central depository[520]. The existing EU directives that address the components and operation of these different infrastructures influence the entirety of this structure. The former paragraph introduced generally the different forms of financial markets from a mere theoretical point of view. The legal organization of these forms does not differ much from the financial theory. Legislation merely codifies every form and provides the most appropriate rules and procedures that aim at protecting investors and safeguard the integrity of the market.

182 ***Regulated French markets.*** The regulated markets, one of the essential forms referred to throughout this paper, are those regulated by law and both their exercises and members fall under the supervision of the relevant securities authorities. Both the *AMF* general regulation and the *Code Monétaire et Financier* address markets' organizational rules and their code of conduct[521]. These markets defined as the markets for financial instruments that consist of a multilateral system that insures or facilitates the meeting of different interested buyers and sellers of financial instruments, within its scope and following its set rules, a meeting that results into entering into a contract involving financial instruments negotiated on this market[522]. This form of markets managed by a market operator incorporated as a commercial company[523].

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[519] Also known as central counterparty (CCP) defined in Article 2(1) Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories OJ L 201/1; C. mon. fin., art. L. 440-1; *AMF*, régl. gén., art. 541-1 and following

[520] Defined as "a legal person that operates a securities settlement system providing services that include mainly settlement services in addition to notary and central maintenance services": Article 2(1)(1) Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012OJ L 257/1; C. mon. fin., art. L. 441-1

[521] C. mon. fin., art. L. 421-4

[522] C. mon. fin., art. L. 421-1; A similar definition is stated in Article 4 (1)(21) of MiFID II

[523] C. mon. fin., art. L. 421-2

They are subject to the supervisory power of the *AMF*[524]. The perfect example of regulated markets in France is the Paris Stock Exchange[525]. It is operated by the NYSE Euronext Paris SA (the one principle market in France). This market includes the Euronext Paris Market[526] (contains the main board and the professional compartment[527]) in addition to the Alternext[528].

183 ***Other market infrastructures.*** Regulated market differs from the MTF, as the latter is a non-exchange financial trading venue, considered as an alternative to traditional stock exchanges where the market is made up of securities typically using electronic systems[529]. The regulated market is different from the systematic internaliser, as it consists of an investment firm which on an organized, frequent and systematic basis deals on own account by executing clients' orders outside the regulated market or the MTF[530].

184 ***Jordanian Structure.*** The JSL defines the financial market as any securities market licensed and registered with the JSC[531]. The securities market[532] and the Amman Stock-Exchange are regulated markets that fall under the supervisory power of the JSC. The ASE is a secondary capital market that consists of different specialized market segments including: first[533], second[534] and third markets[535], bond market, fund market, subscription right market and

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[524] C. mon. Fin., art. L. 421-3,4; *AMF*, régl. gén., art. 511-5; regulated markets are subject to the supervision of the authority of prudential control (*ACPR*) (C. mon. fin., art. L. 421-4). The *ACPR* ensures the stability of the financial system and protects the beneficiaries and clients of the persons falling under its control. Its missions and scope of competence is defined in the financial and monetary code (C. mon. fin., art. L. 612-1)

[525] Jean-Luc Soulier and Sandra Vreedenburgh, *Securities Law in France* in Marcus Best and Jean-Luc Soulier (eds) , *International Securities Law Handbook* (3rd edn, Kluwer Law International 2010) page 203

[526] The main Paris stock exchange. It is a regulated market where companies list their stock, once the company is admitted to the market it complies with its admission rules along with those provided in the governing rules

[527] The professional compartment is a platform for listing of shares as well as specialist securities such as debt securities, convertible or exchangeable securities of any denomination

[528] A trading venue designed for small and recently incorporated companies. It provides less strict regulatory environment

[529]C. mon. fin., art. L. 424-4; Article 4 (1)(22) MiFID II Directive

[530] C. mon. fin., art. L. 425-1; Article 4 (1) (20) MiFID II Directive

[531] Article 2 JSL of 2017

[532] Article 64 JSL of 2017

[533] Defined as that part of the secondary market that provides a trading venue for companies' listed stock in accordance with its special rules and conditions provided by law

[534] Defined as that part of the secondary market that provides a trading venue for companies' listed stock in accordance with its special rules and conditions provided by law

[535] Defined as that part of the secondary market where companies' stock not meeting listing requirements of neither the first nor the second market are traded

OTC[536]. Jordanian rules address a Securities Depositary Center (SDC) as part of the listing and issuing procedure of securities, this center is responsible for the registration and listing of the securities in addition to settlement and clearing services[537].

185 ***IC market membership.*** After going through the legal elements of the available national market structures, and considering the form of securities or financial instruments the IC trades in; we note that the IC fits perfectly within a capital market in both its categories primary and secondary. A question may be introduced in this regard: whether or not national legal rules explicitly state the form of financial markets within which ICs trade their financial instruments. Under the Jordanian rules, being a Plc. the IC is obliged to list its shares on regulated capital markets[538]. Therefore, IC becomes a member within the intended market and follows the internal regulatory rules. French rules provide a similar statement, nonetheless they only address the listing of the IC company shares on regulated markets[539], therefore when considering the form of financial instruments this company issues and lists; we deduce that *SICAV* trades its shares on regulated equity markets.

186 ***Industrial organization.*** The structural organization of financial markets differs nationally depending on the adopted regulatory regime in each country further it is influenced by the economic level of each country. Nonetheless, different regimes adopt successful structures from each other and transpose them nationally. The financial market regulation that covers financial transactions can be traced back in history to the most ancient civilizations, yet, the notion that applies the economic principles to the design and implementation of regulatory structures of financial market is a relatively modern one[540]. Financial markets do not at all times operate within formally constituted exchanges. When referring to those markets that do so, two main categories are noted: the mutually owned cooperatives and the shareholder-owned companies[541]. A formal organization such as the exchange; facilitates and coordinates the

[536]Article 2 Regulation for Listing Securities on the ASE for the year 2016
[537] Articles 74 & 75 JSL of 2017
[538] Article 69.b JSL of 2017
[539]C. mon. fin., art. L. 214-7; C. mon. fin., art. D. 214-22-1; UCITS Directive refers to regulated market as that mentioned under the MiFID II (Article 9(1))
[540] Andrew w. Lo (ed), *Introduction to The Industrial Organization and Regulation of the Securities Industry* (University of Chicago Press 1996) page 2
[541] R. Bailey n (480) Page 41

cooperation between suppliers of financial transaction services; therefore, exchanges may be considered as institutions devised to reduce transaction costs[542]. The notion of the industrial organization of the securities industry is mainly connected to the level of cooperation and coordination present among different markets, while at the same time applying the most efficient rules to guarantee market integrity, achieve freer access and most importantly reduce costs. All of which leads to the connection between finance and competition rules. The different financial markets compete with each other, investors in some markets are considered as better informed than others, and the membership of these organizations may be faced with entry barriers, therefore orienting the discourse back to the role of the regulation while considering functions and goals of financial markets; most importantly those relating to investor protection. Considering the IC as a participant in the securities industry, specifically in the capital market means that this Company should acquire the necessary authorizations and seek the needed memberships in order to be an active participant and an operational element. After defining the proper local financial market of the IC, the following sub-section illustrates the membership requirement within this financial market. An essential process in order to perform the activities of an issuer and later a dealer within the intended financial market.

Sub-section 2: Registration and Membership Procedures

187 ***Concept of Membership***. To be able to access the market and freely trade in financial instruments, ICs along with other Plc. are required to become members of their intended market[543]. The membership capacities and what can be exercised within the market are determined by the scope of the authorization or the license the competent securities authority grants to the member[544]. Considering this statement leads to having a membership procedures executed post financial licensing or authorization and not parallel[545].

188 ***Requirement***. National securities rules state the membership requirement and links the membership to the exercise of investment services. The admission conditions and regulatory

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[542] Craig Pirrong, 'A Theory of Financial Exchange Organization' [2000] 43 J.L & Econ. <http://heinonline.org.ezp.slu.edu/HOL/Page?handle=hein.journals/jlecono43&div=23&start_page=437&collection=journals&set_as_cursor=0&men_tab=srchresults> accessed 26 November 2016

[543] Article 7 Internal Bylaw of the Amman Stock Exchange of the year 2004

[544] Rule 2102/1 Euronext Harmonized Rule Book of 2016

[545] *AMF*, régl. gén., art. 513-2; Article 8.a.1 Internal Bylaw of ASE of the Year 2004

framework on the other hand, is left to the discretion of every financial market. This discretion is subject to the elements of transparency and non-discrimination based on objective criterion[546].

189 ***Membership vs registration***. The main aim of the membership is to have access to the financial market and be able to list and trade financial instruments within the intended one. This stage is distinct from the registration[547] of financial instruments at the securities depositary center therefore the latter comes consequently to the membership, in other words the membership is a prerequisite to the registration. This distinction is further explained in this sub-section alongside the membership process.

§1: *Timeline of the Procedural Process*

190 ***Membership application.*** IC and other Plc. file a membership application in accordance with both; general regulatory framework set by law and internal detailed governing rules imposed by the intended financial market[548]. The intended financial market for IC is the capital market; therefore, the rules and regulations of this market state membership conditions and the process of application for all financial institutions, including the IC, on which they look into listing their financial instruments[549]. The IC that is incorporated in Jordan or France finds its applicable membership related rules in the regulatory framework provided by the national stock exchanges; the ASE[550] and the Paris Stock Exchange (PSE) respectively[551].

191 ***Application content.*** The admission to membership of the securities market require the IC, despite its country of incorporation, to file a written membership application with its intended market[552], in accordance with the standard form the market provides[553]. The applicant company's signatories sign the form, further, they attach the entirety of documents and

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[546] C. mon. Fin., art. L. 421-17; Articles 64 & 69 JSL of 2017

[547] The relevant securities commission determines the securities that are subject to the registration requirement, this registration is primarily addressing corporate debt and equity securities; A. Rechtschaffen n (305) Page 141

[548] Article 68 JSL of 2017; Article 7 Internal Bylaw of ASE of the year 2004: this Article addresses financial intermediaries and states that ASE's membership includes any other financial institution that the Securities Commission Council requests its admission to membership; C. mon. fin., art. L. 421-17; C. mon. fin., art. L. 421-18

[549] Rule 2101/1 Euronext Harmonized Rule Book of 2016

[550] For ICs incorporated under the Jordanian Law

[551] For *SICAV* incorporated in France or those incorporated in other European MS

[552] Rule 2301/1 Euronext Harmonized Rule Book of 2016

[553] Rule 2302/1 Euronext Harmonized Rule Book of 2016; Article 9.a Internal Bylaw of ASE of the Year 2014

information the market requires[554]. The IC when submitting the membership application fulfils the membership eligibility conditions[555]. The minimum information and details that should be stated in the application include among other things the name and the address of the Company, the registration certificate (with the company controller). Further to, the written permission to commence the activities, the AOA and MOA, the financial licensing or authorization, and management details. In addition to the list of shareholders holding more than five percent of the capital.

192 ***Membership criteria.*** To be an eligible candidate for the securities market membership the IC, despite the country of its incorporation, should hold at the time of application a financial license or authorization issued from the competent securities authority, and enjoys the business standing suitable for such an admission[556]. Further, the staff and management hold the necessary qualifications, experience and expertise to perform its business activities on the market, has sufficient resources, fulfils the language requirement (required by the Euronext considering that it is a pan-European financial market), and enjoys technical requirements requested by the market[557]. The IC is further required to appoint at least two responsible persons (registered staff)[558], the Euronext rules further request authorized representatives that do not exceed five persons and are distinct from the responsible persons[559]. These conditions are continuous and not instant[560]. The IC should hold these conditions valid as long as it is considered a member in the market.

193 ***Decisions relating to application.*** Once the membership application is submitted the market reviews the application and verifies if it is complete and includes the entirety of the list of documentation and whether or not the eligibility criteria is fulfilled. Following this stage, the market reaches a decision based on the application (the market has the sole discretion to issue

[554] Rule 2302/2 Euronext Harmonized Rule Book of 2016; Article 9.a Internal Bylaw of ASE of the year 2014
[555] The eligibility conditions mentioned in Article 8 of the Internal Bylaw of the ASE address explicitly the intermediaries, and are implicitly applicable over the remaining members of the ASE
[556] Required by the Euronext for non-MiFID undertakings such as UCITS
[557] Article 8.a Internal Bylaw of ASE of the year 2014; Rule 2201/1 Euronext Harmonized Rule Book of 2016
[558]Article 8.aInternal Bylaw of ASE of the year 2014; Article 4 Euronext Notice 2-01 dated 4 August 2014 on the Registration of Authorized Representatives and Responsible Persons
[559] Articles 9 and 11 Euronext Notice 2-01 of the year 2014
[560] Article 8.b Internal Bylaw of ASE of the year 2014; Rule 2101/4 Euronext Harmonized Rule Book of 2016

this form of decisions)[561]; the market either approves[562] or rejects[563] the membership of the IC[564]. Any decision that contains a rejection or refusal to admission should be reasoned[565].

194 ***Open or limited membership.*** The admission to membership on regulated markets is not open to everyone, alongside the criteria and eligibility conditions that the applicants go through; the financial market has the full discretion to limit the number of admitted members (this decision is taken by the market operator)[566].

195 ***IC admission to market.*** Once the approval decision is issued by the market and the IC is officially considered as an active member of the capital market, the legal consequences are due and the Company is expected to adhere to post-membership obligations that include among other things abiding to the rules of the market in addition to issuing shares. The aftermath of the admission to membership and the legal consequences resulting out of a positive decision by the market are further illustrated in the following paragraph 2.

§2: *Admission to Membership Aftermath*

196 ***Legal consequences.*** Once the securities market approves the membership application of the IC, it becomes an official active member of this market[567]. Within this market, it can exercise its authorized business activities. As a natural legal consequence to the membership, the IC should maintain the membership conditions valid as long as it remains a member[568].

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[561] Under the Jordanian rules the period during which this decision is issued should not exceed thirty days following the date the complete application is submitted (Article 10.a Internal Bylaw of ASE of the year 2014)

[562] Under the Euronext rules the membership may be restricted or conditional, it is left to the discretion of the market to evaluate the appropriateness of the scope of membership of the undertaking in question

[563] Where can the ASE decisions be contested? Administrative or regular courts? Is the ASE considered a public entity or not? The explanatory decision number 1 of the year 2012 states that the ASE is considered as a non-official public entity for the matters that relate to the supervision of the ombudsman over its actions. The newly implemented JSL of 2017 states explicitly that the decisions of the ASE are contestable before the JSC, strictly the decisions relating to securities. The decision of the JSC can later be contested before administrative courts (article 73 JSL of 2017)

[564] Article 10.aInternal Bylaw of ASE of the year 2014; Rule 2303/1 Euronext Harmonized Rule Book of 2016

[565] Rule 2303/1 Euronext Harmonized Rule Book of 2016; Article 10.c Internal Bylaw of ASE of the year 2014

[566] C. mon. fin., art. L. 421-19

[567] Article 10.b Internal Bylaw of ASE of the year 2014; the member should commence exercising its activities six months follwoing the date of admission to the market, failing the exercise within the set period may result in the termination of its membership (Article 12.b Internal Bylaw of ASE of the year 2014)

[568] Article 8.b Internal Bylaw of ASE of the year 2014; Rule 2101/4 Euronext Harmonized Rule Book of 2016

Further, abiding to market's internal rules and regulations[569]. The most important legal consequence to the admission to membership, considered the main reason behind it, is the ability to list and trade financial instruments on the intended market[570].

197 ***Members' obligations.*** Members of the capital market share similar continuous obligations towards the market and implicitly towards each other and the investors. The obligations imposed by the market are similar to those stated under the financial authorities' rules. Therefore, the member of the market, including the IC, adheres to multiple similar internal regulations that has the safeguarding of investors' interests and the integrity of the market as their guiding principle. What form of obligations does the market impose on the IC particularly and the remaining members generally? The obligations may be classified in different categories; financial obligations, transparency obligations and obedience obligations.

198 ***Financial obligations.*** Include payment of membership fees and those charges relating to the exercise of business activities[571]. The importance of financial obligations is connected to the ability to become an active member in the market's GA. As those members who do not pay their annual membership fees and their enrollment fees cannot participate in the market's GA, hence they lose their right to vote in the GAM[572].

199 ***Transparency obligations***. The IC complies, as a member of the capital market, with disclosure conditions and requirements provided in the internal rules of the market[573]. The disclosure addressed in these rules exists along with that imposed by national securities' authorities and does not in, any way replace it[574]. The IC informs the market with any material change in the information provided in the membership application[575], give prior notice of any

[569] Rule 2401 Euronext Harmonized Rule Book of 2016; Articles 9.a (12) & 30.a Internal Bylaw of ASE of the year 2014; The IC signs a written form with the ASE that states the absolute commitment of the Company with market's internal rules and regulations (Article 30.c Internal Bylaw of ASE of the year 2014)
[570] Article 12 Internal Bylaw of ASE of the year 2014
[571] Rule 2401 Euronext Harmonized Rule Book of 2016; Article 30.a (2) Internal Bylaw of ASE of the year 2014
[572] Article 13 Internal Bylaw of ASE of the year 2014
[573] Article 32 Internal Bylaw of ASE of the year 2014
[574] The reasoning for the existence of both forms of disclosures is reasoned by the fact that regulated markets are supervised by the national securities authority same as they supervise their members
[575] Article 33.c Internal Bylaw of ASE of the year 2014

circumstances that may affect its legal form, organization or financial standing[576], submit annual and regular financial reports[577], in addition to informing the market of any ongoing legal actions[578].

200 ***Obedience obligations.*** IC abides to the internal rules and regulations of the intended market. To fully adhere to these rules the IC complies -at all times- with membership conditions including those connected to technical requirements and most importantly the Company fulfils the obligations mentioned in the admission agreement[579]. The obedience and subordination of the IC results in the creation of a sort of supervisory power of the market over the actions and activities of this Company and all its members in general[580]. This supervision takes several forms including disciplinary and investigatory. Disciplinary actions the market resorts to include sanctioning its members for their misconducts and violations of market's internal rules[581], in addition to terminating or annulling the membership and the suspension of the trade for those same reasons or when it deems necessary[582]. As for the investigatory actions, they include on-the-spot inspections[583], and investigations[584], that the representatives of the market perform when there is a suspected misconduct or violation[585].

201 ***Overview of financial requirements.*** The legal personality of the IC is created the minute it is fully registered in the companies' registry in its state of incorporation. This personality bestows on the IC the moral person characteristic. The IC then generally commences the exercise of its business activities. Nonetheless, this exercise is restricted to obtaining prior authorization and fulfilling financial administrative prerequisites. They include obtaining a

[576]Article 33.b Internal Bylaw of ASE of the year 2014
[577] Article 33.a Internal Bylaw of ASE of the year 2014
[578] Rule 2401 Euronext Harmonized Rule Book of 2016
[579] Under French securities rules membership in regulated markets creates a contractual relation between market operator and the member (C. mon. fin., art. L. 421-18), it results out of an agreement entered into between them (*AMF*, régl. gén., art. 513-5). The disputes arising between these two parties may be resolved through arbitration (*AMF*, régl. gén., art. 516-16)
[580] Rule 2302/3 Euronext Harmonized Rule Book of 2016; Article 5 Internal Bylaw of ASE of the year 2014
[581] Article 36 Internal Bylaw of ASE of the year 2014
[582] Article 11 Internal Bylaw of ASE of the year 2014; *AMF*, règl. gén., art. 514-3
[583] Article 34 Internal Bylaw of ASE of the year 2014
[584] Article 35 Internal Bylaw of ASE of the year 2014
[585] Members should authorize the market to perform regularly or when it deems necessary; the inspections over their financial records and registries (Rule 2401 Euronext Harmonized Rule Book of 2016); Article 65 JSL of 2017

financial license or authorization from the competent securities authority of the Company's state of incorporation, which permits the IC to exercise its business activities. The licensing is followed by a membership obligation in the relevant capital market in order to facilitate the trading in financial instruments. Trading on financial markets requires the registration of the said financial instrument at the competent securities depositary center. The question that we can ask in this regard is the following: Can the IC switch between the different markets once it is a member with one of them? Generally, under ASE rules, Plc. may move between the available sub-markets of the capital market as long as their financial instruments meet trading and listing conditions provided by every segment[586]. The following title addresses the issuing and listing of financial instruments on regulated markets (chapter 1) in addition to the conduct of the IC within the financial market (chapter 2).

[586] Article 5 & 7 Listing Regulation on the ASE of 2016

Title Two: Post-Establishment Requirements: The Birth of a Financial Legal Person

202 ***Juridical person.*** Not the standard natural person subject to the majority of legal rules. Law grants the legal personality to ICs consequently to fulfilling the incorporation and licensing prerequisites. This personality opens the door to the possibility to treat the company as an asset alongside its legal personality. To some extent, the company is an asset. This statement is true regarding the view shareholders may have of the company "something they own". The company is an asset in the sense of being a subject of law with a patrimonial value (the moral person itself) further to, a collective entity endowed with a legal capacity[587].

203 ***Reasoning for market access.*** The IC is a moral person with financial activity. It accesses financial markets as its core activity. IC provides investments while taking into consideration their different characteristics; risk, return, safety, liquidity and marketability[588]. Therefore, having tradable investment instruments. The access is not random. It is based on several expectations, goals and targets differing from one market participant to the other. The different financing and investment resources available at financial markets unite market participants. Financial undertakings choice of access differs depending on the character of the researched investment resource. The notion of financial markets is dispersed; it does not respond to one unique definition. The definition of the financial market in question depends on the object of the undertakings' question. Is it money, financial instruments or goods? The choice of the financial market is a multi-dimensional one. Both the undertaking and the individual investor have various options to choose from when investing or looking for an investment. In the sphere of ICs, the proper choice is regulated capital market.

204 ***Methods of market access.*** ICs access their intended capital market in the aim of trading their products and the available ones on this market. The product is a financial one. It consists of financial instruments IC issues, lists and trades in. ICs available methods for market access include offering financial instruments for public sale (through PO for sale) or trading in financial instruments (acquisition). PO is one of the most well-known investment resources. It

[587] Pierre Mousseron et Lise Chatain-Autajon, *Droit des Sociétés* (2nd ed, Joly 2014) page 36
[588] V.A Avadhani, *Securities Analysis and portfolio Management* (12th edn, Himalaya 2016) pages 6 & 7

plays a crucial role in providing an investment opportunity for different investors in addition to determining investor protection related rules. The rules translate mainly into a disclosure and communication obligation. PO is a method through which financial instruments are offered to the public[589]. The access therefore is the means through which ICs exercise their financial activities on their intended market.

205 ***Exercise and corporate governance.*** Generally, ICs exercise their financial activities through a management body that holds powers to execute decision-making process as efficiently as the interest of shareholders require. Corporate governance rules rise as means to structuring the decision-making powers to avert from having a management that allocates personal revenues on the expense of company's shareholders. On a broader term, corporate governance when implemented refers to different financial theories in connection with its main structure and object. These theories include market in equilibrium that structures the company as a black box, which holds no distinction between the interests of its different elements[590]. The agency theory[591] considered as the intellectual foundation of corporate governance. In addition to the entrenchment theory (managerial entrenchment), broadly states that, mechanisms are not always sufficient to the management to run the company in the interests of its shareholders as managers may aim at making their replacement very costly therefore increasing their powers and discretionary powers[592]. IC follows market and securities rules in the process of providing their financial services. The law provides two options for the exercise direct or indirect. This title addresses the market rules the IC follows to have their shares listed on the intended capital market (chapter 1). Further to the internal control mechanisms followed in the course of exercising their financial activities through auto management or outsourcing (chapter 2).

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[589] C. Echaudemaison n (491) page 356

[590] William Sharpe, 'Capital asset Prices: A Theory of Market Equilibrium under Conditions of Risk' (1964) 19 (3) Journal of Finance 425; Gregory Chow, *Dynamic Economics: Optimization by the Lagrange Method* (OUP 1997) page 54

[591] An agency relationship defined as a contract under which one or more persons (the principal) engage another person (the agent) to perform services on its behalf. If both parties to the relationship are utility maximizers, the agent does not always act in the best interest of the principal. The principal can limit divergences from his interest by establishing appropriate incentives for the agent and by incurring monitoring costs designed to limit the aberrant activities of the agent (Michael C. Jensen & William H. Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics 305)

[592] Andrei Shleifer & Robert W. Vishny, 'Management Entrenchment: The Case of Manager-Specific Investments' (1989) 25 Journal of Financial Economics 123

Chapter 1: Market Related Conditions: Exercising Financial Services Activities

206 ***Preview.*** The exercise of financial services as part of the activities of Plc. in general and IC in particular, puts securities and financial instruments as core object of these services. Securities or financial instruments generally defined as financial goods traded on their relevant financial market. Established as a Plc.[593] the IC follows the same requirements and fulfills the same conditions as other Plc. to the extent the particularity of this Company allows. IC as other Plc. trades its goods and provides its services to concerned investors within financial markets. Generally, every Plc. has a capital that consists of shares traded on regulated markets[594]. To be eligible for this trading Plc. is granted a financial license to exercise financial activities including that of an issuer[595]. Consequently, the IC is similarly licensed. The question rising in this regard that feeds the following debate is whether the IC is considered an issuer as other Plc. or does the particularity of the open-end form of this company require otherwise.

207 ***Issuer.*** The issuer as a character and an activity was defined by different domestic and regional legislations as the undertaking that issues securities or financial instruments or expresses its will to issue them[596], those undertakings whose securities are the subject of an application for admission to official listing on a stock exchange[597].

208 ***Investment Company as issuer.*** If the IC is, a Plc. then as an automatic consequence it issues shares and trades them on regulated markets. This auto classification restrained in the case of the IC. Previously addressed, IC is exempted from minimum capital requirement rule applied globally to all Plc.[598]. Furthermore, the IC has a main object and provides as its main activity; collective investment services. IC does not as a general term trade its own shares on regulated market this Company has as its main purpose the collective investment in transferable

[593] C. mon. fin., art. L. 214-7; Article 209.a JCC
[594] C. com., art. L. 225-1; Article 90.a JCC
[595] Article 4 Licensing Regulation of 2005
[596] Article 2 JSL of 2017
[597] Article 1.a Codified Listing Directive (Council Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities [2001] OJ L 184/0001)
[598] Article 209.b.2 JCC

securities or any other liquid financial assets[599]. These particular conditions feed the debate concerning the issuer character of the IC.

209 ***Exemption minimum capital requirement.*** OEIC is exempted from maintaining the minimum capital that is legally required for Plc. that share the same category of activities. This exemption applies in later stages of the life of the Company. It is directly linked to the variability of this company's capital[600]. Having a fluctuating capital[601] requires a derogation from the rules that strict capital movements[602]. Therefore, IC in the stage of incorporation is obliged as other Plc. to fulfil initial capital requirement provided by law. For purposes of most efficient performance of activities, in addition to accomplish the flexibility in redeeming and repurchasing shares at any moment the IC is exempted from holding the capital required by law. This exemption is restricted; IC assures a minimum liquidity or asset at hand[603]. The restriction is connected to shareholders' right to request the redemption of their shares at any moment[604]. The fear of emptying the liquidity of the Company requires ceasing the redemption if the assets at hand do not mount to the threshold provided by law[605].

210 ***Character of issuer.*** The IC is an issuer and it is licensed to exercise the activities of an issuer mainly for purposes of the incorporation stage. The IC is not obliged to reissue new securities during its existence. In some cases, the IC is exempted by legislation from the application of general issuing and later listing conditions that apply globally to issuers of financial instruments[606]. The IC may in later stages request to suspend its issuer activities such

[599]Article 209.a JCC ; Article 1.2.a UCITS Dir. 2009/65 ; C. mon. fin., art. L. 214-7
[600] C. com., art. L. 231-5
[601] C. com., art. L. 231-1 (A capital that varies increasingly and decreasingly without specific restriction)
[602]C. com., art. L. 231-3
[603] C. com., art. L. 231-5; Article 47 Collective Investment Regulation of 1999
[604] C. mon. fin., art. L. 214-7
[605] Article 23.b Collective Investment Regulation of 1999; *AMF*, régl. gén., art. 411-21
[606] The Codified Listing Dir. addresses in several places the possibility of exempting the undertaking of collective investment (other than the closed-end one) from the application of different conditions commonly applicable to the issuer within the internal scope of the MS

as those relating to the admission to list and to trade[607]of securities on regulated markets, in addition to the continuous restriction of its object to the collective investment of securities.

211 ***Opening.*** How does the IC issue financial instruments? What are financial instruments? What are the different categories of financial instruments? Is there a difference between a financial instrument, a security and a transferable security? What form of financial activities does the IC exercise consequently to issuing financial instruments? How are financial instruments traded? What is the role of the Company and the market in the financial transactions? All of these questions and more addressed thoroughly in the following chapter. Financial activities exercised by IC divided in the following chapter into two stages: preliminary stage; preparation of the offering prospectus and the actual issuing of securities (section A). Secondary stage addressing post-issuing and listing procedures (section B).

Section A: Issuing and Listing Securities: Different Classes of Shares Investment Companies Issue

212 ***Preview.*** The IC is a Plc. that exercises financial activities including but are not limited to issuing securities and trading them on regulated markets. In order to enable future investors to make well informed judgments and investment decisions; IC follows a set of administrative phases provided by securities legislation in order to fulfill its incorporation conditions and eventually trade its securities on regulated markets. Where is the starting point for IC to effect the issuing of securities? How and where the issuing is performed? What form of requirements does the IC comply with before finally trading its securities? What are the prior-trading stages that the IC goes through? Generally, IC commences with the registration of the intended issued securities with the competent authority, following the approval of the registration the company proceeds with the issuing of these securities. Consequently, to the issuing or in some cases parallel to the latter the IC deposits the securities at competent securities depositary center within the state of incorporation. The IC then admits the registered and deposited securities for listing to trade them finally on the regulated market of its choice.

[607] Every public issuer under the Jordanian law is obliged to submit a listing application before proceeding with trading its securities on regulated market (Article 3.a Listing Regulation of 2016)

213 ***Registration of Securities.*** Prior to proceeding with issuing securities, every issuer files a securities registration statement, for those securities it intends to issue, with the securities commission of its state of incorporation[608]. The commission then enjoys the full discretion in accepting or refusing the registration. Particularly the refusal is in case where the commission finds that the registration might result in harming holders of issuer's securities (if it is a new issue) or generally harm investors (initial issue)[609]. The registration statement differs from the prospectus that is prepared and published as the main procedure in the issuing and offering securities.

214 ***Issuing of securities.*** It is the process entailing offering for sale, of newly issued financial instruments. The offer might be "initial" such as the case of recently incorporated companies therefore addressing securities issued for the first time. "Posterior" such as the case of securities issued in later stages of company's life. When considering the number of the targeted investors in the offer the offer may be public or private[610]. In order to understand the issuing process the question of the form and content of the offer emerges (later explained in sub-section 1).

215 ***Depositing.*** It is the documentation of the securities ownership and that of the information relating to the owners, further it includes the registration of any existing royalties or restrains over the securities in question at the competent depositary center[611]. The IC registers and deposits its securities at the competent depositary center[612], in addition, it designates a

[608] Article 5 JSL of 2017; Article 3.a Issuing Regulation of 2005
[609] Article 3.b Issuing Regulation of 2005
[610] Article 4 Issuing Regulation of 2005
[611] Article 2 Registering and Depositing Regulation of 2004
[612] Article 8 Registering and Depositing Regulation of 2004 & Article 79.a JSL of 2017; Who is the depositary center? The depositary center is the entity responsible, among other things, for the registration of issued securities, depositing the securities, transferring their ownership in addition to effecting settlements and clearing services (Article 3 Registering and Depositing Regulation of 2004 & Article 75 JSL of 2017). Under French rules, the depositary is an investment firm authorized by the competent authority to exercise the activities and functions of a depositary (all that relates to the authorization of the depositary is illustrated in the *AMF* Instr. DOC-2016-01 of 6 April 2016). The depositary center provides investors with securities related services, including but not limited to: issuing ownership statements, issuing securities account records and freezing the securities (Article 4 Registering and Depositing Regulation of 2004, *AMF*, régl. gén., art. 323-1; C. mon. fin., art. L. 214-10-5 and Article 22.3 as amended by Article 1.4 of Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions [2014] OJ L 257/186; The Depositary center is supervised by the Securities Commission (Article 81 JSL of 2017)

depositary[613] from the list of undertakings authorized to exercise this activity in the state of issuing[614]. The IC as other Plc. should file a registration statement -different and later to that filed with the Securities Commission- with the depositary center once it receives the authorization to commence its activities, as a result the IC becomes a member of this center as other financial services undertakings[615]. This statement includes the number of securities, their nominal value, their related prospectus (this requirement emerges the debate of whether the deposit of securities proceeds or precedes the issuing of securities), the registration approval issued by the commission and the securities ownership record[616]. The securities are considered as documented and deposited once the issuer communicates the information required by the center including owners and securities details[617]. Following this registration the issuer submits the securities ownership record to the center; where at this date or any later date communicated to the issuer the securities are officially deposited[618]. The issuer is not obliged to deposit all the securities it issues at the center[619], yet it holds a record of non-deposited securities where every transaction, detail and transfer involving these securities is documented[620]. As depositing, is a pre-requirement to admission to trade of securities.

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[613] IC appoints a sole depositary through a written contract (Article 22.1.1, 2 as amended by Article 1.4 of Dir. 2014/91 and *AMF*, régl. gén., art. 323-11), the depositary is distinct from the MC whereas the exercise of both activities cannot be combined within the same undertaking (shall be further illustrated in the following Chapter) Article 25.1 as amended by Article 1.8 of Dir. 2014/91

[614] C. mon. fin., art. L. 214-10; Article 23 as amendment by Article 1.6 of Dir. 2014/91

[615] Mandatory membership: Article 80.a JSL of 2017; the depositary center enjoys investigatory powers (Article 80.b JSL of 2017). The depositary is liable and responsible towards the company and its shareholders. It is liable for the loss affecting the deposited financial instruments. This liability may be invoked directly or indirectly by the shareholders of the IC (Article 24 as amended by Article 1.7 of Dir. 2014/91), further it should safe keep the records of the financial instruments in respect of the governing rules and regulations (*AMF*, régl. gén., art. 323- 2 & 3). The depositary further holds a record of the charges relating to the exercise of its activities (*AMF*, régl. gén., art. 323-6) in addition to acquiring the requested material, personal means and the internal control and organization that allows the proper performance of its activities (*AMF*, régl. gén., art. 323-7)

[616] Article 8 Registering and Depositing Regulation of 2004; The same operation is repeated for every newly issued security at later stages (Article 9.a Registering and Depositing Regulation of 2004)

[617] Article 13 Registering and Depositing Regulation of 2004

[618] Article 14.a Registering and Depositing Regulation of 2004

[619] Securities that do not meet the depositing requirements cannot be deposited, further they should be mentioned in the non-deposited section of the securities ownership record (article 12.b Registering and Depositing Regulation of 2004) ; The securities that are not deposited cannot be traded on the market (Article 19.b Registering and Depositing Regulation of 2004)

[620] Article 15 Registering and Depositing Regulation of 2004

216 ***Listing.*** It is the registration of securities on capital market's records, therefore admitting the securities to trade upon the request of the issuer[621]. The registration or admission to trade of the security is preceded by a listing application submitted by the issuer[622]with the relevant market and for all its underwritten[623] or subscribed[624] securities. While at the same time the issuer (applicant) complies with the conditions laid down in the governing rules[625], including providing all the information deemed necessary and appropriate to protect investors and ensure smooth operation of the market[626]. Further to the application, the competent authority may request a listing particular to be prepared and submitted by the issuer that includes necessary details relating to securities in question[627]. Consequently, to the admission to listing the securities become freely transferable and negotiable on regulated markets[628], therefore creating the close link between the admission to listing and the admission to trade[629]. The two phases are mixed[630] due to the overlapping occurring in most cases nonetheless; both terms coexist and are distinct from one another.

217 ***Opening.*** The distinction between the different administrative stages that lead to the admission to trading on regulated markets is critical in some legislation. The closeness and the similarity of the requirements of every financial step, in addition to the overlap of certain steps feeds the difficulty of distinction and complexity of drawing a final time frame with definitive location for each step. To develop a global overview of the method through which securities end-up being traded on financial markets we chose to discuss two main steps within the following sub-sections: issuing (discussing the structure and preparation of the prospectus 'sub-section 1') and admission to listing of securities (discussing post-prospectus stages 'sub-section 2'). The remaining stages further explained in the following chapters.

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[621]Article 2 Listing Regulation of 2016; Rule 6102 Euronext Harmonized Rule Book of 2016
[622] Article 3.a Listing Regulation of 2016; Rule 6201 Euronext Harmonized Rule Book of 2016
[623] Article 3.b Listing Regulation of 2016; Article 49 Codified Listing Dir.
[624] Rule 6607 Euronext Harmonized Rule Book of 2016
[625]Article 5 Listing Regulation of 2016
[626]Article e 4.a Listing Regulation of 2016; Article 16 Codified Listing Dir.
[627]Article 21 Codified Listing Dir.; To be further explained in sub-section 2 of this chapter
[628]Rule 6605 Euronext Harmonized Rule Book of 2016
[629]The allocation of Securities for the trade on regulated markets
[630]Rule 6102 Euronext Harmonized Rule Book of 2016

Sub-section 1: Structuring the Offering Prospectus

218 ***Financial Instrument.*** The coordination of the conditions for the admission of securities to official listing on stock exchanges provides equivalent protection for actual and potential investors; therefore ensuring that sufficient information is provided. Previously mentioned the trading of securities on regulated markets is preceded with an issuing and listing process for securities in question. IC throughout this process offers its financial product known as "Security" or a "financial instrument". The question rising in this regard is the following: can both terms be used as synonyms or are they distinct from one another? Financial instrument is an asset or evidence of ownership of an asset or a contractual agreement between two parties to receive or deliver another financial instrument[631]. It can be further defined as a contract that gives rise to a financial asset of one entity and a financial liability (or equity instrument) of another entity, hence representing a store of value without possessing an intrinsic value of their own[632].

219 ***Component of financial instrument.*** Financial instrument is classified based on its initial recognition as a financial asset[633], financial liability[634] or an equity instrument[635]. This classification is made in accordance with the substance of the contractual agreement. Under French law, financial instruments include financial titles[636] and financial contracts[637]. As for the

[631] C. mon. fin., art. L. 211-1; Commission Staff Working Document Impact Assessment Accompanying the document Commission Delegated Regulation supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency, portfolio compression and supervisory measures on product intervention and positions {C(2016) 2860 final} {SWD(2016) 156 final}, 18.5.2016, SWD(2016) 157 final, p. 61

[632] Definition based on two international standards : the IAS 32 (paragraph 11) and the ESA 95; European Central Bank, 'Statistical Classification of Financial Markets Instruments' (July 2005) <https://www.ecb.europa.eu/pub/pdf/other/statisticalclassificationfmi200507en.pdf?05d940969ab122b2d9aa7b512e2d29fa> Accessed 30 March 2017

[633] According to IAS 32, financial asset means any asset that is cash, an equity instrument of another entity, a contractual right to receive cash or another financial asset from another entity or to exchange financial assets of financial liabilities with another entity under conditions that are potentially favorable to the entity

[634] Defined in Paragraph 11 of the IAS 32 as a contractual obligation that entails the reception or exchange of cash or other financial assets with another entity

[635] Equity instrument is any contract that evidences a residual interest in the assets of an entity after deducing all of its liabilities; IFRS Foundation Staff, 'IAS 32 Financial Instruments : Presentation' (2012) IFRS Technical Summary <http://www.ifrs.org/Documents/IAS32.pdf> Accessed 30 March 2017

[636] They include equity titles, debt titles and units of CIUs; they become material once they are subscribed to and hold their proper owner (C. mon. fin., art. R. 211-1)

[637] Financial contracts also known as financial instruments with a term, they include option contracts, future contracts, exchange and others (C. mon. fin., art. D. 211-1 A); C. mon. fin., art. L. 211-1 al. III

EU law, they include among other things: transferable securities[638], money-market instruments, units in CIUs, options, futures, swaps, forward rate agreements and any other derivative contract[639].

220 ***Security.*** Under financial section of the business dictionary, the security is defined as a financing or investment instrument issued by a company or the government that denotes an ownership interest and provides evidence of a debt, a right to share in the earning of the issuer or a right in the distribution of a property. Within the scope of the Euronext rules, the security is defined as any transferable security that falls within one of the following categories: equity securities, certificates, depositary receipts, bonds or other debt securities, warrants, units in CIUs and any other security considered as such by the relevant national rules[640]. Both definitions lead to the same conclusion; considering the security as a form and part of the financial instruments and not an equivalent term[641]. The security or the transferable security classified into two main categories: debt securities and equity securities.

221 ***Equity security vs. debt security.*** The distinction between the debt and equity based securities generally lies in investor's intention[642]. The denomination given by the issuer may not be enough to determining if the security is one or the other. The US courts for example use an objective economic reality test to distinguish between equity and debt based securities, the test entails reasoning behind the fund paid by shareholders whether it is a contribution to the capital (equity) or a loan (debt)[643]. The distinction between equity and debt-based securities can be

[638] Article 2.1.n UCITS Dir. 2009/65
[639] Section C of Annex I of MiFID II
[640] Article 1.1 Euronext Harmonized Rule Book of 2016
[641] Both Jordanian (Article 3.a JSL of 2017) and US (Section 2(1) of the Securities Act of 1933) rules used the term security when addressing financial market instruments
[642] C. mon. fin., art. L. 211-1
[643] 3rd circuit, *Fin Hay Realty v. United States* (1968)

designated by the following three different approaches[644]: basic ownership approach[645], ownership-settlement approach[646] and reassessed expected outcome approach[647].

222 ***Investment Company issues.*** IC issues and has as its main object the collective investment in a form of financial instruments that is securities or transferable securities. IC issues equity securities in the form of shares or stock[648]. The shares are issued through public offering. The following paragraphs present a definition for shares and their public offering process (paragraph 1), in addition to discussing the preparation of the public offering (paragraph 2).

§1: *Investment Company as a Plc that Issues Securities*

223 ***Shares or stock.*** Plc. – including IC - hold a capital that is divided into shares or stock generally granting equal rights to their holders[649]. The company in the process of raising this capital in the initial incorporation stage or later when deciding to increase the publicly declared capital; issues stocks that entitles owners to a partial ownership of the company. This stock is transferable and is traded on regulated markets (mainly the stock exchange) consequently to incorporating the company at the competent company controller[650]. Therefore, the investor becomes a shareholder, granting him a portion of ownership interest in the company represented by a stock certificate stating the number of shares of an issue of the corporation's stock[651]. The share or stock entitles its holder to an equal claim on the company's profits, an equal obligation for the company's debts or losses in addition to conferring a voting right[652]. Therefore, the

[644]Identified according to the FASB project updates, can be accessed on the FASB website <http://fasb.org/fi_with_characteristics_of_equity.shtml>

[645] The basic ownership instrument is the one that is the most subordinate interest in an undertaking and it entitles the holder to a share of undertaking's net assets after satisfying all higher priority claims

[646] This approach classifies financial instrument according to return and settlement requirements. Equity security is the basic ownership instrument, other perpetual instruments such as preferred shares and indirect ownership instruments. All other instruments are classified as assets or liabilities

[647] This approach classifies instruments depending on the direction of movement of fair value of the basic ownership instrument; A. Rechtschaffen n (305) Pages 53 - 55

[648] Article 3.b JSL of 2017; Jo. Cass. Civ., 22 March 2004, n° 140/2003; Jo. Cass. Civ., 11 Sept. 2005, n° 1228/2005; Article 2.1.n UCITS Dir. 2009/65

[649] Article 90.a JCC; C. com., art. L. 225-1

[650]C. com., art. L. 228-10

[651]Stephen Michael Sheppard, *The Wolters Kluwer Bouvier Law Dictionary* (compact edn, 2011) page 1023

[652]C. mon. fin., art. L. 212-1 A ; C. Echaudemaison n (491) page 10

holder is entitled to the earning and is responsible for the risk for the portion of the company that each share or stock represents.

224 ***Classes of shares.*** Issued shares may take several forms. Most common categories of shares include ordinary shares (common stock or equity) and preference shares. Common stock or ordinary shares are those shares that their holders' exercise all the rights linked to the share ownership without any restriction such as voting on major decisions undertaken in GAMs (ex. Merger and distribution of dividends)[653]. As for preference shares, they are those shares whose holders do not enjoy all the rights connected to the share ownership, meaning having a restriction on the exercise of shareholder activities or conferring a special right whether permanent or temporary[654]. The perfect example is embodied in holding a share with no voting right, receiving a minimum dividend or having the priority[655] in dividend distribution[656].

225 ***National laws addressing preference shares.*** The origin of the preference shares in French company rules is traced back to the initiative to modernize company law following the footsteps of Anglo-Saxon countries. This form of shares was introduced in 2004[657] in the aim of conferring particular rights on shareholders (having privileged shares)[658]. The particular right does not confer at all times an advantage on the shareholder's part. The particular right may impose obligations or restrictions such as depriving shareholder from his voting right. The Jordanian law introduced the concept of preferred shares in 2002[659] in the process of attracting foreign investments, where a new form of company[660]was introduced. This form of shares was limited to this company[661] and was not extended to include the Plc. The preference shares are convertible into ordinary shares or to preferred shares from another category[662]. The particular rights conferred by this form of shares may invoke a general standing legal concept of equality

[653]C. mon. fin., art. L. 212-1; C. com., art. L. 228-7; Article 97 JCC
[654]C. mon. fin., art. L. 212-6-1; C. com., art. L. 228-11
[655]C. mon. fin., art. L. 212-6; C. com., art. L. 228-29-8 à 10
[656] C. mon. fin., art. L. 212-5; C. com., art. L. 228-11
[657]*Ordonnance* n° 2004-604 of 24 June 2004 completed by *Décret* n° 2005-112 of 10 February 2005
[658] Philippe Bissara, 'Présentation Sommaire de la Réforme du Régime des Valeurs Mobilières émises par les Sociétés Commerciales' (ANSA, Report n° 04-058 [2004])
[659] Amending law n° 4 of the year 2002
[660] Private Shareholding Company the equivalent of *Société par Actions Simplifiée (SAS)* in France
[661] Article 68- Repeated JCC; Confirmed by the explanatory decision, 28 Aug. 2013, n° 4/2013
[662] C. com., art. L. 228-14

of participation between shareholders, therefore violating the prohibition addressed in the civil law and known as the Lion Clause.

226 ***Lion clause and shareholding.*** The lion clause is invoked in case of having a preferred share in a French IC that holds merely a voting right and totally deprives the shareholder from the connected financial rights[663]. As for the case of the Jordanian company, the rule is invoked even if the preferred share is granted a fixed amount of the dividends despite the achieved profit[664]. The existence of preference shares further requires the distinction between two concepts that relate to share ownership; the "shareholder character" and the "exercise of activity". This distinction is specifically required in the case of no-vote shares. The restriction does not affect the character of shareholder even though it affects the exercise of activities the voting right grants. Particularly when the company in question looks into making a decision that legally requires the consent of the totality of the shareholders without connecting the decision to the voting right of the share (a very rare case). In this case, shareholder of a preferred share with no voting right has the right to participate in the decision-making process in his character as a shareholder as long as the decision is not limited to a majority represented in the general assembly meeting[665].

227 ***Features of share.*** Generally, concerning shares offered by a Plc, no share should be indivisible, nonetheless a single share can be owned by multiple individuals when the ownership results out of succession[666]. Common features of a stock deduced from the previous presentation include the right to receive dividends upon an apportionment of profits, negotiability, the ability to be pledged, conferring a voting right in proportion to the stock owned and the capacity for value appreciation[667].

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[663] C. civ., art. 1844-1; See ANSA report on the calculation of percentage of participation in the case of having preferred shares (ANSA, 'Action de préférence sans droit de vote– obtention du droit de vote à terme : comptabilisation ou non de ces droits de vote pour le calcul du seuil de l'OPA obligatoire' (*Comité Juridique*, 12-026 [2012]))

[664] Articles 588 and 590 Jo. Civil Code

[665] Ansa, 'Droit Formant Rompus: Exercice des Droits de vote' (Comité Juridique, 12-014 [2012])

[666] Article 96 JCC

[667] These features were confirmed by the US jurisdiction in the process of determining the stock as a financial instrument due to the existence of common characteristics and a common name (*Landreth Timber Co. v. Landreth*, 471 US. 681 n.2 (1985)); A. Rechtschaffen n (305) Page 248

228 ***Share classes of Investment Company.*** The Jordanian law limited the incorporation form of the IC to the Plc[668], unlike French law that provided two different forms of companies from which the IC chooses[669]. This restriction limits the shares the IC issues to the ordinary one within the Jordanian scope and provides the French incorporated IC with the possibility to issue both ordinary and preferred shares[670], in addition to the possibility to attribute particular advantage to the benefit of a special group of shareholders[671].

229 ***Means of issuing shares.*** Being a Plc. the IC is legally required to have a fully subscribed to[672] or an underwritten[673] nominal capital (the authorized or registered capital at the moment of incorporation). The governing legal rules designate the applicable restriction on the timeframe permitted to fulfill the obligation in addition to the supplementary requirements and conditions met alongside this timeframe[674]. The puzzling question in this equation is the following: what is the link between this requirement, the IPO and the prospectus? To answer this question, a definition to each of these terms is introduced.

230 ***Underwriting.*** The process whereby financial institutions (such as banks) commit to purchase the offered securities at a designated date (usually after the closing date) in case the minimum subscription amount is not met[675]. The underwriter commits to cover the unsubscribed securities, avoiding the risk arising from certain unforeseen contingencies, which may endanger the issue resulting from the shortfall in public response to purchase the offered securities.

231 ***Public offering.*** An issue of securities offered for sale to the public after meeting all the requirements of securities authorities[676]. The IPO is the introduction on the stock market the capital raised at the time of introduction therefore offering new issue securities. Under EU law

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[668] Article 209.a JCC
[669] C. mon. fin., art. L. 214-7
[670] *AMF*, régl. gén., art. 422-23
[671] C. com., art. L. 225-8
[672] C. com., art. L. 225-3; It is the process through which investors sign-up and commit to invest in a financial instrument before the actual closing of the purchase
[673] Article 99 JCC
[674] C. com., art. L. 225-4; C. com., art. R. 225-5
[675] R.S.N Pillai and others, *Legal Aspects of Business* (Mercantile laws including industrial and company laws, S. Chand 2011) page 884
[676] West's Encyclopedia n (341); Thierry Bonneau & France Drummond, *Droit des Marchés Financiers* (3rd ed, Economica 2010) page 795

and followed by the French legal system PO is considered a communication[677] in any form or medium presenting sufficient information relating to the offer and the securities in question that puts the investor in a state of a well-informed judgement once making his investment decision to purchase or subscribe to the shares[678]. As for the Jordanian law, it defined the PO as the offer for the sale of securities targeting more than thirty individuals[679].

232 ***Prospectus.*** Is the disclosure document that describes a financial security for the potential buyer. It commonly provides investors with material information about the offered stocks and the offeree. This includes a description of company's business, financial statements, biographies of officers and directors, detailed information about their compensation, any litigation that is taking place, a list of material properties and any other material information. In the context of an IPO, underwriters or brokerages distribute a prospectus to potential investors[680].

233 ***Link.*** The IC when incorporated raises capital through the sale of its issued securities[681]. These securities are issued and offered to the public through IPO[682] (for the first introduction). Investors purchase the offered securities by way of subscription or underwriting (through intermediaries)[683] or as a result of listing the securities in question for negotiation on regulated markets[684]. In order to make the investment decision and to subscribe to the offered securities based on a well-informed judgement, the IC produces and provides the investor with a

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[677] The notion of communication under French rules (C. mon. fin., art. L. 411-1) is addressed thoroughly in cases involving the distinction between a marketing communication (as referred to in Recital 58 and Article 77 of UCITS Dir. 2009/65) and a PO. French jurisprudence confirmed this rule by the following statement: in order to consider the communication as a PO it should include indications or information relating to the financial instrument; C. com., art. R. 225-1; CA Paris, 15 Fèvr. 1995, n° 29/ 22470

[678] Article 2.1.d Prospectus Dir.

[679] Article 5.a.1 Issuing Regulation of 2005

[680]ESMA, 'The Consistent Implementation of Commission Regulation (EC) No 809/2004 Implementing the Prospectus Directive' (ESMA update of CESR recommendations) ESMA/2011/81 of 23 March 2011; Article 35 JSL of 2017; *AMF*, régl. gén., art. 212-7

[681] C. mon. fin., art. L. 214-7

[682] C. com., art. L. 225-2

[683] C. mon. fin., art. L. 411-1

[684] Article 5 Issuing Regulation of 2005; French rules consider the admission to negotiation on regulated markets and the subscription for publically offered securities as two different procedures despite the similarity unlike the Jordanian law that considered the underwriting and the listing as two different forms to the public offering (the Jordanian rules address the concept of public listing that is the offering for sale of securities that result from cases other than the public issuing of securities such as the conversion of the form of the company or shares of privatized public entities "Article 6 Issuing Regulation of 2005")

document stating a full description of the offeree and the offered financial instrument; known as the prospectus.

234 ***Mandatory or optional prospectus.*** Generally, the undertaking that looks into realizing a PO or an admission to trade on regulated markets for the issued securities puts in place a prospectus and submits it with the competent securities authority[685]. Nonetheless, it is possible to derogate from this obligation upon a decision made by securities authority for reasons involving a value threshold of the offered securities, the number of targeted investors[686] or when considering that the prospectus is replaceable by sufficient disclosure made by the company[687]. The necessity and the role of the prospectus requires a through explanation of its format and content.

§2: *Preparation of Initial Public Offering*

235 ***Importance.*** Those who issue a prospectus hold out to the public great advantages which will accrue to the persons who will take shares in the proposed undertakings. The public is invited to take shares on the faith of the representations contained in the prospectus and it is at the mercy of company promoters. Therefore, everything must be stated as a fact with strict and scrupulous accuracy. Nothing should be omitted, the existence of which, might in any degree, affect the nature or quality of the privileges and advantages which the prospectus holds out as inducement to take share.[688]

236 ***Format.*** The prospectus may constitute of a single or multiple documents[689]. When constituted of multiple documents the prospectus includes a reference document[690], a base

[685] *AMF*, régl. gén., art. 212-1; Article 34.a JSL of 2017; Article 5.b Issuing Regulation of 2005
[686] Cass. Com., 1 Févr. 2004 : Banque et Droit 2004, n° 95
[687] *AMF*, régl. gén., art. 212-4 ; C. mon. fin., art. L. 412-1 ; Article 36 JSL of 2017
[688] Vice chancellor Kidnersely in New Brunswick & Canada Railway Company vs. Muggeridge (1960)
[689] When having multiple documents the prospectus is prepared based on a referencing procedure to the attached documents (*AMF*, régl. gén., art. 212-11)
[690] *AMF*, régl. gén., art. 212-13; The reference letter according to the *AMF*, constitutes a communication tool that provides financial analysists, institutional investors or individual shareholders with all the necessary information to make a well-informed judgement in relation to the activities of the issuer, its financial situation the outcomes and the perspectives of the issuer. It includes the exhaustive sum of legal, economic, financial and accounting information. This document may take the form of an annual report destined to shareholders or as a specific document (*AMF*, Instr. 2016-04 art. 10). This document is submitted with the *AMF* and it is provided free of charge

document for the first introduction to regulated markets[691], a notice of securities and a *résumé*[692]. The prospectus may be submitted electronically[693] or on a paper form[694], signed by the management of the issuer and the majority of founding shareholders in case of IPO[695], in addition to being signed by the person responsible for its preparation[696]. The main format of the prospectus and upon the request of securities authority attaches supplementary documents. The documents include among other things AOA of the issuer, legal opinion justifying the legality of the issuing[697], agreement entered into with the issuing manager and the contracts containing essential information including the designation of omitted information[698]. Furthermore, the issuer attaches a statement within which he declares the responsible individuals or moral persons for the prospectus and its content in addition to attesting the accuracy, confirming the reality and facts of the content and the non-existence of any alteration or omission, all of which to the best knowledge of the mentioned persons in the statement[699].

237 ***Content[700].*** Prospectus should include information that permits the investor to make a well-informed judgement, therefore including all the related investment project information, in addition to those details relating to issuer's objectives[701]. The mentioned information includes those addressing the nature of the issuer, capital level and other details that allow the investor to evaluate the financial standing of the issuer[702], in addition to predicting the prospective financial outcomes and verifying the rights and guaranties related to offered securities (a *resumé* of the

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to the public the day following the submission whether electronically or on a paper form. It may be updated at any moment following the same rules of modification of the prospectus

[691] *AMF*, régl. gén., art. 212-23

[692] *AMF*, régl. gén., art. 212-6; *AMF*, régl. gén., art. 212-9l; Commission Delegated Regulation (EU) 2016/301 of 30 November 2015 supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Commission Regulation (EC) No 809/2004 [2016] OJ L 58/13

[693] *AMF* limited in its Instr. 2016-04 the format of the prospectus to the electronic form whether submitted electronically or directly deposited with the authority (Article 1)

[694] Article 37.a JSL of 2017

[695] Article 37 JSL of 2017

[696] *AMF*, régl. gén., art. 212-14

[697] *AMF*, régl. gén., art. 212-14

[698] Article 71.1 UCITS Dir. 2009/65; Article 35 JSL of 2017; *AMF,* Instr. 2016-04, art. 2

[699] *AMF*, régl. gén., art. 212-14; ANSA, 'Responsabilité des Administrateurs Signataires d'un Prospectus' (Comité Juridique, n° 06-036 [2006])

[700] SICAV prospectus includes all the information mentioned in Schedule A of Annex 1 of the UCITS Dir. 2009/65; *AMF*, régl. gén., art. 411-113; *AMF*, régl. gén., art. 411-114

[701] Article 69 UCITS Dir. 2009/65; *AMF*, régl. gén., art. 411-113; *AMF*, régl. gén., art. 422-71

[702] *AMF*, régl. gén., art. 212-7 ; C. mon. fin., art. 412-1

securities)[703] and most importantly the investment related charges[704]. Unless the prospectus is submitted with a copy of the AOA, the prospectus should provide all the details usually mentioned within which[705]. The investor may request that the prospectus provides specific information or details especially those relating to risk evaluation[706]. The content of the prospectus is adaptable to the type of offered securities[707], therefore any essential information that require to be omitted or considered as confidential should be removed[708]. Further, the prospectus explicitly indicates the asset category IC is authorized to invest in[709]. The content of the prospectus should be provided in a clear and non-ambiguous language[710], published in the language of the country of issuing or that usually used in the financial field particularly for public offering targeting multinational investors accompanied with a resume in the national language of its home country[711].

238 ***KIID[712].*** Issuers are further required to draw-up a short document containing key information of the offered investment known as Key Investor Information Document[713]. The information included are essential and structured in an appropriate manner that permits investors to comprehend the nature, characteristic and risks of both the issuer and the offered securities, further to allowing them to reach a decision without having to exhaustively go-

[703] *AMF*, régl. gén., art. 212-8
[704] *AMF*, régl. gén., art. 422-72; Article 14 Collective Investment Regulation of 1999
[705] *AMF*, régl. gén., art. 212-11; Article 69.2 UCITS Dir. 2009/65
[706] *AMF*, régl. gén., art. 422-77; Article 70.4 UCITS Dir. 2009/65
[707] *AMF*, régl. gén., art. 212-17; *AMF*, régl. gén., art. 411-119
[708] *AMF*, régl. gén., art. 212-18
[709] *AMF*, régl. gén., art. 411-116; *AMF*, régl. gén., art. 422-74 ; Article 70 UCITS Dir. 2009/65
[710] *AMF*, régl. gén., art. 212-7
[711] *AMF*, régl. gén., art. 212-12; Under the Jordanian rules no such requirement or option is addressed. The language issue presents a debatable issue on whether or not the possibility to draft a prospectus in a habitual language in the financial field violates the national laws protecting the languages such the *loi Toubon* in France and the law on the protection of the Arabic language in Jordan. The CE in France addressed the violation of loi Toubon if the prospectus contained a mere resume in French and it was entirely prepared in another language (CE, 20 dec. 2000, n° 21-3415); Arnaud Raynouard, 'Langues Françaises, Marches Financiers et Sources du Droit', CE, n° 21-3425, *Dalloz Recueil*, 2001 (21), p. 1713
[712] The reasoning behind the introduction of the KIID: The Simplified Prospectus (SP) has failed as a consumer communication because the rules have led to long documents. In addition, many have been written in technical or legalistic language and poorly structured and designed, resulting in unattractive documents, which are unlikely to be read. The KIID is a radical attempt to address these shortcomings by giving management companies more scope to produce a document that is readily understandable by average retail investors (CESR, Guide to Clear Language and Layout for the Key Investor Information Document [CESR/10-1320] of 20 December 2010)
[713] Article 78 UCITS Dir. 2009/65; *AMF*, régl. gén., art. 212-8-1 ; *AMF*, régl. gén., art. 411-106

through the prospectus[714]. The KIID states different forms of elements that should be mentioned in the order provided by the governing regulation[715]. These elements include; a short description of the investment's objectives and policy[716], risk and reward profile of the investment[717], the charges[718], performance history and activities of the issuer[719] and practical information relating to the general conditions of the offer, reasons of the offer and admission models[720].

239 ***Format of KIID.*** This document is parallel to the prospectus and does not replace it. It indicates where and how to obtain any additional information relating to the proposed investment. It should be prepared in a language that investors understand, should be clear, coherent, correct, not misleading and most importantly the used language should not be technical, it should facilitate the comprehension of the retail investor to the content by simple reading and to distinguish this document from the prospectus and any other attached documents[721]. KIID should not be too long; it should not exceed two pages of the size A4[722]. The content of KIID should be reviewed regularly at least every twelve months[723], and the revised version should be published[724].

240 ***Communication of KIID.*** KIID is communicated to investors by the issuer[725] in a durable medium[726], on a paper form or by any other mean of communication such as websites; while meeting at the same time the conditions set by Article 38 of the KIID implementation regulation

[714] Recital 61 UCITS Dir. 2009/65
[715] Article 4 Commission Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website OJ L 176/1
[716] Article 7 Reg. 2010/583
[717] Article 8 Reg. 2010/583
[718] Articles 10-14 Reg. 2010/583
[719] Articles 15-19 Reg. 2010/583
[720] Article 20 Reg. 2010/583 ; *AMF*, régl. gén., art. 411-107; *AMF*, régl. gén., art. 422-68
[721] Article 3.3 Reg. 2010/583; Article 5 Reg. 2010/583
[722] Article 6 Reg. 2010/583
[723] Article 22 Reg. 2010/583
[724] Article 23 Reg. 2010/583
[725] A disclaimer addressing the liability of the issuer for the prepared KIID is addressed under the *AMF* rules in articles: 411-108 and 422-69
[726] Article 81 UCITS Dir. 2009/65

2010/583. Provided free of charge and at a useful time for the investor[727]. Once communicated the KIID is bestowed with a legal value where it is considered as a pre-contractual agreement[728].

241 ***KIID in Jordan.*** No such document was addressed under the Jordanian securities rules. This document provides a higher level of protection for retail investors in prior investment stages. The existence of such document within the same strict rules as those provided by the EU rules introduces a new form of investor protection seen as pro-shareholder orientation as long as such introduction does not impose further costs on companies in terms of its preparation and publication. The closest concept to the KIID under the Jordanian securities rules is the written content attached to or preceding a valid prospectus that was addressed in the former JSL of 2002[729]. As for the JSL currently in force, it addresses an announcement or advertisement containing a summary of the prospectus[730]. Once the company is done with preparing the prospectus, it proceeds to disseminating it to the public in order to fulfill its purpose. The following sub-section addresses post preparation stages.

Sub-section 2: Reporting and Publishing when Prospectus is Prepared

242 ***Importance of IPO***. IPO is not an end in itself or a culmination. It offers companies the opportunity to regularly carry out secondary fundraising operations allowing them to continue to finance their development and growth through the market.[731] According to the Euronext, IPO permits undertakings to increase its equity by raising capital, diversify its sources of financing at the IPO and throughout its stock market life through capital increases and bond issues. Further, increasing the visibility at a national and international level, develop liquidity through offering shareholders' a liquidity tool allowing them to buy or sell company's security at any moment on the markets. In addition, IPO helps strengthening the structuring level, retain teams and make employees recruiting easier when offering attractive share incentive plans to increase employee motivation and involve them more in the development of the company, further through IPO

[727] *AMF*, régl. gén., art. 411-128
[728] *AMF*, régl. gén., art. 422-68; Article 79 UCITS Dir. 2009/65
[729] Article 34.a (3) JSL of 2002
[730] Article 34.b(2) JSL of 2017
[731] Marc Lefèvre, Director of Issuer Relations and Commercial Development for Europe at Euronext

companies promote their external growth, increase their credibility, and enhance their company's value over time[732].

243 ***Prospectus related Disclosure.*** IPO requires the preparation of a prospectus. Seen as a form of disclosure; yet there is a difference between prospectus related disclosure and periodic disclosure (that relating to annual and half-annual reports) required by the governing rules. In PO process, issuers (including the IC) disclose details linked to offered securities including those details stating the number of subscribed or underwritten securities and their classes. This disclosure is made to both the public and the securities authority[733]. They further disclose management decisions that are connected to the offering including those decisions undertook in GAMs[734]. This form of disclosure is treated under the different governing rules consequently to preparing and submitting an approved prospectus with the securities authority, it is known as the publication process of the prospectus project[735]. The publication addressed in this sub-section is a form of communication to the public and a means of publicity to the conducted PO by the company in question (further addressed in paragraph 1)[736]. The publication is followed with an enforceability and updating mechanisms of the prospectus' content (further explained in paragraph 2).

§1: *Data Accessibility*

244 ***Submission of Prospectus.*** The prospectus generally, is not a confidential or a private document where neither the issuer holds secretly in its private possession nor does the securities authority consider as classified. The prospectus is the means of communication used by issuers to announce to potential investors the offered investment plan. It is prepared to fulfil an essential aim that is to allow investors to reach a well-informed judgement in connection with offered securities. Therefore, the prospectus in a PO is public and accessible by potential

[732] Euronext website https://www.enternext.biz/en/enternext/non-listed-company/the-means-of-financing/ipo-initial-public-offering accessed 5 April 2017
[733] Article 10 Issuing Regulation of 2005
[734] Article 19 Issuing Regulation of 2005
[735] Article 68.1 UCITS Dir. 2009/65; *AMF*, régl. gén., art. 212-26
[736] Connection between corporate reporting and integration of sustainability (ESG) in order to restore the confidence of investors; Jean Rogers and Robert Hertz 'Corporate Disclosure of Material Information: The Evolution and the Need to Evolve Again ' (2013) 25 Applied Corporate Finance 50

investors in most cases free of charge. Once the prospectus project is prepared meeting all the required conditions, containing all the essential information and attaching all the supplementary documents it is submitted with the securities authority[737]. This reporting or submission addressed by various legal systems. Nonetheless, some explicitly states the requirement (such as French and EU rules) and others referred to it implicitly (such as Jordanian rules). The different Jordanian securities rules and specifically those governing PO address the submission of the prospectus as a natural outcome to the preparation without providing an explicit obligation. The Jordanian law considered PO that does not meet the exemptions from the prospectus, yet is opened with no prospectus as a violation of securities rules[738]. The securities rules further address the role of the submission in the validity of the prospectus[739] as for the public nature of the prospectus it is consequent to the approval of the JSC[740].

245 ***Role of securities authority.*** The legal rules state the role of the securities authority in accepting, rejecting, suspending or commenting on the performed prospectus submission. Securities authority as a form of external supervision; reviews and examines the submitted prospectus project and verifies its complete content[741]. The prospectus obtains a form of visa from the securities authority. The authority decides whether to approve and deposit the prospectus or reject it based on a reasoned decision[742]. Within the Jordanian scope, the JSC has the power to suspend the prospectus for the same reasons it may reject it[743].

246 ***Publication and accessibility.*** The prospectus once submitted and granted the visa of the securities authority becomes public no longer a private document[744] with the exception of specific cases involving particular sensitive information[745]. The issuer is further required to publish the prospectus and communicate it to investors free of charge whether or not they

[737] *AMF*, régl. gén., art. 212-6; *AMF*, régl. gén., art. 411-120; *AMF,* Instr. 2016-04 art. 1; Article 74 UCITS Dir. 2009/65
[738] Article 34.a JSL of 2017
[739] Article 39 JSL of 2017; Article 12.a Issuing Regulation of 2005
[740] Article 38.a JSL of 2017
[741] *AMF*, régl. gén., art. 212-21; *AMF,* Instr. 2016-04, art. 1; Article 41.a JSL of 2017
[742] *AMF*, régl. gén., art. 212-20; *AMF*, Instr. 2016-04, art. 11; Article 5.a Issuing Regulation of 2005; Article 15 Issuing Regulation of 2005
[743] Article 15 Issuing Regulation of 2005; Article 41.b JSL of 2017
[744] Article 38 JSL of 2017
[745] Article 38.c JSL of 2017; *AMF*, régl. gén., art. 212-4; *AMF*, régl. gén., art. 212-30 (direct communication to professional investors or private offering)

request it[746]. The prospectus is published in newspapers, provided on a printed copy at the headquarters of the issuer, posted online on the issuer's website that of the intermediary or the securities authority[747]. Therefore it is provided to potential investors in a durable medium[748]. Meaning *using an instrument which enables an investor to store information addressed personally to that investor in a way that is accessible for future reference for a period of time adequate for the purposes of the information and which allows the unchanged reproduction of the information stored*[749].

247 ***Lack of publication obligation.*** No publication obligation is addressed under the Jordanian rules, similar to that stated by the French and EU rules. The sole reference that the law made to the publication of the prospectus was implicitly when stating the necessity of the publication of the supplementary note to the prospectus. This statement states the necessity to follow those rules and medium of publication provided for the prospectus[750]. The publication is made and the issuer does communicate the prospectus to the public as a natural exercise with no legal obligation. On the other hand, the securities law imposed a publication and accessibility obligation on the part of the JSC. This obligation entails allowing the public to access the prospectus and its attached documents[751]. Seen as a form of visa granted to the prospectus by the securities commission. Even though the submitted and approved prospectus is considered as final, its content may be subject to modification, alteration or change. The prospectus once approved obtains a legal value and becomes enforceable to be further illustrated hereinafter.

§2: *Following a Published Prospectus*

248 ***An up to date prospectus.*** Generally, prospectus when submitted with the securities authority is final, nonetheless the content of the prospectus may witness certain modifications, changes or alterations. The change affects the prospectus either after the submission and before the visa or after the visa and publication. Being essential or not the change is reported to the

[746] Article 68.1 UCITS Dir. 2009/65; Article 75 UCITSS Dir. 2009/65; *AMF*, régl. gén., art. 212-27
[747] *AMF*, régl. gén., art. 212-27
[748] Article 78.2 UCITS Dir. 2009/65
[749] Article 2.1.m UCITS Dir. 2009/65
[750] Article 17.b Issuing Regulation of 2005
[751] Article 38.b JSL of 2017

securities authority[752], the non-disclosure, the inaccuracy or omission in the contained information is considered a violation of the law[753]. Therefore, the essential elements of the prospectus should be maintained up to date[754]. If any essential or important change affects the prospectus or a new event arises during the PO and before the opening date of the period of subscription or the sale then the issuer prepares and submits a complementary note to the prospectus while following the same procedure of publication used for the base prospectus[755]. The mentioned essential change or modification means that having a possible significant influence over securities' evaluation. The other case of change is that affecting the content of the prospectus during the period of subscription, then the issuer suspends the subscription meanwhile it prepares the complementary note and meets the prerequisites set by the Jordanian law[756]. As for the French law no such suspension was addressed the solution was found in granting the subscribed investor the right to withdraw from its subscription or purchase as long as it is proven that the change affects the closing of the PO and the delivery of the securities[757].

249 ***Enforceability of the prospectus.*** The prospectus once published and the PO period is opened; does not remain valid and have an inevitable legal value. A Jordanian prospectus becomes valid and applicable thirty days following the submission date to the JSC[758], it remains as such for the entire period of the PO (within which is included the period of underwriting or sale). PO is open for a period not inferior to ten days and has a closing date not exceeding ninety days[759]. The opening date for the sale or subscription to Jordanian issued securities begins the least ten days after the opening date of the public offering[760]. As a general principle

[752] Article 40 JSL of 2017; Article 16.a Issuing Regulation of 2005; *AMF*, régl. gén., art. 411-120
[753] Article 42 JSL of 2002 and 2017; in the new JSL of 2017 the content of Article 42.d is modified as it no longer consider the PO with no valid prospectus as a violation it introduced a new violation for the securities rules; the offer for sale of non-registered securities. This modification is positive in terms of investment protection nonetheless the deletion of the former violation puts potential investors' protection at risk of falling for a non-valid prospectus. This risk may be partially averted from by implementing Article 34.c JSL of 2017; the article states that the enforceability of the sale of securities is possible if preceded by the communication of a copy of the valid prospectus. There is no guarantee of the validity of the prospectus other than reviewing the prospectuses published on the JSC website
[754] *AMF*, régl. gén., art. 212-10; Article 72 UCITS Dir. 2009/65
[755] *AMF*, régl. gén., art. 212-25; Article 17 Issuing Regulation of 2005
[756] Article 17.c Issuing Regulation of 2005
[757] *AMF*, régl. gén., art. 212-25 al. II
[758] Article 39 JSL of 2017; Article 12.a Issuing Regulation of 2005
[759] Article 14.b Issuing Regulation of 2005
[760] Article 14.b Issuing Regulation of 2005

and by summing up the mentioned timeframes a public offering within the Jordanian securities market remains for a period not less than two months starting from the submission of the prospectus and ending with the closing date of the public offering. The validity and enforceability of the Jordanian prospectus is a mandatory requirement as any issuer having a PO. On the other hand, the French approved prospectus remains valid for the period of twelve months as of the date of the visa granted by the *AMF*[761]. The valid prospectus is the core component of the enforceability of the sale of securities over the subscribed investors, whereas the validity and legal value of the sale result out of receiving a valid prospectus by the investor[762].

250 ***Aftermath of prospectus.*** As a core outcome for publishing an approved prospectus is the opening of the PO where the interested investors subscribe to or purchase the offered securities. At the closing date of the PO the issuing process is finalized the subscribed and bought securities are communicated to the securities authority and the securities (shares in our case) may then be listed on regulated markets[763]. The listing procedure is defined by the relevant financial market, it is mandatory to all Plc[764].

251 ***Admission for listing.*** The IC following the issuing of its shares seeks its concerned regulated market to admit these shares for listing following the procedure designated by the market. The admission procedure commences with an application submitted with the securities market containing all the details relating to the background of the Company, its financial situation, financial statements, those details of the issued shares[765] and most importantly the prospectus[766]. The market enjoys a full discretion to approve or reject (reasoned decision[767]) the admission to listing of applicant's securities[768]. The rejection is contestable by the applicant[769].

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[761] *AMF*, régl. gén., art. 212-24
[762] Article 34.c JSL of 2017
[763] Rule 6304 Euronext Harmonized Rule Book of 2016
[764] Article 98.c JCC; Article 3.a Listing Regulation of 2016; Article 69.b JSL of 2017
[765] Rule 6702 Euronext Harmonized Rule Book of 2016
[766] Article 4 Listing Regulation of 2016; Rule 6201 Euronext Harmonized Rule Book of 2016; Rule 6501 Euronext Harmonized Rule Book of 2016; Language requirement under the Euronext rules (Rule 6503 Euronext Harmonized Rule Book of 2016)
[767] Grounds for refusal (Rule 6401 Euronext Harmonized Rule Book of 2016)
[768] Article 3.d Listing Regulation of 2016; Article 11 Codified Listing Dir.; Rule 6301 Euronext Harmonized Rule Book of 2016

The securities are admitted once the market expresses and communicates its approval to the applicant[770] while at the same time meeting market requirements[771]. The admission to listing on the ASE is performed primarily on the second securities sub-market[772]. Shares of the IC may change their listing market therefore upgrading to the primary sub-market if they meet the required conditions set by the ASE[773].

252 ***Supervisory power of the market.*** Other than rejecting the admission to listing securities, the market imposes reporting obligations on the companies in question particularly of their financial statements[774]. The market imposes further listing requirements[775], undertakes sanctioning and investigatory measures through applying sanctions on the companies in question including delisting the company[776] or returning the securities to the second securities sub-market after being listed on the primary[777]. Consequently, to the successful admission to listing of securities on the market the securities can then be admitted to trading on the regulated market. The trading and listing of securities are distinct from one another. Nonetheless, they are

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[769] Article 3.d Listing Regulation of 2016; Article 19 Codified Listing Dir.; Rule 6403 Euronext Harmonized Rule Book of 2016

[770] Article 4 Listing Regulation of 2016; The Euronext undertaking issues its decision within a period not exceeding thirty days after the date of submission of the complete application by the company (Rule 6301 Euronext Harmonized Rule Book of 2016). The decision remains valid for a limited period of time that is not superior to ninety days extendable upon the request of the applicant for ninety further days (Rule 6302). The Euronext undertaking further issues a notice that designates the effective date of the listing (Rule 6303). No such periods where addressed in the Jordanian rules. The law does not state the period during which the decision of the ASE should be issued and the procedures in case such decision is not rendered. Further, the rules do not state a limited validity for the approval to admission to listing on the ASE. This leads back to the debate of the characterization of the ASE as an administrative or private entity, therefore designating the competent legal rules as the administrative ones if the ASE is considered as a public entity. As for the case, the ASE issues a decision then it is contestable before the JSC within fifteen days of its communication. The council of the JSC issues a decision in the matter within fifteen days from the submission date of the appeal. The decision rendered by the council is also contestable before administrative courts within thirty days of its communication (Article 73 JSL of 2017)

[771] Article 5 Listing Regulation of 2016; conditions include: prior registration of securities with the securities commission, deposit of securities, having clear and non-restricted securities, signing listing agreement with the stock exchange, providing financial statement for at least one preceding year and other conditions related to the subscription thresholds

[772] Article 4 Listing Regulation of 2016

[773] Articles 7 and 10 Listing Regulation of 2016

[774] Article 8 Listing Regulation of 2016

[775] Rule 6206 Euronext Harmonized Rule Book of 2016

[776] Article 15 Listing Regulation of 2016; Rule 6901/2 Euronext Harmonized Rule Book of 2016; The risk of delisting is used by the market as a disciplinary measure as a result of the violation of responsibilities and obligations stated by law or as a complementary measure for the change in company's legal status and character

[777] Article 9 Listing Regulation of 2016

similar. The governing rules and conditions differ therefore the distinction between the two steps is required.

253 ***Distinction listing and trading.*** The two terms (admission to list and admission to trade) coexist[778] yet they overlap in some respects. They differ in their objectives. The rational for the admission to trading is to facilitate the fact that a particular financial instrument is appropriate for trading purposes. For example in terms of liquidity and other circumstances which would support orderly trading and market integrity. As for the intent behind official listing is to add quality not only to the financial instrument but also to the issuer. The financial instrument may be listed without being subject to official trading on a regulated market or even being subject to continuous trading on other trading venues. *Admission to listing is a quality label, which adds value to the markets and their participants, including investors, and thus that it may enhance the competitiveness of the financial markets*[779]. The meaning of this argument is that a regime for official listing creates a perception of higher quality, rather than adding higher quality in substance. However, if admission to listing on a stock exchange and admission to trading on a regulated market were to be totally separated. In the sense that the admission to listing were to be decided upon by an independent listing authority (not being a regulated market), then the decision on admission to listing could be seen as a "rating" adding value from a credibility point of view. In such a model, the issuer could first seek admission to listing from a designated listing authority, and then decide the trading venue where it wants its securities to be admitted to trading. It would then be possible to admit such securities to trading also on other regulated markets even without the consent of the issuer.

254 ***Suspending Issuer Activities.*** Having a variable capital provides the OEIC with an exemption from the general applicable formalities of the immediate disclosure and submission

[778]Within the EU scope, the MiFID does not recognize the notion of admission to listing other than by reference in one of the recitals (Recital 57 in addition to the wise men report). This might mean that many of investor protection rules set out in MiFID are not applicable to all the instruments that are admitted to listing without simultaneously being admitted to trading on a regulated market. This observation is also valid for other directives such as the Prospectus Directive, the Market Abuse Directive, the Transparency Directive, and the UCITS Directive which effectively have resulted in that requirements that previously applied in respect of officially listed instruments have been abolished for such instruments (unless they are admitted to trading on a regulated market)

[779] ESME report on MiFID and admission of securities to official stock exchange listing <http://ec.europa.eu/internal_market/securities/docs/esme/05122007_mifid_report_en.pdf> 5 Dec 2007 accessed 09 march 2017

of the change in share ownership whether executed by way of repurchase or redemption[780] and within the scope of the variability, therefore excluding the cases of takeover and mergers. This variability and fluctuation of capital imposes constrains on the possible continuous trading of this company's financial instruments on regulated markets. The main constrain is envisaged in the legislative requirement suspending the trade on the market every time the company performs a share transfer[781]. French rules provided an explicit restriction to the negotiation method of the securities of companies with variable capital it allowed the negotiation solely through the transfer of ownership on company's registry[782], nonetheless the Financial and Monetary code states the possibility of trading the securities of OEIC on regulated markets within the conditions fixed by law[783]. The Jordanian law provides among a list of cases of suspension of the trade of financial instruments[784], the company with the full discretion to request the suspension of admission to trade solely upon a decision made by its board and for the period, they deem necessary[785]. Previously mentioned that the IC follows the issuing and listing procedures as other Plc. solely for the incorporation purposes, therefore such a suspension is necessary to continue its efficient activity performance in pooling assets and selecting its portfolio. Further to their role in preserving market integrity. The question rising in this regard is the following: what happens once the shares are admitted to trading on the market? To answer this question, the following section B addresses continuous conduct qualities required by the market and securities rules.

Section B: Pre and Post Trade Transparency

255 ***Preview***. Securities market participants, including the IC are required to establish certain means of control and should contribute to market integrity. Market integrity is a prerequisite to efficient and transparent financial market. The full and proper transparency is guaranteed through preventing unlawful behaviors that encompass financial market abuse. Market abuse

[780] C. com., art. L. 231-3
[781] Article 13.b.1 Listing Regulation of 2016
[782] C. com., art. L. 231-4
[783] C. mon. fin., art. L. 214-7
[784] The list includes among other things the cases of: merger, the day of the GA meeting until the decisions taken therein are communicated to the market and upon the decision of the market (Article 13 Listing Regulation of 2016)
[785] Article 13.b.4 Listing Regulation of 2016; The board decides to issue (Article 95.o JCC) and they make the decision to suspend the issuer activities

behaviors include as a general concept those behaviors involving insider dealing, unlawful disclosure of inside information and market manipulation[786]. As a result the regulatory regime of market abuse is necessary to fulfil the mentioned aims including preserving market integrity, avoid potential regulatory arbitrage, ensure accountability in the event of attempted manipulation and provide more certainty, investor protection and confidence in the market[787].

256 ***Connectivity to investor protection and reliability***. In addition to the aim of achieving market transparency company legislation and that of financial markets aim to provide a high level of investor protection, particularly through regulatory regimes that deal with control of the prospectus, financial reporting and with different aspects of the functioning of securities markets. Reasonable investor when seeking the financial market reaches its investment decision based on an *ex ante* available information. Therefore, an evaluation of the available information is required. The evaluation consists of determining whether the decision reached by the investor, based on the available information, was impacted by sensitive and essential information that granted him an unfair advantage in comparison with other investors of the same category and class. The concept of fair treatment and preventive measures of conflicts of interest arises. Conflicts of interest linked and to some extent based on the disclosure of managerial transactions that may influence the overall investment conduct (further illustrated in sub-section 1).

257 ***Connection to admission to trading and listing***. The main outcome of issuing shares and listing them is conducting financial transactions; meaning trading on regulated markets. Market integrity is a prerequisite to financial transactions therefore; they should be clean and non-fraudulent. There has to be transparency to hinder the abusive behaviors and the misconceptions of market elements[788]. The protection of the underlying investor requires laying down a regulatory framework that provides legal certainty and less complexity to market participants in order to prevent and in some cases eliminate market abuse behaviors (to be further illustrated in sub-section 2).

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[786] Provided for in the MAR

[787] This necessity is addressed in the MAR (Recital 4)

[788] Introducing preventive measures such as grey lists, window trading, implementing codes of conduct and establishing Chinese walls

Sub-section 1: Hindering Conflicts of Shareholders' Interest

258 ***Definition.*** Conflicts of interest[789] is a term used to describe the situation in which a public official or fiduciary who, contrary to the obligation and absolute duty to act for the benefit of the public or a designated individual, exploits the relationship for personal benefits typically pecuniary benefits[790]. Different transactions may cause two different interests to clash into each other. The clash falls under rules of conflicts of interest and the law intervenes in cases that involve one party owing to the other a duty of loyalty (exceeds the ordinary duty to act in good faith), therefore the first is expected to protect and promote the interests of the other. Both civil and common law address this issue, the outcomes are similar yet the approach and the legal reasoning differ. In common-law jurisdictions the duty emerged out of the fiduciary duty that originate from the law of trusts, the duty of loyalty is a legal consequence of entrusting the trustee with the interests of the beneficiary[791]. On the other hand, in civil-law jurisdiction the duty of loyalty is connected to the obligations under a mandate contract or agency contract; where the agent undertakes to perform a service for or manage the interests of the principal[792]. It is a mandate of representation, which empowers the agent to act on behalf of the principal, therefore its execution is at the core of the contract and not its results, and this assumes the duty of care and diligence at a core position. The main valid outcome out of these definitions is that directors and officers everywhere and despite the governing jurisdiction and legal approach owe a duty of loyalty to their companies and shareholders.

259 ***Scope of conflicts of interest.*** Conflicts of interest is not limited to individual relationships, the widespread of this issue has an adverse effect on the entire market in question. The impact includes principally avoiding financial markets and lack of confidence that results out of believing that agency costs are too high therefore limiting the access to capital to certain wealthy or professional investors. Further, investors may seek an auto-investment decision-making rather than acquiring professional and expert opinions and consultations. The scope of

[789] This plural form of conflict of interest is the most commonly used from in legal doctrine and internationally prepared reports

[790] William Burton, *Burton's Legal Thesaurus* (4th edn, McGraw Hill 2006)

[791] Tamar Frankel, 'United States Mutual Fund Investors, their Managers and Distributors' in Luc Thevenoz and Rachid Bahar (eds), *Conflicts of Interest Corporate Governance and financial Markets* (Kluwer Law International 2007)

[792] Julien Valiergue, 'Les Conflits d'Intérêts en Droit Privé : Contribution à la Théorie Juridique du Pouvoir' (DPhil thesis, Université de Bordeaux 2016)

conflicts of interest then is defined and addressed by the financial market regulatory framework rather than merely leaving it to company law. Where in this case financial markets take the issue at hand using the instruments of administrative law to resolve it or the least avoid it. This approach can be clearly noted within the EU financial markets regulations, including the UCITS regulatory framework[793].

260 ***Regulatory role of financial market.*** Laws generally impose a duty to act in the best interest and an implied conflicts of interest rule. With the emergence of corporate governance codes and their integration in the admission to listing and trading of securities, they play a major role in presenting the connection between and bring together financial markets regulations and that of company law. For example, company laws were not strongly concerned with issues that relate to executive compensation. Particularly in terms of the impact the flexibility provided within company rules may have on the securities market integrity and the protection of shareholders, the securities rules had an essential role in providing regulatory obligations and preventive measures that are crucial in governing board practices and their compensation packages[794].

261 ***Conflicts of interest legal context.*** The term "Conflicts of Interest" has a very specific meaning in the legal sense. It refers to the case where an individual in a certain situation holds a duty to decide how to act based on the interests of the other person. While having repercussions on his own interest by the choice made (having a conflict of duty and interest) or on the interests of others meaning third party he is bound to protect (a mere conflict of duties)[795]. The concept stating the existence of a personal interest in the choice the acting person is legally bound to make, is enough to arise conflicts of interest, is insufficient in the legal sense creating conflicts of interest. As a general rule in representation duties, they all intend to orient the actions of one

[793] Recital 13 and Article 12.1.b UCITS Dir. 2009/65

[794] The implementing directive (2014/91) of UCITS addresses the necessity to introduce a restricted and clear remuneration policies by national competent authorities in MS

[795] A conflict of duties does not differ much from the conflict of duty and interest. The conflict of duty and interest is a problem because there is a risk and fear that the person will not fulfill its duties as it contradicts or conflicts with its personal interest. As for the conflict of duties is problematic because abiding to one duty may imply the breach of another, therefore imposing sanctions that eventually affects the acting person's interest

person to protect the interest of that represented[796]. The question rising in this regard is the following: what characterizes the situation of conflicts of interest in the legal context?

262 ***Characteristics of duty of loyalty.*** Conflicts of interest in the legal sense falls within the content of the legal duty of the acting person. This duty is commonly referred to as the duty of loyalty. This duty has two main characteristics[797]. The first characteristic is that the legally required action is not specifically identified: the law does not provide the acting person with a specific rule on how to act and what to do, nonetheless this acting person under this duty enjoys a discretionary margin within which he can estimate the appropriate action[798]. This duty is distinct from the duty of care. The second characteristic is considered a consequence to the first one. It is based on the subjective standard in the judgement of the situation. Therefore addressing the *ex-ante* motive and purpose of the action and not the *ex post* effects of this action[799]. In order to relate the characteristics of the duty of loyalty and the concept of conflicts of interest with the context of market integrity and investor protection within the scope of the IC the following paragraphs address this scope (paragraph 1) and the preventive regulatory measures that where put in place (paragraph 2).

§1: *Applicability of Conflicts of Interest in Portfolio Investments*

263 ***Reason to worry.*** IC as other financial institutions essentially offers its shareholders the knowledge and skill in making and executing investment decisions. The decisions are supposed to be inspired by the investment interest of the shareholder. This loyalty that is promised, bargained for and legitimately expected arises potential conflicts of interest. Theoretically, the conflict may be eliminated by changing the substance of the rendered services; promising the

[796] Nonetheless the legal action may be steered to protect one's own interest, in those cases where the acting person is entrusted to reliably protect his interests voluntarily such as the cases of minors

[797] Marc Kruithof, 'Conflicts of Interest in Institutional Asset Management: is the EU Regulatory Approach Adequate' in Luc Thevenoz and Rachid Bahar (eds), *Conflicts of Interest Corporate Governance and financial Markets* (Kluwer Law International 2007)

[798] The typical element of this character is the combined presence of personal interests that are affected by the choice made, and having a legal duty that excludes this personal interest from the decision making process. Therefore the requirement connected to this character is the need for the acting person to be independent, impartial, unbiased or the like (As introduced by: Michael Davis, 'Introduction' in Michael Davis and Andrew Stark (eds), *Conflicts of Interest in the Professions* (OUP 2001))

[799] This character presents the difficulty in some cases to deduce the intentions as the effects are objectively deduced. The effects of actions are not at all times determined by the actions alone they are influenced with external factors (what is known in economic literature as "high-noise, low-signal environment")

delivery of a particular outcome rather than full loyalty and best efforts or through restricting the discretionary margin of Company's decision-making the question rising in this regard is: why worry about conflicts of interest in portfolio investments? Investor protection and confidence in the market.

264 ***Investor protection.*** Financial services directives address the matter of conflicts of interest in dispersed provisions some explicitly and other implicitly. The beginning of the investor protection in regulatory parameters of financial services is found with stating reinforced pre-contractual duties that oblige issuers to disclose all relevant material information and prohibit them from conducting any fraudulent behavior[800]. This mere obligation was reinforced with new rules that address the conduct of market participants and the steps that should be taken to prevent conflicts of interest[801].

265 ***Interest in Investment Company.*** The company when incorporated has as a main object making profit and sharing it[802]. Sharing is envisaged in the distribution of dividends. Generally, the object of the company should be legitimate and the incorporation should be conducted in the common interest of shareholders[803]. What is the interest of shareholder? Generally, it is maximizing their wealth, minimizing their risk and profiting from their shareholding character, especially for long-term shareholders. Wealth is maximized only if the company is efficiently functioning and is producing such a profit, therefore exercising its activities and offering its services. The single interest of every shareholder forms an integral part of common shareholders' interest created with the incorporation of the company. Common interest is favored over the individual one and should be protected. The concept and aspects of shareholders' protection create obligations on the acting person within the scope of the company to act in such a manner that achieves the best interest and guarantees a treatment on an equal footing (fairness and equality of treatment of shareholders)[804]. Common interest under French law is superior; the violation or absence of which may result in the invalidity of the company

[800] The perfect example is the Rule 10b-5 in USA

[801] Rachid Bahar and Luc Thevenoz, 'Conflicts of interest: Disclosure, Incentives and the Market' in Luc Thevenoz and Rachid Bahar (eds), *Conflicts of Interest Corporate Governance and financial Markets* (Kluwer Law International 2007)

[802] C. civ., art. 1832

[803] C. civ., art. 1833

[804] Cass. com. 3 June 1986, n° 85-12.118

what is called "*la nullité"* [805]. This invalidity is linked to the concept of proportionality. In the sense that makes it limited to particular violations that mount to invalidity, meaning to a proportion of infringements. Common interest is the substance of the company whereas it is applicable equally to all shareholders[806]. It asks multiple related questions in terms of the participants' in shareholders' safeguarding process. There are two main questions. They are related to whether legal rules should assign to the company the research of the exclusive interest of its shareholders by subjecting its management, decision-making and investments towards a single criterion that is shareholders' interest or assign to the company the research of company's prosperity meaning subjecting its activities and decision-making to company's interest criterion. All of which while considering the incentive of shareholders is it long-term or short-term investment.

266 ***Company vs shareholders' interest.*** Managing the company in shareholders' interest is one thing and managing the capital for the company's interest is another. Despite their difference they are connected and are considered as complementary to one another. The proceeding issues arising out of the existence of two interests relate generally to powers and discretion of the management in deciding to go for one of the interests rather than the other. Corporate governance rules generally orient the management towards the protection of Company's common interest in addition to fair and equal treatment of shareholders[807]. Management may favor company's interest as it benefits its management character therefore considering a non-shareholder management, or prefer shareholders' interest as it benefits their shareholder character. This situation of pick-and-choose results into creating cases entailing conflicts of interests. The management may hold a personal interest in the undertaken decision beside that of the company or its shareholders[808]. This private or other interest may be favored over the common one creating what is called "Conflicts of interest".

267 ***Legal obligation.*** The basic rule for conflicts of interest in Collective Investment spins around the decisions made by the management on behalf of the investor. EU rules address the

[805] C. Civ., art. 1844-10
[806] Cass. com. 10 October 2000, n° 98-10.236
[807] Article 5 Jordanian Corporate Governance Regulation of 2017
[808] Dominique Schmidt, *Les Conflits D'intérêts Dans La Société Anonyme* (Joly 2004) page 33

necessity to prevent conflicts of interest whereas UCITS Directive urges competent authorities[809] and the IC to lay down specific rules that prevent conflicts of interest[810]. The prevention that was addressed in the recitals of the Directive was transformed into a less restrictive obligation in the form of laying down rules that minimize conflicts of interest[811]. This approach by the EU may be understood as the impossibility to fully avoid and hinder conflicts of interest. Conflicts occur therefore the minimum requirement approach leads to reducing the impact of such conflicts over investors' interests[812]. The approach guarantees fair treatment in cases where the conflict cannot be avoided[813]. The minimum requirement approach was supported with the separation of the management and depository functions this split introduced a supervisory mechanism over company's activities[814]. French legislature followed the EU approach with a similar minimum requirement. *AMF* general regulation states that investment services providers should take all reasonable measures to detect conflicts of interest that may arise in relation to undertaking, concerned persons or any person that has a direct or an indirect connection to the provided services or those connected to clients[815]. The *AMF* in its approach of hindering conflicts of interest imposed another obligation on investment services providers to establish and maintain at all times an operational and efficient conflicts of interest managing policy while taking into consideration the size, the organization, the nature, the importance and the complexity of the provided activities[816]. *AMF* provides non-exhaustive case examples of conflicts of interest situations[817]. They include suspicion of making a financial profit or avoiding a loss on the expense of others, holding an interest for a third party in the performed transaction that is distinct from that of the investor. Further to, privileging or favoring the interest of a group of investors over that of the main investor, the acting person exercises a similar professional activity to that of the investor or the case of receiving or a future incentive

[809]Recital 85
[810]Recital 13
[811] Article 12.1.b UCITS Dir. 2009/65
[812] Eddy Wymeersch, 'Conflicts of Interest, Especially in Asset Management' in Luc Thevenoz and Rachid Bahar (eds), *Conflicts of Interest Corporate Governance and financial Markets* (Kluwer Law International 2007)
[813] Article 14.d UCITS Dir. 2009/65
[814] Article 13.e UCITS Dir. 2009/65; conflicts of interest should be hindered by the depositary when performing its functions. It should ensure fairness, honesty and professionalism and it should act in the interest of the company and that of investors. Further, it hinders from carrying out activities that may arise a situation of conflicts of interest (Article 25.2 of the UCITS Dir. 2009/65 as amended by Article 1.8 of Dir. 2014/91)
[815]*AMF*, régl. gén., art. 313-18
[816]*AMF*, régl. gén., art. 313-20
[817]*AMF*, régl. gén., art. 313-19

of receiving an advantage from a third party in a form other than that of the commission or the fees commonly billed for the provided service.

268 ***Jordanian approach to conflicts of interest.*** Jordanian legislature took a different approach to that of EU and French ones. It addresses disclosure of existing interests and not the matter of conflicts of interests. The Jordanian rules address the necessity to separate the functions of the custodianship and that of the investment management[818], further the rules specifically state the prohibition of having a custodian with a shareholder character or being a part in the transactions conducted on behalf of the IC[819]. The approach prohibits having any direct or indirect interest by the investment manager in the performed transactions[820]. The rules address the consequences of the control of conflicts of interest situations including; independence (of members of management those owning shares in addition to non-executive and independent members that have no connection to the company other than their shareholding character)[821], fair treatment and equality in different places without imposing an actual explicit legal obligation on the IC to lay down a conflicts of interest policy as such provided for under the *AMF* rules. The sole article relating implicitly to conflicts of interest is stated in JSL. It states that every licensee should comply with the applicable code of ethics. In addition to acting in an honest and diligent manner that maximizes investors' interest and achieves investment goals, with diligence, impartiality and fair treatment and without incurring investors further or excessive rates, fees and commission, avoiding empty or unrealistic profits and promises and hindering from any misleading or fraudulent behaviors[822]. This legal obligation despite the approach used requires preemptive measures that manage the occurring conflicts, hinder their occurrence, disclose potential or existing conflicts and ensure fair treatment of investors (further explained in paragraph 2).

[818] Article 51 JSL of 2017; Article 31 Collective Investment Regulation of 1999
[819] Article 29 Collective Investment Regulation of 1999
[820] Article 30 Collective Investment Regulation of 1999
[821] Article 4 Corporate Governance Regulation of 2017
[822] Article 57 JSL of 2017

§2: Preemptive Measures for Conflicts of Interest

269 ***National approach.*** Conflicts of interest occur, they cannot be fully prevented yet they can be avoided or in some cases disclosed in order to avert from negatively affecting the investment decision or influencing market transparency and integrity. This approach requires the Investment Companies to define the steps they might reasonably be expected to take to identify, prevent, manage or disclose conflicts of interest as well as to establish appropriate criteria to determine the types of conflicts of interest whose existence may damage the interests of the Company[823]. In the process of managing conflicts of interest, regulatory approach is considered the most common one. Whereas through this approach structural measures are taken by national competent authorities that entail as core principles; disclosure, safeguarding the independence and ensuring market integrity. The most common structural measure is requiring undertakings to establish and maintain an internal supervisory method that prevents, exposes and identifies situations entailing conflicts of interest, this method may take the form of a conflicts of interest policy[824].

270 ***Conflicts of interest policy.*** The policy that the IC is expected to put in place should identify among other things investment services and other activities that arise or potentially arise a situation of conflicts of interest. In addition defining the procedures and measures to be followed in order to manage these conflicts and insure that acting persons exercise their activities with an appropriate level of independence in terms of the size and activities of the company[825].

271 ***Appropriate independence.*** IC is expected to safeguard appropriate independence[826] of its acting persons by following a set of procedures and laying down measures whether those imposed by the legislature or any supplementary ones it deems necessary. The measures include

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[823] Article 14.c UCITS Dir. 2009/65

[824] Like the case of the French legislature (*AMF*, régl. gén., art. 313-20)

[825] *AMF*, régl. gén., art. 313-21

[826] Jordanian corporate Governance Regulation of 2017 provides (Article 2) a definition for the independent member of management. It defines him/her as a board member that does not hold any financial interest or is connected with the company, the auditor, the administrative staff or a competing company other than the interest or the connection linked to its shareholding in the company. This independence concerns the interest or connection that may bring out a suspected financial or non-financial benefit influencing its decisions or entailing a misuse of its powers and position

but are not limited laying down efficient procedures that prohibits the exchange of information between the acting persons that their activities arise or potentially arise situations of conflicts of interest. Deleting the direct link between the acting person's remuneration of one activity and the revenue of a concerned person when suspecting a situation of conflicts of interest. Further to laying down measures that prohibit or limit the inappropriate influence third parties may exercise over the acting person in addition to limiting and controlling the number of participations acting persons hold in other competing undertakings that may result into conflicts of interest or affect the adequate management of such conflict[827]. The independence of members of management was previously addressed in this work, and relates to shares ownership and board membership in companies that exercise similar activities to the IC in question.

272 ***Independence and disclosure.*** The independence of members of management may be guaranteed through disclosure measures. Measures that aim to control the situations entailing conflicts of interest; as the full prevention is difficult and impossible in certain cases. How is the disclosure dealt with? What disclosure do conflicts of interest require? The disclosure is that regulated in national governing rules and is based on the mere statements of acting persons' participations and interests outside the scope of the undertaking in question. Therefore it constitutes a preventive measure to the activation of the fiduciary duty and the agency theory. The disclosure as a measure averting and controlling the rise of conflicts of interest differs from the periodic disclosure of financial statements that is further required in securities rules. The disclosure of the interest empowers investors with the ability to assess conflicts of interest and its impact on the overall decision-making process. Conflicts of interest generally results out of the multi-managerial involvement in competing companies or in their transactions arising or entailing conflicts of interest.

273 ***Performing disclosure.*** Disclosure is conducted through submitting a written statement to the company specifying the names of the companies in which the member owns competing participations or holds a management position[828]. Disclosure obligation extends to include close family members of members of management; including the spouse and minor children.

[827] *AMF*, régl. gén., art. 313-21 II

[828] Articles 12, 2 & 23 Disclosure Regulation of 2004; C. com., art. L. 225-109; Article 138.a JCC; Articles 133, 146.b, 147 JCC

Members of management of the IC are prohibited from having any direct or indirect interest in the transactions they perform on behalf of the company[829]. They are required to disclose any existing interest.

274 ***Conflicts of interest and clean transactions.*** The connection between conflicts and interest and clean transactions lies in the disclosure as it empowers the investor to fully assess the prospective investment decisions therefore making a well-informed decision. The disclosure further hinders the possibility of abuse of inside information as members of the management are prohibited from having any direct or indirect interest in the transactions they perform on behalf of shareholders except for the case of having shareholder directors, and then the fair treatment rule is activated[830]. Therefore, the main aim for hindering conflicts of interest is having a prudent and efficient management. Hindering situations entailing conflicts of interest and disclosure of interests result in presenting the market with integrity, confidence and transparency. These characteristics should be guaranteed. The following sub-section addresses the measures that should be taken to safeguard the confidence, integrity and transparency of the financial market.

Sub-section 2: Maintaining a Clean Market

275 ***Preview***. Providing financial services requires continuous diligence and care prior and post-the performance of the activity. The necessity of this diligence is requested by both the investor and the market. Therefore, the two main concepts that the diligence ensures are safeguarding shareholders interest and market integrity. They are interconnected shareholders interest is protected through performing clean and non-fraudulent transactions on the market, in other words ensuring market integrity that creates a level playing field for all market participants and increases investors' confidence in the market they are seeking. Reaching the required level of market integrity entails the introduction of different regulatory frameworks of financial markets that address abusive market behaviors such as market manipulation, through establishing a strong commitment to transparency and equal treatment of market participants.

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[829] Article 148.c JCC; Article 30 Collective Investment Regulation of 1999

[830] As a perfect example the EU approach. Its approach clearly provides for the difficulty to avoid conflicts of interest in certain circumstances therefore requires fair treatment of investors

276 ***Background of AMP and MAP***. In financial markets, participants exercise two forms of financial practices: Accepted Market Practices (AMP[831]) and Market Abuse Practices (MAP). The distinction between the two categories of practices is explicit under the governing legal rules. EU rules provide a harmonized framework for the prohibition of market manipulation. It encompasses the prohibition of entering into a transaction, placing an order to trade or engaging in a behavior, which gives or potentially gives a false or misleading signal as to the supply of, demand for or price of financial instruments within the sphere of the financial instruments defined by MiFID. Not all practices even though they seem, as manipulative fall under the concept of MAP, there are exceptions from this categorization. The exception applies if it is established by the concerned person that the transaction in question is conducted for a legitimate reason and in accordance with a preexisting national market practice, therefore holding what is referred to as an AMP[832]. AMP is viewed as a safe harbor that exempts the acting person or undertaking from the abusive characterization and the sanctioning imposed by competent authorities. To qualify as an AMP the practice in question should meet a set of criteria stated within the EU scope under the MAR. The criteria include having a practice that provides a substantial level of transparency to the market, ensures a high degree of safeguards to the operation of market forces, positively impacts the liquidity and efficiency and does not create integrity related risks whether directly or indirectly[833]. What behaviors fall under the abusive category and considered as endangering the integrity of the financial market? What is the scope of these behaviors within the sphere of the IC? The answer for these two questions is in the following paragraphs.

§1: *Behaviors Endangering Market Integrity*

277 ***Market abuse.*** An efficient and transparent financial market requires market integrity. Smooth functioning of securities market and public confidence in the market are prerequisites for economic growth and wealth maximization. Market abuse harms the integrity and negatively affects investors' confidence in securities[834]. This concept entails the unlawful behavior in

[831] MAR addresses this form of practices
[832] ESMA, 'Points for Convergence in Relation to MAR Accepted Market Practices or Liquidity Contracts' (Opinion) ESMA70-145-76 of 25 April 2017
[833] Article 13 MAR
[834] Recital 2 MAR

financial markets that prevents full and proper market transparency. On a general scale this concept consists of insider dealing, unlawful disclosure of inside information and market manipulation.

278 ***Base obligation.*** The main requirement imposed on financial market participants is that entailing the notification submitted with competent authorities of newly or any admitted securities to trading on regulated markets[835]. This notification consists of, among other things, the identification of trading venue, financial instruments in question, further to the notification of the ceasing of trade.

279 ***Inside information.*** The exercise of financial activities including; trading securities on regulated markets, entails providing the investor with an overview of investment transactions and decisions while ensuring at the same time equal or the least fair treatment of all targeted investors. Members of the investment services provider hold wider and more detailed knowledge, background and experience relating to the investment in question, than that of the investor (particularly retail investors). This knowledge may be referred to as "Inside Information"[836]. The inside information is an information with a precise nature[837] which was not publically disclosed and relates directly or indirectly to one or more issuers or financial instruments, where if it is made public there is a likelihood[838] that it will have a significant effect on the price of the financial instrument[839]. The market abuse practice relating to this form of information is the unlawful disclosure of the information.

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[835] Article 4 MAR

[836] C. mon. fin., art. L. 465-1; Cass. crim., 26 June 1995, n° 93-81.646

[837] 'The precise nature is that indicating a set of circumstances which exists or which may reasonably be expected to come into existence, or an event which has occurred or which may reasonably be expected to occur, where it is specific enough to enable a conclusion to be drawn as to the possible effect of that set of circumstances or event on the prices of financial instruments' (Article 7.2 MAR). The European Court of Justice in a preliminary ruling defined that the notion of the precise nature refers to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur (Case C-19/11 *Markus Geltl v Daimler AG* [2012] ECR I); French jurisprudence mentioned precise nature and not necessarily certain (Cass. com., 5 Oct. 1999, n° 97-17.090). The information needs to be sufficiently precise to be immediately exploited on the market (Cass. crim., 26 Oct. 1995, n ° 94-83.780). As a perfect example of a precise information the preparation of an IPO

[838] Means information a reasonable investor would be likely to use as part of the basis of his or her investment decisions (Article 7.4 MAR)

[839] Article 7.1 MAR

280 ***Unlawful disclosure of inside information***[840]. This case arises if a person possessing inside information discloses that information to any other person, except where the disclosure is made in the normal exercise of an employment, a profession or duties[841]. To avoid unlawful disclosure the issuer is obliged to conduct a prior transaction disclosure of inside information in order to permit investors to make a well-informed assessment of the information and its impact on the investment in question[842].

281 ***Insider dealing.*** This practice is considered as market abuse behavior prohibited by the governing legal rules[843]. This situation arises as a result of holding inside information and using them by way of acquiring or disposing, to the person's own account or that of a third party, directly or indirectly in relation to an information relating to financial instrument in question[844]. Who is the insider? The insider is the person possessing the information as a result of: being a member of issuer's management, supervisory body or administration[845], having a holding in issuer's capital, having access to the information through the exercise of an employment, profession or duties[846], being involved in a criminal activity[847] or a third party insider[848].

282 ***Safe harbor.*** Not all behaviors including inside information are considered as abusive. The law specifies legitimate behaviors the exercise of which does not entail a violation of market integrity. This exercise should meet the criteria set by law that allows the proof of good faith or that justifies the nature of the activity exercised by the acting person[849].

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[840] Article 14.c MAR; French jurisprudence addresses non-disclosure of inside information as another form of violation next to the disclosure of false and misleading information (Cass. crim., 16 Nov. 2005, 04-85.815) where, the *AMF* have the discretion to sanction both under its administrative umbrella

[841] Article 10 MAR

[842] Article 17 MAR

[843] Article 14 MAR

[844] Article 8 MAR; C. mon. fin., art. L. 465-3

[845] Primary insider C. com., art. L. 225-108; Simple presumption of knowledge is required by jurisprudence (Cass. crim., 15 Mars 1993, n° 92-884)

[846] Secondary Insider: Cass. crim., 18 Fèvr. 1991, n ° 90-82.288

[847] Article 8.4 MAR

[848] Cass. crim., 26 Oct. 1995, n° 94-83.780

[849] Article 9 MAR provides a list of legitimate behaviors

283 ***Market manipulation.*** This form of abusive behaviors[850] encompasses the case of entering into a transaction, placing an order to trade or any other behavior that gives rise, introduces or is likely to give rise to misleading or false signals, secures or is likely to secure a price at an abnormal or artificial level or the behavior that affects or is likely to affect the price of a financial instrument[851]. Market manipulation includes further behaviors that involve disseminating, providing or transmitting of false or misleading signals or information[852]. Market manipulation may be conducted through securing a dominant position, conducting a buying or selling that misleads investors, disrupting or delaying functions of the trading system and voicing opinions on financial instruments by taking advantage of regular access to the media[853]. The question rising in this regard is the following: what is the scope of this abusive behavior and other abusive practices in the sphere of ICs?

§2: *Scope of Market Abuse Behaviors for Investment Companies*

284 ***Scope.*** IC when exercising its portfolio investment activities should act within a sphere of market transparency, in a manner protecting market integrity and most importantly preventing market abuse practices. The scope of application of the MAP covers all the persons professionally arranging or executing transactions. Who is this person? Does the IC fall under the scope of the person? The person is that professionally engaged in the reception and transmission of orders for, or in the execution of transactions in financial instruments[854]. In the EU approach, this definition is activity based, does not cross-refer to and is not subject to one investment related regulation. This leads to a non-limitation and non-exclusion in the applicability of this definition to a particular category of persons nor does the scope limit the application to investment services provided through non- portfolio investment undertakings[855]. In a broader sense, MAR provides a scope of application that extends to cover a broad range of financial instruments on a scale that clearly addresses the IC[856].

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[850] Article 15 MAR
[851] Article 12.1 (a) (b) MAR
[852] Article 12.1 (c) (d) MAR
[853] Article 12.2 MAR
[854] Article 3.1 (28) MAR
[855] ESMA, 'Questions and Answers on the Market Abuse Regulation' ESMA/2016/1644 of 20 December 2016
[856] Article 2 MAR: Applies to financial instruments that are traded on regulated markets

285 ***Jordanian approach to MAPs.*** The Jordanian approach is closely linked to the powers and supervisory role of JSC. The Commission has as its main goal and objective the regulation and development of the financial market in a manner safeguarding and achieving the intended equality, efficiency and transparency, in addition to protecting the market from any potential risks and providing investors' protection[857]. In the process of fulfilling these goals, the Commission exercises a supervisory power over the market and its transactions[858].

286 ***MAPs in Jordan.*** Securities rules in Jordan provide two forms of prohibited practices that are categorized based on the character of the acting person. The first category is market manipulation limited to licensees and their authorized members[859]. The second category is that relating to the misuse of inside information and is globally applicable to every violating person or undertaking[860]. Market manipulation consists of the practices negatively or attempts at negatively influencing the financial market whether performed individually or as part of an organization[861]. Furthermore, practices that negatively affects the competitiveness within the market[862], conducting fraudulent, misleading or prohibited transactions and the misuse of investors' assets[863]. As for the second category of abusive practices, their applicability is broad and is positively interpreted as providing a large scale for investors' protection and a solid ground for market integrity and transparency. The infringements that may be committed as part of the inside information related practices include insider dealings (trading of securities based on inside information[864]), unlawful disclosure of inside information and the misuse of these information to fulfil unlawful financial or non-financial profits and gains[865]. Further to the practices affecting or manipulating the prices of securities[866].

287 ***Positivity of insider dealing.*** Insider dealing is considered globally as a MAP, nonetheless the economists note a potential beneficial effect for this form of practice. This view

[857] Article 8.a JSL of 2017
[858] Article 8.b JSL of 2017
[859] Article 56 JSL of 2017
[860] Article 105 JSL of 2017; Article 106 JSL of 2017
[861] Article 56.d JSL of 2017
[862] Article 56.c JSL of 2017
[863] Article 56.a JSL of 2017
[864] Concerning an informed individual defined in Article 2 Disclosure Regulation of 2004
[865] Article 105 JSL of 2017
[866] Article 106 JSL of 2017

was advocated through analyzing this dealing as a victimless crime that potentially increases market efficiency[867]. Theoretically speaking insider dealing leads to a faster reflection of the information on the market price than in cases where the trade is restricted to the reflection the globally available information has[868].

288 ***Preventive measures.*** The contribution to market integrity and investor protection requires all market participants to become integral parts of the control process of financial services. The control process addresses preventive measures participants should employ to deter from abusive practices influencing the market or investors' interest in addition to regulating prohibited and violating practices of acting persons within the market. In the process of promoting transparent and efficient markets, corporate governance emerges as a framework that contributes to this promotion and provides a system that is consistent with the rule of law and clearly articulate the division of responsibilities among different supervisory and enforcement authorities[869]. The measures covered by the notion of corporate governance include the control of the self-executed practices through laying down a code of conduct or merely outsourcing the activities to a more professional MC (further illustrated in chapter 2).

[867] Geneviève Giudicelli-Delage, 'Les dispositifs spécialisés de lutte contre la criminalité économique et financière – D. interne/ D. comparé' Synthèse in 'L'organisation des dispositifs spécialisés de lutte contre la criminalité économique et financière en Europe' LGDJ 2004

[868] M. Andenas n (71) Page 518

[869] D. Hillier n (215) page 43

Chapter 2: Internal Conduct Conditions: Auto-Management or Outsourcing

289 ***Preview.*** Corporate governance is defined broadly as the organization of the control over and management of a company[870]. Its structure specifies the distribution of rights and responsibilities among different participants in business transactions[871]. Including members of management, shareholders and other stakeholders. The question rising in this regard: what does corporate governance cover? It covers the definition of company's legal framework (its organization, functioning, rights and responsibilities of shareholders meetings and corporate bodies responsible for oversight), rules for appointing management, rules of conflicts of interest, organization of control over management (regulatory controls and audits) and the disclosure of financial information[872].

290 ***Good governance.*** Good govenance is a means to support economic efficiency, sustainable growth and financial stability[873]. It facilitates long-term access of companies to the capital market; in addition, it ensures protection and fair treatment of company's participants including shareholders and other stakeholders. According to the OECD, corporate governance provides a set of relationships between a company's management, its board and shareholders, therefore providing the structure through which company's objectives are set.

291 ***Purpose of corporate governance.*** The main purpose is to help build an environment of trust, transparency and accountability necessary for fostering long-term investments, financial stability and business integrity thereby, supporting stronger growth and societies that are more inclusive[874]. A credible corporate governance framework supported by effective supervision and enforcement mechanisms help improve and in some cases restore the confidence of investors in

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[870] C. Echaudemaison n (491) page 244; the origin of this concept dates back to Berle and Means when referring to the concept of separation of ownership and control. In today's conception it addresses also the performance of the company therefore, modern theories address different mechanism of internal and external governance and control

[871] ECB, 'Annual Report 2004' [2005] page 219 < https://www.ecb.europa.eu/pub/pdf/annrep/ar2004en.pdf > Accessed 8 February 2018; the same definition was referred to by the OECD in its Glossary of statistical terms

[872] Pierre Vernimmen and others, *Coporate Finance : Theory and Practice* (3rd edn, Wiley 2011) page 810

[873] World Bank, 'Governance and Development' (1992) Washington DC < http://documents.worldbank.org/curated/en/604951468739447676/Governance-and-development > Accessed 16 April 2018 page 1

[874] Angel Curria: OECD Secretary General

the market, further reduces the cost of capital, underpin good functioning of financial markets and ultimately induces more stable financing sources[875].

292 ***Scope of corporate governance.*** Corporate governance consists of various global key guiding principles that provide companies with a model performance. These principles are usually regulated nationally in a way that provides a benchmark for sound financial systems that functions with sufficient flexibility and stability. Further, the principles address efficient assessment and enforcement measures. One of the main principles of corporate governance is promoting transparent and fair financial markets. This principle entails providing sound and reliable legal framework that permits different market participants to resort to it once their private contractual relations are established[876]. The implementation of this principle requires monitoring and supervising market related performances. Whereas corporate governance contributes to market integrity that eventually requires laying down means of control and preventive measures including the application of internal codes of conduct, application of window trading mechanisms, and establishing Chinese walls[877]. In addition to the possibility of outsourcing the activities to professional management companies (further illustrated in section B).

293 ***Internal conduct control and market performance.*** The objective behind the preventive measures required by financial rules is to provide shareholders, management, financial intermediaries and financial services providers with the right incentives to perform their activities within a framework of checks and balances. According to the OECD approach, corporate governance entails four main areas that relate to the internal performance of company's activities: shareholders' rights (particularly ex-ante rights and their reinforcement such as voting), transparency of information (periodic disclosure and disclosure of material information), organs of management and control and the alignment of compensation.

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[875] OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris < http://dx.doi.org/10.1787/9789264236882-en > page10

[876] Ibid page 13

[877] M. Andenas n (71) page 530, MAD Recitals

294 ***Adoption of corporate governance codes.*** National codes setting corporate governance principles are generally not obligatory[878]. They have an explanatory nature and provide a model law that may be adopted by different companies in accordance with companies' legal rules[879]. This adoption differs depending on the form of exercise the company seeks. Self-exercise or externalization as two options provided for IC. The following section A addresses extensively these options.

Section A: Self-Executed Activities

295 ***Preview.*** Investment services providers, including the IC, in the process of performing their activities are obliged to comply with their professional obligations including enacting sound administrative procedures, internal conduct mechanisms, efficient risk evaluation techniques in addition to respecting and following the applicable governance norms that guarantee the liquidity and stability of financial structures[880]. The main objective of the rules of internal conduct should be investors' protection and the integrity of the operations. The value of shareholders' investments is added whenever financial managers succeed in making the company earn a higher return than that earned by shareholders' themselves. Generally, shareholders' opportunities outside the company set the standards to those investments inside the company. In the process of increasing the value, the company should combine governance rules and procedures with appropriate incentives to make sure that all the participants in the investment decision are in hand to reach the targeted increase. The necessity to separate ownership and control, the attempts of the management to secure their jobs rather than maximizing shareholders' wealth and restrained and shy decisions management may reach create conflicts between them and shareholders.

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[878] Véronique Magnier et Yann Paclot, 'Le Gouvernement d'entreprise en France, Vingt ans après' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015) page 496

[879] C. Com., art. L. 225-37; C. Com., art. L. 225-68; Jean-Marc Moulin, 'La Force Normative du Code AFEP-MEDEF' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015) page 597

[880] Article 151 JCC (Article 11 of the amending bill of this law for the year 2017 introduces and for the first time the term corporate governance into the Company's law), Article 53.a Licensing Regulation of 2005, C. mon. fin., art. L. 533-2; no such requirements are addressed in the newly implemented Licensing Bylaw of 2018

296 ***Agency problems.*** Agency theory is the main intellectual foundation of corporate governance. It is due to the significant effect corporate governance has on company's performance, in terms of inducing management to act in the interest of share value optimization[881]. Particularly, when considering this theory as the rule governing the relation between management and shareholders. Corporate governance is the means through which shareholders control management. The conflict of shareholders and management's objectives arises agency problems, whereas they avail when agents (managers) work for principals (shareholders). As a perfect example to these problems is higher agency costs incurred by shareholders due to the lack of the attempts to maximize company's value and the costs of monitoring and constraining the actions of management[882].

297 ***Solution for agency problems.*** Profit is the incentive of every business. Profit is achieved through acquiring an efficient, effective and non-costly management body, in addition to a solid decision-making framework. The incentives intended from the business activity are endangered by the misconduct of management and the lack of control measures. The question rising in this regard is the following: what form of management may IC have? Previously noted that there are two forms of portfolio management active and passive.

298 ***Active management.*** Active investing is an attempt to add value. It is the outperformance of a given equity market often represented by an index or achieve a specific investment objective, it is achieved through the use of financial analysis skills and a process of stock picking[883], this form of management has both benefits and risks[884].

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[881] Livia Bonazzi and Sardar Islam, 'Agency Theory and Corporate Governance: A study of the Effectiveness of Board in their Monitoring of the CEO' (2007) 2 (1) Journal of Modelling in Management 7 < https://doi.org/10.1108/17465660710733022 > accessed 16 April 2018

[882] R.A. Brealey n (1) page 12; see: Patrick McColgan, 'Agency Theory and Corporate Governance: A Reviewof Literature from a UK Perspective' (2001) < https://pdfs.semanticscholar.org/79c5/2954af851c95a27cb1fb702c23feaae86ca1.pdf > Accessed 16 April 2018

[883] Stock picking is the buying of shares that are undervalued and have future potential increase in price or in paid dividends

[884] Vanguard, 'Active and Passive Investing' 2017 < https://www.vanguard.co.uk/documents/portal/literature/active-passive-investing-guide.pdf > accessed 31 May 2017

299 ***Passive management*[885].** Stemmed out from the belief that it is difficult to outthink the market therefore matching it. It is a form of managing investments while focusing on costs. How is the market matched? The approach is following or tracking an investment index[886], the advantage is spreading the risk widely within the market[887], this form of management is approached through replication (straightforward matching[888]) or sampling (optimizing[889])[890].

300 ***Form guaranteeing efficient portfolio management.*** Both forms of management have their related benefits and risks; they are practically the contrary of each other. The active management benefits in the opportunity of outperformance, the research insights in addition to the application of defensive measures minimizing potential losses. These benefits form the risks of the passive management as it leads to total market risk, lack of flexibility due to non-application of defensive measures and provides a performance constraint. As for the risks active management incurs they include expenses. Market research is costly and the management henceforth charges higher fees, the provided style issues limits the performance in addition to holding no guarantees on picking successful shares at all times. Contrary to active management, passive holds the risks of the active as its benefits, whereas it achieves diversification, low costs and simplicity. Which of the two forms provide a more efficient portfolio management for the IC is difficult to tell, as both can be useful. We previously preferred active management for IC rather than passive management; nonetheless, mixing both approaches into an asset allocation model may be more realistic. This blend known as core or satellite approach, includes submitting a portion of the portfolio to active management therefore avoiding costly operations, it is a practice of both tactical[891] and strategic[892] asset allocation[893]. The following sub-sections

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[885] *SICAV* passively managed C. mon. fin., art. R. 214-28

[886] History of indexing (Gokhan Kula & others, *Beyond Smart Beta*: *Index Investment Strategies for Active Portfolio Management* (Wiley 2017))

[887] The risk is spread and not avoided, this approach cannot protect from broad market declines and it follows it

[888] Closely tracking the performance of the target index, preferred for equities.

[889] Using a representative sample of the securities included in the target index, it requires extensive portfolio modeling and monitoring combined with very disciplined and cost-conscious trading capabilities.

[890] Lionel Martellini and others, *Fixed-Income Securities: Valuation, Risk Management and Portfolio Strategies* (Wiley 2003) page 213

[891] It is opportunistic, takes advantage of the shifting market conditions to increase the level of investments in shares that are expected to outperform in a short-term.

[892] A long term approach that takes into consideration financial goals and risk tolerance to determine portfolio path.

address the performance of the management in terms of achieving efficient portfolio management and the decision-making process.

Sub-section 1: Efficient Portfolio Management

301 ***Portfolio management.*** The right governance model is contextual as it depends on; what the concerned company does and the conditions of the market. Governance model should be dynamic therefore, accommodating the changes in the market if it cannot then it is considered as too simple to accommodate the complexity of the business environment in which companies function[894]. Portfolio management is a process consisting of an integrated set of steps undertook in a consistent manner creating and maintaining an appropriate portfolio, while meeting at the same time investors' goals[895]. This process has as its main component investment policy, which identifies the financial objectives and risk tolerance. The process has a preset path that is considerably stable despite the inconveniences along the way. It commences with the planning, moves to the execution and returns to feedback.

302 ***Focus.*** This sub-section focuses on the execution level with slight reference to feedback stage. Execution requires establishing well-documented organizational structure for the IC, clearly allocating responsibilities, implementing supervisory functions and appropriate internal conduct mechanisms, in addition to laying down effective decision-making procedures that secure compliance on all levels[896]. Eventually these implementations should be combined with effective communication and recording mechanisms in order to achieve the main objective of efficient portfolio management.

303 ***Purpose of efficient portfolio management.*** The purpose of efficient portfolio management is reached through employing and using techniques and instruments that relate to

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[893] Active vs. passive Portfolio Management (Broadridge Investor Communication solutions) 2013 < https://www.vanguard.co.uk/documents/portal/literature/active-passive-investing-guide.pdf > Accessed 31 May 2017

[894] Ronald J. Gilson, 'From Corporate Law to Corporate Governance' [2016] ECGI Working Paper Series in Law 324/2016 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2819128 > accessed 1 June 2017

[895] John L. Maginn & others, *Managing Investment Portfolios: A Dynamic Process* (3rd edn, Wiley 2007)

[896] Article 4 of Commission Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organizational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company [2010] OJ L 176/42

the traded securities and follow strict investor-oriented criteria[897]. The criteria include cost-effective and economically appropriate instruments that fulfil ultimate aims of cost and risk reduction, in addition to generating additional income and capital with a proper level of risk falling within the risk tolerance of the undertaking and respecting diversification rules[898]. To have a better understanding of efficient portfolio management the following paragraphs address the agency control related mechanisms (paragraph 1) and the risk management function (paragraph 2) as part of the execution stage.

§1: *Agency Control Mechanisms*

304 ***Locating agency problems.*** According to *Jensen & Meckling* model, agency problems exist where there is a possibility and incentive to management to pursue their interests at the expense of shareholders. Efficient portfolio management requires effective control of management performance in a manner alleviating the agency problems and their associated costs. The performance of management refers to their activity. Meaning their decisions and behaviors throughout their term. This term differs from performance management used in human resources writings. The latter refers to an appraisal system that promotes and improves employees' effectiveness through continuous review, control and cooperation between them and the management. Therefore, it refers to a process and not the actual activity[899]. Agency control mechanisms assist the company in achieving its strategic goals. It is integrated into the company's organization. The doctrine introduces various mechanisms as part of an agency control system exercised directly by the company. These mechanisms fall under two main categories: one aligns the incentives of managers and shareholders and the other limits the discretion of managers. The aim from both categories is to reduce agency costs.

305 ***Doctrinal examples.*** One proposition entailing equity based managerial compensation that links management remuneration to the performance of share price[900]. Further, market for

[897] Article 51.2 UCITS Dir. 2009/65
[898] Article 11 of Commission Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions [2007] OJ L 79/11
[899] Margret Sinclair Hunt, *Performance Management* (Updated by Helen Simms, Cambridge) page 18
[900] Robert A. Haugen & Lemma W. Senbet, 'Resolving Agency Problems of External Capital Through Options' (1981) 36 (3) Journal of Finance 629

corporate control[901], as stock price signals managerial ability and efficiency[902]. Low stock shows poor management and creates an incentive for takeovers by more efficient owners. In addition to the role of managerial labor market (incentive to guard the reputation)[903]. These examples lead to seven main issues addressed by both the agency relation and corporate governance rules. They include management remuneration, independence, conflicts of interest, risk management, compliance, efficient decision-making process and the exercise of shareholders' rights. This paragraph addresses solely the first two, as for the remaining ones they are further illustrated in the upcoming chapters.

306 ***Remuneration.*** Agency theory suggests that managers be rewarded based on their performance. Therefore avoiding agency conflicts. The compensation is used as an incentive to motivate and induce managers to think more like shareholders. It develops a shareholder's mind-set that stimulates the effective and profitable decision-making[904]. Doctrine suggests that outside managerial labor market exerts direct pressure on companies to sort and compensate managers according to their performance. The pressure availed in the form of having the company as always in the market for new managers. Managers in the managerial labor market are always concerned with the remuneration mechanisms and responsiveness of this mechanism to their performance. It was suggested that in a competing managerial labor market if company's reward system is not responsive to performance, company loses managers (the best manager leaves first)[905]. This opinion opens the door for questioning the link between compensation entailing share ownership and that granting a percentage of the net profit and creating the incentive for managers to better control the decision-making process.

307 ***Compensation systems.*** The notion of the separation of ownership and control aims to avoid conflicts of interest and agency problems. Laying down a compensation scheme based on

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[901] Henry G. Manne, 'Mergers and the Market for Corporate Control' (1965) 73 (2) Journal of political Economy 110
[902] Tuomas Laiho, 'Agency Theory and Ownership Structure: Estimating the Effect of Ownership Structure on Firm Performance' (Master Thesis, Aalto University 2011)
[903] Eugene F. Fama 'Agency Problems and the Theory of the Firm' (1980) 88 Journal of Political Economy 288
[904] Charles M Elson, 'Directors Compensation and the Management-Captured Board: The History of a Symptom and a Cure' (1996) 50 (1) SMU Law Review <http://heinonline.org/HOL/LandingPage?handle=hein.journals/smulr50&div=16&id=&page=> accessed 13 December 2015
[905] E. Fama n (903) page 292

allocating shares to managers creates a financial incentive and induces managers' performance to be shareholder-oriented. On the other hand, being a shareholder may lead to unfair and bias treatment. Managers are capable of influencing the decision-making process and orient it to serve their personal interests on the expense of others. The other form of compensation is the one connecting the remuneration with performance. This form seems pro-agency solution. Managers are more likely to become accountable once the pay is linked to performance. This notion induces to act rationally in order to maximize performance[906]. Nonetheless, this system arises excessive remuneration problems. In this particular place, the role of corporate governance and internal conduct rules is found. Both insist on the necessity to implement a detailed remuneration policy, whether through having a cap on the allocated amounts[907], establishing a 'say-on-pay' system entailing ex-ante or ex-post binding vote, or the preparation of an extensive remuneration report controlled by shareholders[908].

308 ***Excessive remuneration.*** Problems of excessive remuneration exist in all forms of compensation systems. To avoid these problems and hinder their occurrence, a regulatory approach should be put in place. Legal rules should stipulate clearly the direct role of shareholders in monitoring and controlling the allocated amounts. Most regulatory approaches provide the board with the discretion to designate the remuneration strategy and allocate to itself the amount it deems appropriate with no system of checks and balances[909]. The allocated amount includes mobility, exceptional remuneration or missions, activities and privileges. Jordanian rules as a perfect example for this lack of legal involvement did not grant shareholders a vote on remuneration; they provided them with a mere reviewing role[910]. The

[906] Hasna Haron, 'Determinants of Directors' Remuneration in Malaysian Public Limited Companies ' (2013) 6 (2) Indian Journal of Corporate Governance <http://eds.a.ebscohost.com.ezp.slu.edu/eds/pdfviewer/pdfviewer?sid=1734462b-33c4-4fa4-a9ea-63c224ec88ca@sessionmgr4005&vid=2&hid=4105 > Accessed 20 December 2015

[907] Jordanian law approach limited the allocated remuneration to managers to a percentage of the net profit ten percent. Therefore, allocating an amount that does not exceed five thousand JOD per year (Article 162.a JCC); approximately five thousand seven hundred Euros (exchange rate of February 2018)

[908] Article 143 JCC (no actual binding vote on the report overviewing right unlike France a binding vote); C. com., art. L. 225-115

[909] Article 162 JCC

[910] Article 143 JCC

discretion is further extended to no-binding vote over the allocation of remuneration amount for general manager[911].

309 ***Dealing with excessive remuneration in France.*** French rules on the contrary, provide shareholders with a binding vote on pay. The question rising in this regard is whether this vote is ex-ante or ex-post. In the process of avoiding excessive remuneration *code de commerce* introduces a general prohibition of fixed or permanent allocations to members of management other than those stated by law[912]. The remuneration is connected to members' attendance of their meetings and calculated based on a fixed annual amount determined by the GA[913]. Nonetheless, not all forms of remuneration allocations are determined by the GA. Exceptional remuneration for missions and mandates confined to members of management, is determined by the management with the assembly's binding vote on the set amounts[914]. The vote on management remuneration in France has two forms. Ex-ante and ex-post. Ex-ante over the principles and criteria of allocations. This vote includes the chairman, general manager, and assistant director (*directeur général délègué*)[915]. In addition to the members of two tier management[916]. Further to, an ex-post vote on the allocated and attributed amounts that are limited to variable and exceptional elements of the remuneration[917]. They cover chairman, president of the supervisory board, president, *directeur général délègué* and members of executive committee. The remuneration of members' of executive committee is designated in the appointing deed while being subject to the binding vote of GA[918]. Chairman may decide to allocate himself his proper remuneration yet it is subject to the binding vote of the assembly[919]. Board determines general manager's remuneration while subjecting this allocation to the binding assembly vote on pay[920]. Whereas the French jurisprudence considered the general

[911] Article 153.a JCC
[912] C. com., art. L. 225-44
[913] Board: C. com., art. L. 225-45; Supervisory body: C. com., art. L. 225-83
[914] Board: C. com., art. L. 225-46; Supervisory body: C. com., art. L. 225-84; Bénédicte François, 'Bilan 2017 du Say-on-pay' (2017) 10 Revue des Sociétés 607
[915] C. com., art. L. 225-37-2
[916] C. com., art. L. 225-82-2
[917] C. com., art. L. 225-100
[918] C. Com., art. L. 225-63
[919] C. Com., art. L. 225-47
[920] C. com., art. L. 225-53

manager's attributed remuneration without being foreseen in the statute nor was it approved by the board as an abuse of company's assets[921].

310 ***Binding vote on remuneration.*** The binding vote on pay represent a method to avoid excessiveness in management remuneration. French recent approach introducing the system of say-on-pay in 2016 provides a balanced and protective measures to shareholders interest. Further, it hinders management excessiveness and limits managerial and operational costs. The EU when amending the UCITS directive addressed the necessity to establish and maintain remuneration policies that are consistent with, and promote sound and effective risk management while at the same time not impairing management from acting in the best interest[922]. Further to the say-on-pay system provided by shareholders directive on an EU level. The say-on-pay came as part of the measures introduced on an EU level to provide shareholders with a form of control on management's performance and a verification tool that management preserves the viability of the company through having transparent remuneration, say-on-pay, creation of remuneration committee and subordinating the variable remuneration to the performance[923].

311 ***Independence.*** Previously addressed in this part, the notion of management independence in terms of the possibility to have multiple memberships in different boards. The flexibility is linked to the general prevailing concept of 'no need to have a fully available manager', managers should be available enough to run the company in an efficient and effective manner that hinders conflicts of interest and be oriented in the best interest of its shareholders. The value of the independence is viewed by corporate governance rules as a solution to many problems. The notion of independence is having a director that has no link of any nature whatsoever with the company, the group or management, which could compromise him in the exercise of his free will[924]. Board independence is related to better company performance.

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[921] Cass. crim., 22 mars 2017, n° 15-84.229 ; Bernard Bouloc, 'Rémunération non autorisée d'un Dirigeant', Cass. Crim., n° 15-84.229, *Revue des Sociétés*, 2017, n° 10, p. 591

[922] UCITS. Dir. 2014/91 amending UCITS Dir. 2009/65

[923] Benoit Lecourt, 'Les Rémunérations des Dirigeants des Sociétés Cotées' in 'Dossier : Réflexions Collective sur la Nouvelle Directive Droits des Actionnaires' (2017) 12 Revue des Sociétés 692

[924] Article 2 Jordanian Corporate Governance Regulation of 2017

312 ***Achieving independence.*** The key concept of the notion of independence lays in having a director or general manager that is not a senior member of management (neither a board member nor the chairman). Therefore, having what is known as an outsider general manager. The role and positive value of this concept depend on the role given to general manager. Is he a mere implementer of the rules or an actual decision-maker? An outsider general manager is a monitoring process to related-party transactions those that invoke conflicts of interest, it is further seen as a protective shield to minority shareholders verses the majority[925]. This is conditioned to having effective monitoring and assigning general manager with actual functions and discretion. A perfect example of national implementation of the concept of outsider director is found in both Jordanian and French company rules that provide for such possibility (an option and not a strict binding rule)[926]. This option limits the freedom of general manager as he/she should exercise the activities assigned to him/her by the board and he/she is subject to board's supervision. This limitation minimizes the value of the independent director as his discretion is restricted therefore, opening the door to dominant board especially if the general manager is appointed by the board.

313 ***Connection to risk management.*** According to OECD corporate governance reports, the governance of remuneration incentive systems often fail because the decisions and negotiations are not carried out at arm's length. Managers have far too much influence over the level and condition of the performance-based remuneration while having an incapable board of exercising objective independent judgement[927]. Management remuneration and independence closely relate to risk management. When they are both controlled and strictly regulated, they offer a solution to elevated agency costs therefore influencing one of the forms of risks incurred by IC (operational risk). The regulation of both notions avert from having a dominant board that implements excessive remuneration policies and alleviated charges. The following paragraph addresses different elements of the risk management function.

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[925] Donald C. Clarke, 'Three concepts of the Independent Director' (2007) 32 Delaware Journal of Corporate Law 73
[926] C. com., art. L. 225-51-1; Article 153.a JCC
[927] OECD (2011), Board Practices: Incentives and Governing Risks, Corporate Governance, OECD Publishing. < http://dx.doi.org/10.1787/9789264113534-en >

§2: Risk Management

314 ***Risk and business.*** Risk taking is a fundamental driving force in business. Effective management does not entail risk elimination it involves an effective management of risk taking. Companies face both financial and non-financial risks. When considering financial institutions (including IC) the focus naturally tends to be financial such as market risks in addition to operational risks.

315 ***Financial risks.*** A risk involving a financial aspect such as market risk. It is the fluctuations in the market value of securities held by the undertaking in question, which may vary over time reflecting different market conditions. Financial risks include other influential factors that impair trading conditions of certain securities. They include among other things credit, counterparty and liquidity risk (ability of the company to meet at a responsible cost its obligations as they become due). Other risk drivers may emerge such as concentration risk[928].

316 ***Operational risks.*** It is the risk of loss resulting from inadequate or failed internal processes, people and systems or external events (including legal risks)[929]. These risks increase the chances of loss due to human or technical errors, they are attached to different features and quality of trading operated by the company[930]. On a general term, it is a form of risk placed over the company and its management.

317 ***Risk management practices.*** They include identifying company's risk appetite and the level of tolerance, appointing a chief risk officer, qualification requirements for staff and management and establishing board committees that supervise company's internal control mechanism in the form of an audit committee states in its duty chart the function of risk management [931]. Key practices[932] include identifying risk hence; there is a need to perform a

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[928] *AMF*, régl. gén., art. 422-61

[929] Basel II Committee on Banking Supervision, 'Principles for the Sound Management of Operational Risk' (Bank of International Settlements, June 2011)

[930] CESR, 'Risk Management Principles for UCITS' (09-178, 2009)

[931] OECD (2014), Risk Management and Corporate Governance, Corporate Governance, OECD Publishing. < http://dx.doi.org/10.1787/9789264208636-en >; FSB, 'Thematic Review on Risk Governance: Peer Review' (February 2013) < http://www.fsb.org/wp-content/uploads/r_130212.pdf >

[932] According to *AMF* (*AMF* Sanctioning Commission decision of 21 October 2011, n° SAN-2011-18)

periodic independent assessment of company's overall risk governance framework[933]. In addition to evaluating company's level of tolerance. The practices relate to the obligation of due diligence, the company should provide financial analysis based on information obtained from an objective and guaranteed source, any contradictory action is considered as lack of due diligence and an action not oriented towards the exclusive interests of shareholders[934].

318 ***Risk management process.*** IC should employ a risk management process that enables it to monitor and evaluate the risk at any time and its contributions to the overall risk level[935]. This process includes the equation through which risk is calculated meaning the calculation of global exposure[936]. Global exposure is the total exposures or leverage that the investment undertaking managed or a general term through financial contracts, which do not exceed the net assets, in addition to the portfolio market risk that captures the exposure of standard movements. IC should be vigilant in maintaining its global risk related to its financial contracts and instruments[937] within a limit not exceeding the net value of its portfolio[938].

319 ***Calculation of global risk.*** The calculation of global risk should be frequent, not less than once a day[939]. The calculation should take into consideration the limits of exposure the national law specifies, as they should be permanently respected. The law further introduces two methods of calculation; a standard commitment approach[940] and a value-at-risk approach[941]. The chosen approach takes into account risk profile of the company that relates to investment policy, the complexity of traded securities and considering the part of portfolio consisting of financial contracts[942]. The approaches have their own criteria that company fulfils when choosing one or the other.

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[933] FSB 2013 n (931) page 33
[934] *AMF* Sanctioning Commission decision of 20 December 2012, n° SAN-2012-21
[935] Article 51.1 UCITS Dir. 2009/65
[936] *AMF*, régl. gén., art. 422-51
[937] *AMF*, régl. gén., art. 422-50
[938] C. mon. fin., art. R. 214-30 ; Article 51.3 UCITS Dir. 2009/65
[939] *AMF*, régl. gén., art. 422-51
[940] *AMF*, régl. gén., art. 422-52
[941] Measures maximum potential loss while considering a specific level of confidence and during a set period of time (*AMF*, régl. gén., art.422-56)
[942] *AMF*, régl. gén., art.422-52 II

320 ***Value-at-risk.*** The choice of this approach requires an IC that employs a complex investment strategy covering a notable portion of its assets, in addition to being exposed to non-standardized[943] financial contracts[944]. An IC of this category surely faces inadequacy in the application of standard commitment approach when calculating its market risk. This approach is completed with a resistance test that assimilates the company in crisis[945].

321 ***Standard commitment[946].*** It is the general approach of global risk calculation. The approach requires the conversion[947] of the position of every financial contract into the equivalent market value of the underlying asset[948]. When using this approach of global risk calculation the techniques and instruments of efficient portfolio management are taken into account[949].

322 ***National law and risk management.*** Jordanian securities and company rules do not address in any form the notion of risk management. Nonetheless, corporate governance regulation of 2017 states the necessity to create a risk management committee within the scope of listed companies[950]. It is a permanent supporting committee of the board. It lays down risk management policy and ensures the calculation and continuous review of risk exposures. The proposed amending bill of company law suggests an amendment of the law and introduces the obligatory application of corporate governance principles including laying down a risk management policy[951]. This newly implemented regulatory reference boosts investors' protection, yet ultimately no obligation is imposed to calculate global risk under securities rules. as an obligation of this kind has infringement consequences that guarantees its application. Shareholders of IC with the new rule can make better informed judgements. Nonetheless this

[943] AMF introduces a list of standard and non-standard contracts (*AMF*, Instr. 2011-15 *Modalités de calcul du risque global des OPCVM et des FIA agréés*)
[944] *AMF*, régl. gén., art. 422-52 III; Thomas Linsmeier and Neil Pearson, 'Value at Risk' (2000) 56 (2) Financial Analysts Journal 47
[945] *AMF*, régl. gén., art. 422-58
[946] Applicability criteria is defined by the ESMA guidelines ESMA/2011/112
[947] *AMF* states in its instruction 2011-15 the conversion equation (Article 7)
[948] *AMF*, Instr. 2011-15, art. 6
[949] *AMF,* Instr. 2011-15, art. 9
[950] Article 10 Jordanian Corporate Governance Regulation of 2017
[951] Article 11

rule remains limited in terms of the explanation of methods of risk calculation and the role of shareholders' protection and market transparency in its applicability.

323 ***Transition.*** Efficient portfolio management entails a properly organized decision-making process, where responsibilities and duties are clearly allocated. The following sub-section addresses this process in terms of both the board and the GA.

Sub-section 2: Meetings and Decision-Making

324 ***Preview.*** Members of management are expected to make decisions based on well-informed and ethical grounds while taking into account company and shareholders' objectives. As it was previously illustrated, management of IC should act in the best interest of all shareholders, in addition it ensures equal and fair treatment between them. They are required to approach the management of the company in an objective and independent fashion that hinders conflicts of interest and manages potential problematic situations[952].

325 ***Strategies.*** According to corporate governance rules, board employs and puts in place a strategy for decision-making process, where they examine and decide on the different transactions therefore performing their responsibility of monitoring the managerial performance[953]. The effective functioning of the strategy depends on the disclosure obligation; that made to the market, shareholders and the public. Generally, management should publish a communication of the strategy relating to financial, non-financial and material disclosure. The strategy permits stakeholders and in some cases, the public to access the data and information. The communicated information should be compatible with business development model and perspectives of the company, further, they should be within the sphere of a well-established communication strategy[954]. In other words, the laid down strategy is the method through which the board orients the corporate performance while taking into consideration managerial requirements. Therefore, clearly defining the structure and responsibilities of the board.

[952] D. Hillier n (215) page 47
[953] Code AFEP/MEDEF of November 2016
[954] OECD 2015 n (875) pages 21 and 50

326 ***Shareholders vs. board.*** Shareholders are the founding pillar of IC. This characterization is due to the participations shareholders contribute with when creating the company and later when increasing its capital or investing in its shares. The contribution grants shareholder in return individual rights that cannot be taken away against its will. IC under classical legal doctrine is established on a contractual basis. The distinction of this company is linked to its form. Shareholders own tradable securities in the form of shares, which brings about the original role of financial markets. This notion presents financial markets as the venue where contesting and control over the performance (trading) is exercised[955]. Where does this put shareholders' rights? Shareholders participate in company's social life through their character as members of the GA.

327 ***Reaching a decision.*** The management runs daily activities of the company. They are mandated by the GA to do so. Therefore, their exercise is controlled, monitored and complemented with decisions and resolutions rendered by the GA. The GA and the management (including board members and the general manager) are the two key components of the company; they function together and they complete each other to achieve eventually company's objectives. The following paragraphs illustrate the role of the board (paragraph 1) and that of the GA (paragraph 2) in the decision-making process.

§1: *Elements of Board*

328 ***Preview.*** Board structures and procedures vary both within and among countries; this structure determines main elements for the allocation of decision-making powers and consequently the responsibility for the decisions within the company. Some countries have two-tier boards that separate the supervisory function and the management function into different bodies. In such systems, they typically have a "supervisory board" composed of non-executive board members and a "management board" composed entirely of executives, the perfect example is the French model[956]. Other countries have unitary boards, which bring together executive and non-executive board members such as the other form of management structure

[955] See: Michel Germain and Veronique Magnier, *Traité de Droit des Affaires* (Tome 2 : Les Sociétés Commerciales, 21st edn, LGDJ 2014)
[956] C. com., art. L. 225-57, 58,59

provided by French rules[957], further to the Jordanian one[958]. In some countries, there is also an additional statutory body for audit purposes. In theory, the board in which two different people exercise the control and management roles, should be more effective in controlling management on behalf of shareholders, yet in practice it is not the case, it depends on the quality and probity of the involved individuals[959].

329 ***Functions and responsibilities.*** The board is principally responsible for monitoring managerial performance and achieving an adequate return for shareholders, while preventing conflicts of interest and balancing competing demands on the corporation[960]. In some countries, companies find it useful and effective to articulate explicitly the responsibilities that the board assumes[961] and those for which management is accountable within its AOA[962]. In order to fulfil their responsibilities effectively, boards must be able to exercise objective and independent judgement.

330 ***Business judgement rule[963].*** Business judgement rule is a legal presumption that directors when making the business decision acted on an informed basis, in good faith and honest belief that the decision made was for the best interest of the company[964]. Therefore, providing directors with a corporation immune from the liability of the loss incurred by the company due to transactions and decisions that fall within their powers and activities. This rule is closely connected to fulfilling the duty of care by the board[965]. Communication and access of information by the board has a notable role in the legality of board's deliberations. The absence

[957] C. com., art. L. 225-17
[958] Article 132 JCC
[959] P. Vernimmen n (872) page 814
[960] OECD 2015 n (875) page 45
[961] C. com., art. L. 225-37-1; C. com., art. L. 225-51 ; Article 156 JCC
[962] C. com., art. L. 225-56, C. com., art. L. 225-64, C. com., art. L. 225-68
[963] This rule is extensively addressed under US jurisdiction within the scope of duty of care of directors and is linked to the fiduciary duties of directors see *Brane v. Roth*, 590 N.E. 2d. 587 (Ind. App. 1992); *Aronson v. Lewis* 473 A.2d 805, 812 (Del. 1984); Lyman Johnson, 'The Modest Business Judgement Rule' (2000) 55 Bus. Law 625 for further discussion
[964] A. Rechtschaffen n (305) Page364; C. mon. fin., art. L. 533-11 ; Article 65.c JSL
[965] Carsten Gerner-Beuerle & others, 'Study on Directors Duties and Liability' (Prepared for the European Commission DG Market , 2013)

of the information may lead to the annulment of deliberations and the decisions made within which[966].

331 ***Board meetings.*** How does the board perform the decision-making powers? The basic answer is; in the decisions reached by the board through their meetings in addition to the decision, general manager or senior management makes on a regular basis when running daily activities of the company. Generally, the AOA determines the procedures for deliberations and number of board meetings[967]; nonetheless, it is possible that company rules provide either a minimum requirement[968] or the actual procedural process[969].

332 ***Session procedures[970].*** Key procedure in board deliberations is identifying the individual or body responsible for calling to convene this meeting. Generally, company rules state that the AOA defines the rules of convocation and the process of deliberation for the board[971]. The rules providing the minimum requirement grant explicitly board members the right to request a board meeting. The validity of this request requires meeting few conditions: board was not convened for more than two months[972]; the request made by third (France) or quarter (Jordan) the members, the request is submitted to the chairman while designating a specific date for the meeting[973], in addition to a justification of the request[974]. General manager holds the same right as the members, through a request submitted directly with the chairman designating the exact date of the proposed meeting[975]. The call for board meetings should further designate the location[976]. Once the board is called the session requires a specific quorum to be convened half of the members for France[977] and the majority for Jordan[978]. The mandates and proxies in board

[966] Cass. Com., 13 Dec. 2005, n° 04-12.135
[967] C. com., art. L. 225-36-1
[968] C. com., art. L. 225-37
[969] Article 155 JCC
[970] This paragraph addresses unitary board structure and not two tier-structure (C. com., art. L. 225-64, 81)
[971] Article 92.b (9) JCC; C. com., art. L. 225-36-1
[972] Under the Jordanian rules there is a possibility to convene the board directly by its members if the calling is not made by neither the chairman nor vice chairman within seven days of the receipt of their request, further the rules designate a minimum number of board meetings during the financial year (six)
[973] C. com., art. L. 225-36-1
[974] Article 155.a JCC
[975] C. com., art. L. 225-36-1
[976] Generally, board meetings are convened at the headquarters of the company unless the call states otherwise
[977] C. com., art. L. 225-37
[978] Article 155.b JCC

meetings are treated differently under the two laws. The Jordanian rules consider that the voting on decisions of the board deliberations is personal and cannot be mandated or delegated from one member to the other[979]. This point of view is understandable as it avoids the dangerousness of having a non-active board member that does not participate in the actual deliberations of the meeting. The presence in board meetings differs than that of the GA; every vote in the board matters and crucially influences the policies and strategies of the company[980]. As for the GA, owning a small non-influential percentage of shares in addition to having a bigger number of involved members minimizes the importance of the presence of every shareholder in the GAMs. Nonetheless, the counter argument to this approach addresses the freedom and choice board members should hold[981]; therefore, French rules permits the representation in board meeting yet limited it to a single mandate per member[982]. Decisions made in board meeting are taken by the approval of the majority of present members[983], in case of tying the chairman's casting vote is taken into consideration[984]. Board meetings have their own registry that contains minutes of meeting for every session numbered chronologically, authenticated[985] and signed by chairman and board members[986].

333 ***Investment Company requirements.*** In Plc. including IC, the chairman is responsible for the preparation of a report (distinct from yet attached to the annual report) that stipulate clearly among other things; the composition of the board, the application of the gender equality representation within the board. Further, the conditions of the working method of the board, the rules of internal conduct and risk management, the procedures dealing with financial and accounting information, identifying the role of the company in fulfilling its social responsibility

[979] Article 155.c JCC
[980] No facilitation of presence by video conference or telecommunication are mentioned under the Jordanian rules, the rules explicitly stipulate that the vote cannot be done in any indirect method. As for French rules, they state the possibility of having a participation in board meetings through video conference (C. com., art. R. 225-21)
[981] M. Germain n (955) page 480
[982] C. com., art. R. 225-19
[983] This opens the debate on the dominance of the board, whereas the decisions relating to the performance of the company can be taken with only quarter of the board
[984] Article 155.b JCC; C. com., art. L. 225-37
[985] The authentication of the municipality or the judge of competent court within its jurisdiction the headquarter falls: a request stated in *code de commerce* as for Jordanian law, it addresses the requirement of company's seal
[986] C. com., art. R. 225-22, 23,24 ; Article 154 JCC

and pro-environmental measures, and providing a reasoning for the selected and adopted rules of corporate governance[987].

334 ***Special committees***. The board does not function solely it is accompanied with various sub-committees that play advisory and supervisory roles. French *code de commerce* in addition to the different national corporate governance codes and guiding principles insist on the necessity to create special committees instructed by the board to draw up reports and provide opinions for board questions. Corporate governance code addresses four principle forms of special committees including audit committee[988], remuneration committee, selections or appointments committee[989] and strategic or financial committee[990]. The *code de commerce* addresses merely the audit committee[991] and studies committee[992]. The Jordanian company rules did not refer to any special sub-committee to be created by the board; nonetheless, the rules address in one occasion the sub-committees in the discussion of the calculation of board remuneration for companies in difficulty[993]. As for the securities related rules they require the creation of two forms of special committees: audit committee and a committee combining the remuneration and election responsibilities[994]. Board performs the responsibilities that the GA cannot exercise on a daily and regular basis. In the following paragraph, we shall illustrate the complementary and initial role of the GA within ICs.

§2: *Role of General Assembly*

335 ***Shareholders' influence.*** Shareholders should be allowed to fully exercise their powers. Anything that stands in the way of this exercise is considered an obstacle to good corporate governance. Its main framework protects and facilitates the exercise of shareholders' rights and ensures the equitable treatment of all shareholders. The basic rights of shareholders include the

[987] C. com., art. L. 225-37
[988] Inspects accounts, monitors internal conduct and selects external auditors
[989] Paves the way for the succession of managing directors and CEO, puts forward proposals for new directors
[990] P. Vernimmen n (872) page 813
[991] C. com., art. L. 823-19
[992] A committee created by the board in charge of examining the question referred by the board or the chairman (C. com., art. R. 225-29)
[993] Article 162.c JCC
[994] Article 46 JSL of 2017

ability to register ownership of their shares, sell their shares, and have access to important and material information, most importantly to share in company's profits, being able to participate in GAM, and to elect and remove the management[995]. Shareholders hold a crucially influential role during the life of the company. Throughout GAM and the exercise of their voting and participation rights; they get a say on major changes and amendments in company's structure and organic documents, composition of the board, approval of extraordinary transactions, and other basic issues as specified in company law and internal company statutes. GA then is considered the place where decisions are made, the perfect location for the communication of information usually addressed to shareholders and the sole form of consultation in Plc. GA globally unites shareholders, for meeting purposes it is represented by attending shareholders, and discusses questions with common interest that impact the entirety of shareholders attending or not. Nonetheless, legal rules present a form of special assembly that consists of a specific category of shareholders especially those holding preference or other special category of shares, it discusses questions that relate to the particular interest of its shareholders[996].

336 ***General assembly.*** All Plc. including the IC have a GA, as for the special assembly it is not globally applicable. It is limited to companies that offer shares with different classes[997]. The GA meets in two forms ordinary and extraordinary one. The periodic convening of each form of GA provides for further sub-categories such as having an annual ordinary general assembly[998]. Ordinary General Assembly stems its activities from its name as it discusses questions relating to regular and ordinary performance of the company[999]. As for Extraordinary General Assembly, it is exclusively responsible for discussing the modifications of the AOA[1000].

337 ***General assembly meetings.*** Both forms of GA cannot be convened spontaneously. They follow a legally pre-set ritual. Company calls shareholders to meet in a set place and date,

[995] D. Hillier n (215) page 44

[996] This form of assembly is introduced by *code de commerce* (C. Com., art. L. 225-99), the assembly seen as a legal protection to either minority shareholders or shareholders with preference shares. In addition this assembly may be influential as its decisions generally modify the rights connected to the category of shares concerned in this group where shareholders represented within which, might own an influential percentage in the company as a whole

[997] See : Paul et Philippe Didier, *Droit Commercial* (Tome 2 : Les Sociétés Commerciales, Economica 2011)

[998] C. com., art. L. 225-100; Article 169 JCC

[999] C. com., art. L. 225-98; Article 171 JCC

[1000] C. com., art. L. 225-96; Article 175 JCC

further it defines the agenda and number of resolutions that needs to be adopted. Most importantly, the call includes communication of material information that permits shareholders to analyze management resolutions and inform them of company's financial situation. Generally, the AOA stipulates the process and power to convene GAMs, nonetheless in case AOA contains no such precision company rules grants this power to the management[1001]. The GAM may be further convened upon the request of shareholders[1002], by auditors and majority shareholders[1003]. The call includes[1004]; all shareholders registered in company's registry three days before the designated meeting date[1005], company controller, securities commission, board members and auditors[1006]. Convening a legitimate GAM requires fulfilling a quorum by attending shareholders. The quorum differs depending on the form of convened meeting. In OGAM the required quorum of present and represented shares or shares with voting right in a first call for the meeting, is the majority of underwritten shares for the Jordanian law[1007] and fifth shares with voting right for the French one[1008]. In case of a second call, the meeting can be convened with any quorum for both laws. EGAMs are convened on a first call with the majority of underwritten shares for Jordan[1009], or quarter of shares with voting rights for France[1010]. On

[1001] For OGAM: Article 169 JCC, C. com., art. L. 225-103; for EoGAM: Article 172 JCC, C. com., art. L. 225-103

[1002] There are two forms of request: one by any shareholder filed with the competent court (*Tribunal de Commerce*) to request the management to convene the annual OGAM if it was not convened within the time limit set by law (C. com., art. L. 225-100). The second form is the request filed with the competent court by a group of shareholders holding not less than five percent of the share capital or the association of shareholders within publically traded companies (C. com., art. L. 225-120). The Jordanian rules provides similar forms for the meeting request; yet, by applying different shareholding percentages. The rules mention a request directly filed with the board from shareholders holding not less than quarter of company's underwritten capital. Another form of request filed with company's controller to request the meeting on their behalf by shareholders holding not less than fifteen percent of the underwritten shares (in Company's Law amending bill Article 15 proposes decreasing the required percentage to ten percent)

[1003] Majority shareholders directly convene the meeting whether they hold majority share capital or majority votes after a public offering; no such right is provided within the Jordanian scope of OGAM; C. com., art. L. 225-103; this exception of the general rule for convening GAMs by company controller or auditors applies solely over EoGAM under Jordanian Law (Article 172 JCC)

[1004] As part of the protection envisaged for employees of the company, the possible attendance of members of the *comité d'entreprise* in GAMs (C. trav., art. L. 2323-67 no longer applicable after the recent reform of the code); their attendance was seen as important in board deliberations (Cass. com., 17 Fevr. 1975, n° 73-13242)

[1005] Article 178 JCC (Article 17 of Company Law amending bill of 2017 proposes the change of number of registered days at the registry to one day instead of three); the principle of participating shareholders in France includes every shareholder registered in the registry two working days before the meeting may participate (C. com., art. R. 225-85)

[1006] Article 182 JCC

[1007] Article 170 JCC

[1008] C. com., art. L. 225-98 (the decisions are made with the approval of majority of present and represented votes)

[1009] Article 173 JCC (decisions are made with the approval of seventy five percent of present shares)

the second call, the meeting is convened if forty percent of underwritten shares are present in Jordan or fifth shares with voting right in France.

338 ***Obligation of meeting.*** The general principle stated by law is convening the least one annual OGAM[1011]. The IC is exempted from the application of this obligation. Whereas the board of the IC is not obliged to call the GA for a meeting unless a new board needs to be elected[1012]. This exemption is linked to the character and activities of this Company. OEIC is particular. It is called open-end due to holding a variable and fluctuating capital that changes continuously increasingly and decreasingly without the need to follow the rigid procedures set by law. Therefore, the GA does not necessarily need to be convened every time a share is redeemed or issued. On the other hand, this exemption complicates the supervisory and monitoring role of the assembly over the performance of the management. Nonetheless, the assembly can still be convened at any time upon direct request of shareholders or indirect requests made with auditors or company controller.

339 ***Meeting agenda.*** The call for GAM includes meeting's agenda and explanatory documents. The items on the agenda differ from one form of meeting to the other. Previously in this part we mentioned that the EGAM discusses the questions relating to the modification of the AOA[1013]. This competence is extended under Jordanian rules to include questions relating to dismissing the board, merger and acquisitions, taking over other companies, increasing or decreasing the capital, allocating shares for employees, buy-backs[1014], in addition to any question that falls under the competence of the ordinary meeting[1015]. The OGAM is competent in matters relating to board reports, financial reports, annual budget, appointing the board and

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[1010] C. com., art. L. 225-96 (decisions are made with the approval of two third of present shares)
[1011] Article 169 JCC; C. com., art. L. 225-100
[1012] Article 209.b (5)
[1013] EoGAM in France discusses also the question of company's nationality and transfer of seat (C. com., art. L. 225-97)
[1014] Article 175.a JCC (the items that can be discussed in the Jordanian extraordinary meeting are normally discussed in ordinary meetings under French rules)
[1015] Article 176 JCC

auditors, prepositions of mortgage and loans any other topic proposed by the board or attending shareholders[1016] and does not fall under the special competence of extraordinary meetings[1017].

340 ***Obstacles to good corporate governance.*** The most important right that shareholders exercise is the right to vote. The control GA exercises over the management is represented in the decisions they take in GAMs involving; appointing or dismissing the board, having a say on pay and monitoring the financial situation of the company. As was previously mentioned, according to corporate governance principles, shareholders should not be restricted from exercising their rights. The restriction or obstacle comes in different forms. The most obvious obstacle is the existence of shares with multiple voting rights that may enable minority shareholders with small stake in the capital to impose their views by wielding their extra votes[1018]. Further to, the existence of preference shares with no voting rights attached[1019]. The restriction of voting rights in meetings by introducing a cap on the number of votes cast during general meetings and administrative or material restrictions on exercising voting rights by way of proxy[1020] or postal vote[1021].

341 ***Transition.*** IC personally exercises its activities through its members of management complemented with the role of the GA. The IC may choose to delegate its functions to more experienced and expert third party known as the MC. The following section B addresses the delegation process and scope of application.

[1016] Shareholders holding not less than ten percent of shares present in the meeting may request to add an item on meeting's agenda (Article 15 of the amending bill of 2017 proposes a decrease in the percentage to five percent); similarly French rules provides such an option but with a smaller percentage of present shares five percent (C.com., art. L. 225-105)

[1017] Article 171 JCC

[1018] Jordanian rules solved the issue by limiting IC to Plc. form therefore; shares of IC are of the same class and enjoy a voting right. As for French rules, the possibility of granting a double vote share exists; it is conditional to having a nominal share that the same shareholder is in hold of it for at least two consecutive years (C. com., art. L. 225-123)

[1019] No such shares can be issued by Jordanian IC as it is limited to the form of Plc. under French law preference shares with no voting right may be issued and therefore providing an exception from the general rule of having all shares connected to a voting right (C. com., art. L. 225-125) this restriction on the exercise of the voting right finds its solution under the French rules in special assemblies

[1020] This restriction does not exist under either laws as both the Jordanian and French rules permit shareholder to mandate another to represent him in GAMs (Article 179 JCC; C. com., art. L. 225-106)

[1021] P. Vernimmen n (872) page 813; the restriction exists under Jordanian law as no voting can be done in GAMs by correspondences or telecommunication therefore complicating and constraining good corporate governance (postal vote C. com., art. L. 225-107; Telecommunication C. com., art. R. 225-61)

Section B: Delegation of Functions

342 ***Preview.*** MC is an undertaking that exercises an investment activity[1022]. It is retained by investors to manage mutual funds and ICs in return for a management fee. It is comprised of experienced and professional managers with an established record of accomplishment in their field[1023]. The IC as a form of delegation of functions assigns a MC. MC performs similar activities to financial intermediaries; nonetheless, this company strictly manages CIUs in all its forms. Under the French securities rules and on an EU level two types of MCs are distinguished[1024]. The first type is the MC created following the UCITS directive therefore it is limited in its activities to managing CIUs and cannot provide investment services of reception and transmission of order on behalf of third party. The second type is the MC that exists following the MiFID directive. This form of MC provides portfolio management services to non UCITS CIUs in addition to other investment services that includes the transmission and reception of orders. The two types differ in their scope of activity yet their governing rules are almost identical. For purposes of this work, the first type of MC is taken into consideration.

343 ***Mandatory Management Company.*** Within the scope of EU rules those addressing CIU, UCITS are required to appoint a MC (except for self-managed undertakings after meeting the conditions set by the directive)[1025]. MC is distinct from the investment manager earlier mentioned in this part. It does not replace the investment manager, they exist side-by-side to strengthen the operating model of CIU. The manager chooses to exercise the activities on its own or delegate them to the MC. Under Jordanian rules, the investment management activity is

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[1022] C. mon. fin., art. L. 321-1 al. I (4); Article 26 Licensing Regulation of 2005; article 10 Licensing Bylaw of 2018

[1023] Business Dictionary, accessed 05 June 2017 <http://www.businessdictionary.com/definition/management-company.html>; Article 2.1 (b) UCITS Dir. 2009/65; CA Orléans, ch. com., éco. et fin., 12 mai 2011, n° 10-02.984; C. mon. fin., art. L. 532-9

[1024] Jean Guillaume de Tocqueville et Stéphane Puel et Esther Boujard, 'OPCVM' in *Répertoire de Droit des Sociétés* (Dalloz 2013) paragraphe 142

[1025] Article 5.2 UCITS Dir. 2009/65

regulated[1026] and MC exists as a notion without having a mandatory rule to assign such a company by the IC[1027].

344 ***Reason for delegation.*** The approach of EU rules requiring carrying out activities of IC through a separate entity segregated from the investment manager and depositary; form an organizational measure used to avoid and hinder conflicts of interest[1028]. The segregation as a form of independence is far from being complete, as MCs tend to be part of universal banks or financial groups where their directors are not fully independent[1029]. The outsourcing of activities rather than self-management is the solution when IC cannot be established as self-managed. It is the case when its directors or the individual investment committee members do not hold the necessary expertise and experience in this form of portfolio investments[1030]. Further to the case where IC does not meet minimum capital requirement and the conditions of self-management stated in UCITS Directive. No similar conditions or reasoning is given under Jordanian rules. The option is available for IC to outsource its management to specialized third party entities at any time without the need to meet any capital or expertise requirements. To which extent-leaving outsourcing of activities as an option is positive? In terms of the investment fund the reasoning is clear. Having no legal personality the fund requires the MC to manage it and represent it. As for the IC, the debate is different whereas it holds a legal personality further to meeting a level of professionalism and expertise. There are no data showing which of the two forms of functioning self or outsourced holds more benefit for shareholders of IC.

345 ***Level of delegation.*** The traditional model of outsourcing functions of the UCITS by assigning a MC focuses particularly on monitoring the delegated functions and ensures the compliance rather than exercising the daily activities of UCITS[1031]. The delegation is of

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[1026] Article 47 JSL of 2017

[1027] Article 6 Collective Investment Regulation of 1999

[1028] L. Thevenoz n (801) Page 17

[1029] Commission, 'Annex to the Green Paper on the Enhancement of the EU Framework For Investment Funds' (Staff Working Paper) COM (2005) 314 final

[1030] Frank Chetcuti Dimech and Frank Caruana, '*Collective Investment Schemes*' (2009) 28 (6) IFLR < http://heinonline.org/HOL/Page?handle=hein.journals/intfinr28&div=133&collection=journals&set_as_cursor=0&men_tab=srchresults > accessed 17 September 2015 Page 69

[1031] William Jones, 'Third Party Management Companies: A New Governance Model' (Deloitte, 2014) < https://www2.deloitte.com/content/dam/Deloitte/lu/Documents/financial-

functional responsibilities such as those relating to risk management and depositary. ICs cannot ultimately delegate their legal liability[1032]. The IC can choose to delegate the entirety of its management to the MC or partially particular functions to more experienced and independent entities[1033]. Outsourcing of activities arises the question of cost, as management fees risk being doubled. The scenario this section is addressing is the case of outsourcing of activities. The scenario lays down two main questions: what is the role of the assigned MC? Where do the legal and managerial liabilities lay? The following sub-sections answer these questions respectively.

Sub-section 1: Role of Management Company

346 ***Pros vs. cons.*** Generally, portfolio management function may be outsourced to a third party asset manager. This can be done through the distribution of third party funds[1034] or by the use of multi-management[1035]. By spreading assets among multiple managers, investors can benefit from a diversification of management styles (and therefore of risks). Multi-management includes funds of funds (mainly for retail investors) and manager of managers (offered to institutional investors). Nevertheless, the double layer of fees may partly counter-weight the positive effects of diversification.

347 ***Main role.*** MC provides investment services as defined by law. They have as their main role management of CIUs[1036]. MC as other forms of companies is subject to rules of incorporation in addition to an authorization requirement. MC when is delegated the functions of CIUs, does not as a general rule, limit its performance to one undertaking it might choose to act on behalf of several undertakings at the same time as long as fair and responsible treatment is guaranteed. The concept of outsourcing activities and functions of ICs arises the importance of understanding the creation of MC, its obligations and its characterization under existing legal theories. What form of company does MC have? What are the conditions and requirements that

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services/performancemagazine/articles/lu-third-party-management-companies-092014.pdf > Accessed 12 June 2017

[1032] A. Rechtschaffen n (305) Page 363

[1033] *AMF*, régl. gén., art. 411-1

[1034] Third-party Distributor: Company that sells the units of CIS on behalf of IC in return for a portion of the fees that IC charges its investors. It is beneficial in the case of having an IC lacking knowledge and resources

[1035] Commission 2005 n (1029) Page 13

[1036] C. mon. fin., art. L. 532-9

it should meet? Is there a place for the application of the agency theory or fiduciary duties? All of which answered in this subsection and the following one. Therefore, localizing shareholders' interest if such delegation is performed.

§1: *Creating a Management Company*

348 ***Organization procedure.*** MC may undertake any form or structure of company provided by national laws[1037]. This rule is conditional to having a statute compatible with applicable rules over the type of activities it intends to exercise, further to subjecting its accounts to legal control[1038]. MC before commencing the exercise of its activities should obtain an authorization or license[1039] from the competent authority of the country where the activity is exercised[1040], in order to asses its eligibility to exercise its intended portfolio management activities. Submitting the authorization application does not have as a pre-requirement the complete incorporation under company law rules. It is possible to file the application in the period of incorporation[1041]. Under French rules for instance the MC adopts the structure of *Société de Gestion de Portefeuille (SGP)*, further it is authorized by the *AMF* in order to be able to exercise its portfolio investment management. The authorization is limited to fulfilling specific conditions directly linked to the performance of its activities. MC should have two persons responsible for its management, have its headquarters in France[1042], hold sufficient capital and adequate financial means, and provide complete details of its shareholders and management component, in addition to preparing a program of activity[1043]. Under Jordanian rules, MC is licensed in a similar manner to that of IC. Further, it follows those procedures and incorporation process applicable to the form of company it chooses to undertake.

[1037] Article 4 Licensing Regulation of 2005; article 4 Licensing Bylaw of 2018
[1038] *AMF*, régl. gén., art. 312-2
[1039] Article 47 JSL of 2017
[1040] Under French rules MC obtains the authorization from the *AMF* as for other investment services providers such as credit institutions and banks; they obtain their authorization from the Authority of Prudential Control and Resolution (*ACPR*)
[1041] *AMF*, recomm. DOC-2012-19, Guide d'élaboration du programme d'activité des sociétés de gestion de portefeuille et des placements collectifs autogérés
[1042] *AMF*, régl. gén., art. 312-1
[1043] C. mon. fin., art. L. 532-9

349 ***Dossier d'agrément***. The applicant company submits the authorization application with the *AMF*. The *AMF* reaches its decision within a maximum period of three months following the submission of a complete application. The refusal of the *AMF* to grant the MC the authorization does not form a sanctioning measure[1044]. The application is divided into six different parts that address on a general term the following information: presentation of the request, nature of the company, its activities and organization, marketing means of financial instruments, and financial elements of the company in addition to the request to freedom of establishment[1045]. The applicant company should define the nature of the manager; is it internal (self-managed company) or external (MC). It further identifies the scope of managed activities and functions, in addition to connected services it intends to exercise alongside management, particularly those activities that require a prior authorization. The applicant company should designate what it manages, meaning it manages a CIU, an Alternative Investment Fund (AIF)[1046], or a third-party portfolio investment[1047]. The applicant provides a detailed list of the nature of authorized financial instruments within the scope of its program of activities[1048]. The applicant fills out any eventual restriction connected to targeted investors or provided financial instruments.

350 ***Program of activity***. This program provides and consists of a synthetic vision of the intended activities of MC. This vision does not replace the detailed description of the provided investment services and activities, the used instruments and the eventual restrictions that also form part of the main body of the program[1049]. The program presents a document containing two main parts: basic program of activity (states general organization of MC) and complementary documents (contains eight complementary documents relating to financial instruments subject of its activities). The program of activity allows the identification of the

[1044] CE, 6e et 1er ch. réunies, 13 juill. 2011, n°s 33-7552 34-5402
[1045] Anne-Dominique Merville, *Droit Financier* (2nd edn, Gualino 2015) page 157
[1046] Regulated in directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 OJ L 174/1
[1047] MiFID Directive
[1048] Financial instruments admitted for trading on regulated or non-regulated financial markets 'C. mon. fin., art. L. 421-1; C. mon. fin., art. L. 422-1', multilateral systems 'C. mon. fin., art. L. 424-1' or foreign markets 'C. mon. fin., art. L. 423-1', units of CIUs provided for retail investors, AIFs destined to institutional investors and others (intermediaries C. mon. fin., art. D. 321-1)
[1049] *AMF,* Recomm. Doc-2012-19 n (1041) page 4

responsible members for company's principal activities including the number of members and collaborators attributed to different functions (financial, commercial and support departments).

351 ***Incorporation rules.*** MC can undertake any form of company provided under the governing company rules[1050]. It should hold a minimum initial capital of one hundred and twenty five thousand Euros[1051]. It should clearly state in its AOA the principle of independence of its management conditions. MC guarantees sound and prudent management[1052], further; it provides proper surveillance or oversight system. The *AMF* particularly endorses the role of GA in fulfilling this oversight mission[1053]. The role and importance find their perfect example in the case of acquisition. There are criteria for acquiring shareholders. It includes the reputation of the candidate, experience and reputation of the management, integrity of the operations and the capacity of the company to satisfy its prudential obligations[1054].

352 ***Management.*** Minimum two persons effectively direct the MC[1055]. The persons directing the MC should be individuals and not entities. They are attributed operational and effective functions. Their detailed background and identity are mentioned in the program of activity and their curriculum vitae attached therein. Their role is important in the performance of MC's activities and MC meeting its liabilities and responsibilities towards managed IC and its shareholders. These individuals should hold necessary knowledge and experience that is compatible with their attributed functions[1056]. These directors undergo a knowledge exam prepared by the *AMF* that examines their financial analytical skills and competences[1057]. The *AMF* has the full discretion to authorize or not the applicant director. The refusal to authorize may be for reasons relating to the involvement of the applicant in a sanctioning process with the *AMF* Sanctioning Commission. Alternatively, for reasons relating to being previously laid off

[1050] *AMF*, régl. gén., art. 312-2 ; limited under the Jordanian rules to Plc., private limited company and limited liability company
[1051] *AMF*, régl. gén., art. 312-3; one million JOD (Article 4 Licensing Regulation of 2005, article 4.d Licensing Bylaw of 2018)
[1052] Article 27 Licensing Regulation of 2005 (standard of care); no such standard is mentioned in the newly implemented licensing bylaw of 2018
[1053] *AMF*, régl. gén., art. 312-5
[1054] C. mon. fin., art. D. 532-15-1
[1055] *AMF*, régl. gén., art. 312-6; C. mon. fin., art. L. 532-9
[1056] *AMF*, régl. gén., art. 312-6
[1057] *AMF,* instr. Doc-2008-03 defines the process of examination. It is similar to that members of management of IC undergo; *AMF*, régl. gén., art. 318-7

for serious misconduct or misconduct for not communicating the required information to the *AMF*. The binary management of MC may be derogated from if the conditions stated in governing legal rules are met[1058]. These conditions include: the case of having a MC that does not manage any CIU, further to the case the value of the managed portfolio does not mount to twenty million euros or it is superior to this amount, yet the functions are limited to managing professional funds of capital investment. In addition to the case of having a director, that holds the necessary knowledge and experience to exercise effectively, the allocated functions in a manner guaranteeing sound and prudent management. A question arises in this regard; to which extent should directors of MC be fully available to run the company? The *AMF* states in its recommendation on the incorporation of MC that at least one of the two directors should be fully available to manage the company[1059]. It further states that in some cases both directors are effectively running the company. The Jordanian MC's management structure and component depend on the form of company the MC choses to undertake[1060]. No conditional structure is imposed by the JSC.

353 ***Association.*** All investment services providers should adhere to an association that collectively represents and defends the interests and rights of companies with similar activities[1061]. MC as a form of investment services providers should be a member of the *Association Française des Etablissements de Crédit et des Entreprises d' Investissement* (*AFECEI*). The importance of the organization of the MC avails in the affect the expertise of this company has on shareholders' interest, especially when the IC decides to delegate entirely its portfolio management activities. The following paragraph addresses the obligations of the MC that influences the performance of the IC and eventually pours in the interest of shareholders.

[1058] *AMF*, régl. gén., art. 312-7
[1059] *AMF,* recomm. Doc-2012-19 n (1041) page 13
[1060] Article 132 JCC for Plc., article 72-bis JCC for private limited company, article 60 JCC for limited liability company
[1061] C. mon. fin., art. L. 531-8

§2: Obligations of Management Company

354 ***Exercise of activities***. Once authorized by the *AMF*, the MC commences the exercise of its activities within a period not exceeding twelve months following the date of authorization. The *AMF* has the full discretion to withdraw the authorization if the MC does not at least manage one CIU within the first twelve months following its authorization[1062]. The exercise of the activities should be continuous without any unexplained or unauthorized interruptions that exceed six consecutive months[1063].

355 ***Notion of obligation***. The activity of portfolio management as part of investment services is a protected activity. The protection avails through different monopolies; one formal relating to the designation of the company as a Management Company (*SGP*), another is connected to the services (the investment services as defined by the different legal rules) and a third relating to the intermediation in financial instruments[1064]. The combination of these notions arises the different categories of obligations imposed on MC as an investment services provider.

356 ***Extended obligations***. The obligations that relate to the label of investment services provider guaranteeing the stability of financial market extend to cover MC. These obligations include prudential and accounting obligation, compliance function, adhering to securities' safeguarding mechanisms, risk management, in addition to fight against money laundry and financing terrorism.

357 ***Particular obligations***. There are particular obligations connected to client-MC relation. They include reporting and disclosure, maintaining the authorization conditions valid, holding technical, financial and professional requirements and means. These obligations form what is known as operational and organizational obligations.

358 ***Operational and organizational obligation***. MC is requested to maintain on a regular and permanent basis adequate and sufficient material, financial and personnel means[1065]. The

[1062] C. mon. fin., art. L. 532-10
[1063] C. mon. fin., art. L. 532-10 (I)
[1064] A.D. Merville n (1045) page 159
[1065] *AMF*, régl. gén., art. 313-54

operational obligation extends to include laying down decision-making procedures in addition to having an organizational structure under a clear form that details hierarchal constitution and functional and responsible divisions. Maintaining a valid authorization requires holding at all times valid the conditions of the authorization[1066] within which included the operational obligation of technical and professional means that is subject to the organizational requirements stated in the program of activity[1067]. Guaranteeing a well-established company and a safeguarding structure require both the MC and its personnel to hold necessary background and experience to manage portfolios and risks[1068]. Other forms of this operational obligation include having a practical operational experience, an engagement and communication policy with investment managers and a problem-solving mindset that orients different components of the company towards achieving reduced failure odds and minimize the negative impact. The *AMF* ensures the existence of professional and technical means through its supervisory power. In deciding whether or not MC lacks these means it examines on a case by case the potential fault and characterizes it as core or not depending on two criterion. Dysfunction the company in its investments and the influence over the exclusive interests of investors[1069]. The MC further lays down rules on internal control and conduct[1070], whether these rules form part of the compliance function and internal control[1071] or a distinct periodic control system[1072]. It is further required to establish and maintain conflicts of interest policy[1073]. Throughout its operation and performance the MC, undertakes all reasonable means to obtain the best results out of its performance. Therefore, it puts in place a best execution policy[1074] that states the selection criteria of

[1066] Similar condition under the Jordanian rules concerning the license (Article 6 Licensing Regulation of 2005; article 8 Licensing Bylaw of 2018)
[1067] *AMF,* Sanct. Comm. 17 March 2015, n° SAN-2015-06
[1068] Article 4.d Licensing Regulation of 2005; article 4.h Licensing Bylaw of 2018
[1069] *AMF,* sanct. comm., 20 March 2013, n° SAN-2013-08
[1070] *AMF*, régl. gén., art. 313-63, 64; Article 66 Licensing Regulation of 2005
[1071] *AMF*, régl. gén., art. 313-63
[1072] *AMF*, régl. gén., art. 313-62
[1073] *AMF*, régl. gén., art. 313-20; *AMF,* sanct. Comm., 17 October 2014, n° SAN-2014-19; under Jordanian rules MC is obliged to declare its direct or indirect interest in the transactions it performs on behalf of the managed IC, this is a form of controlling conflicts of interest yet the rules do not address explicitly conflicts of interest policy (Article 63 Licensing Regulation of 2005), no such obligation is addressed in the newly implemented Licensing Bylaw of 2018
[1074] C. mon. fin., art. L. 533-18

executors within the company[1075]. Jordanian rules do not address the best execution they require sound and prudent performance.

359 ***Risk management***. Management companies are required to establish and maintain adequate and documented risk management policy, which identifies risks; ICs they manage are or might be exposed to[1076]. The risk management policy comprises the necessary procedures that enable the MC to evaluate and calculate the global risk exposure of the IC, including market, liquidity and counterparty risks[1077]. Most importantly, the MC should include in its risk management policy the procedures that detect and evaluate operational risks and calculation of operational costs particularly in cases when it chooses to delegate the management of the IC to a selected third party. The Jordanian rules do not mention the notion of risk management. The securities rules and licensing regulations do not address the notion; this major gap threatens the sound protection of shareholders of the IC. If the MC takes the form of a listed company, it creates a risk management committee according to corporate governance regulation. Yet this committee manages risks faced by MC and not that of the managed IC. Unless the IC is considered as part of its activities.

360 ***Compliance obligation***. The compliance function has a notable status in the financial sphere. It is a function closely related to the operational control that imposes and generally englobes different professions. Compliance has various norms, rules and procedures that are exercised as a form of internal control. MC is obliged to establish and maintain adequate measures, procedures and policy that detect the risk of non-compliance with professional obligations[1078]. The *AMF* sanctioning commission may issues a sanctioning decision based on the breach of professional obligations even for those obligations that did not state in its GR. The key concept is having a clear legal text that can be sufficiently extended in scope and content to contain this justification[1079]. The mission and tasks of the compliance function and officer are

[1075] This obligation is particular to the case of delegation or externalization to third party executors by the MC, especially when the MC executes orders through other entities (*AMF*, régl. gén., art. 314-75). To be further illustrated in sub-section 2
[1076] *AMF*, régl. gén., art. 313-53-4; Article 38 Dir. 2010/43
[1077] *AMF*, régl. gén., art. 313-53-5
[1078] *AMF*, régl. gén., art. 313-1; Article 7 Licensing Regulation of 2005; article 5 Licensing Bylaw of 2018
[1079] CE, 6e et 1er sousec. réunies, 18 fevr. 2011, n° 32-2786

further addressed in the following sub-section 2, further to, the impact of the delegation on IC's accountability.

Sub-section 2: Effect of Delegation on Liability of Main Management

361 ***Preview.*** Managing CIU by an MC arises different questions in terms of the allocation of responsibilities and liabilities among the different participants. If the IC choses to out-source its functions of portfolio investment, risk management or compliance, the core question rising in this regard is the following: what impact does this delegation have on the powers, responsibilities and liabilities of the IC and its management?

362 ***Collective portfolio management***. The core activity of the CIU management is portfolio management meaning the financial management of the UCITS, taking investment and disinvestment decisions[1080]. Other activities include administration; meaning legal and accounting tasks, inquiry requested by investors, evaluation of portfolio and asset value determination[1081], in addition to the commercialization of portfolio or units of the CIU[1082]. The following paragraphs address the consequences of outsourcing functions of IC to MCs. Therefore, they address the outsourcing in terms of characterization of MC's functions; is it a transfer of responsibilities, liabilities or powers (paragraph 1). Further to the role of the competent authorities in controlling the performance of MC (paragraph 2).

§1: *Transfer of Functions vs. Liabilities*

363 ***Role.*** Outsourcing or delegation IC seeks is a delegation of functions. It can be global in terms of portfolio management and all that it entails or partial of particular functions[1083]. The IC does not delegate its liabilities neither its main responsibilities towards its shareholders. The question rising in this regard concerns the nature, the character or the role of the MC. Is the MC a representative of the CIU it manages? In particular circumstances the MC is considered as

[1080] Article 26 Licensing Regulation of 2005; article 10 Licensing Bylaw of 2018
[1081] The activities mentioned in Annex II of the UCITS Dir. 2009/65
[1082] Under EU scope; UCITS may obtain a European passport and may be marketed in other MS
[1083] C. mon. fin., art. L. 214-7-1

such[1084]. MC's role revolves around the exercise of a representative power over the rights connected to financial instruments constituting the managed portfolio[1085]. This responsibility is conferred to the MC, not shareholders or depositary[1086]. Therefore, MC participates in GAMs, exercises voting rights, participates in associations of shareholders in addition to ester in courts. The externalization of the functions and their exercise does not confer the status of a shareholder over the MC in relation to the financial instruments in which IC invests[1087]. MC may also be delegated risk management function either as part of the internal control mechanism of a MC or a partial delegation of functions[1088]. MC performs its delegated functions through an implicit mandate for the account of the IC. The question rising in this regard: what effect does this characterization have on the allocation of liabilities and responsibilities?

364 ***Responsibilities vs liabilities***. MC has specific responsibilities towards the IC it manages. The responsibilities or what is referred to as duties relate to the functions and obligations imposed on MC in governing legal rules. The investment manager remains responsible under the Jordanian securities rules for fault and negligence in the performance of its activities, in addition to being liable for the damages that its actions incurred unit holders[1089]. These responsibilities do not discharge the IC from its liabilities and responsibilities towards its shareholders. Particularly the case of the delegation of the calculation of global risk exposure the European Securities Commission confirmed the statement that the outsourcing of risk management activities does not exempt companies from retaining full responsibility for the effectiveness and appropriateness of risk management process[1090]. Both the IC and the MC should fulfill their incorporation and ongoing conditions. The MC does not hold a direct liability towards IC's shareholders, whereas the liability of the moral person does not transfer. The

[1084] For example in collective investment funds, as they have no legal personality MC's role emerges as the representative of this co-propriety (C. mon. fin., art. L. 214-8-8)
[1085] C. mon. fin., art. L. 533-22
[1086] This statement endorses the separation of MCs and depositaries activities earlier addressed in this part
[1087] See: Isabelle Riassetto and Michel Storck, *Les Organismes de Placement Collectif* (Tome 1 : OPVCM, 2nd edn, Joly 2016)
[1088] Permanent risk management function Article 12 Dir. 2010/43
[1089] Article 104 JSL of 2017
[1090] CESR guidelines 09-178 n (930) page 14

liability it owes is towards the IC and the IC remains liable before its shareholders for the misconducts and violations of the MC.

365 ***Externalization vs delegation.*** MC may choose to transfer partially its functions to a third party for their execution[1091]. The percentage of delegated functions should not exceed the limit that presents MC as a "mail-box" company; meaning no global delegation is accepted. Externalizing or delegating the functions to third party is further conditioned in terms of the performance of the delegate. MC either; externalizes its operational functions or services for a selected third party (services provider) to carry them out[1092], or delegates the functions relating to the management of the IC to a third party delegate[1093]. The Jordanian rules are silent in terms of this form of outsourcing. The silence can be positively interpreted. It is possible to outsource functions of MC in a sub-contracting framework. Nonetheless, the possibility of delegating the management of IC is questionable. Jordanian ICs that do not hold the required experience and resources to perform their activities on their own and not as an automatic obligation refer to MC[1094]. It is an option; therefore, the choice of the IC will fall upon an experienced investment manager and not one that will outsource the activities. If the form of sub-contracting is used to outsource the activities then effectively the responsibilities and the liabilities of the parties to this contract are not affected. Neither party is discharged from its initial obligations consequently to entering into this agreement.

366 ***Conditions.*** MC should inform the *AMF* as soon as possible of the delegation. It should ensure that the delegation does not, in any way, hinder the exercise of the *AMF* of its supervisory power over the MC nor should it prevent a better management of the portfolio by the MC, therefore, negatively influencing shareholders' interest. No delegation of financial management is allowed unless the concerned third party is an entity authorized to manage collective investments similar to those mentioned in the delegation. The delegation should not endanger the best execution of MC's activities, therefore it should not arise cases of conflicts of interest. The delegation is not absolute, the directors of MC should be at all times able to give

[1091] Article 32 Dir. 2010/43; *AMF*, régl. gén., art. 313-77; *AMF*, régl. gén., art. 313-72
[1092] *AMF*, régl. gén., art. 313-72
[1093] *AMF*, régl. gén., art. 313-77
[1094] Even this statement is debatable; the IC is required as part of its licensing process, to provide the JSC with the proof that it holds necessary technical and professional experience and resources

supplementary instructions to the delegate; whereas MC lays down permanent measures that guarantee its effective control over the performance of its assignees[1095]. Third party delegates should be qualified to exercise the delegated functions. Most importantly, and as a form of investor protection; once the delegation is effected and is permitted by the *AMF*; the prospectus and all the documents destined to provide information to concerned investors should detail these delegated functions. As for the externalization, it is limited to essential and important operational functions for the exercise of MC's activities or providing a service[1096]. Essential and important operation function is considered as such if an anomaly or a failure is expected to occur and harm the capacity of the MC in conforming to permanent conditions of its authorization or its professional obligation, further to that harm affecting its financial performance or the continuity of its activities[1097]. The externalization should not constrain the functions of directors of MC, should not modify the relation of the company with its clients nor its obligations towards them, in addition to not having an externalization that alters the conditions or commitments connected to the authorization[1098].

367 ***Legal effect.*** The fact that MC delegates or externalizes its functions to a third party does not discharge nor affect the liability of this company[1099]. This rule finds its grounds in the restriction of full delegation of MC's functions, in addition to considering the transfer of liability of moral persons as not possible due to the fact that the delegated person performs its delegated functions on behalf of the company and never in person. MC should maintain at all times its professional obligations valid. It should hold the necessary expertise and resources to control effectively the delegated and externalized activities. Particularly those activities relating to risk connected to the agreement entered into between delegates and MC. MC further guarantees that the selected third party performs efficiently its activities and has the capacity, knowledge and qualities that permits him to exercise such activities. MC complies with conditions of its outsourcing and that of its authorization within the scope of *AMF*'s powers. The following paragraph explains the scope of oversight and control over MC's activities and functions.

[1095] *AMF*, régl. gén., art. 313-77 (6 and 7)
[1096] *AMF*, régl. gén., art. 313-72
[1097] *AMF*, régl. gén., art. 313-74
[1098] *AMF*, régl. gén., art. 313-75 (I)
[1099] *AMF*, régl. gén., art. 313-77; *AMF*, régl. gén., art. 313-75 (I)

§2: Supervision of Management Company

368 ***Impact of supervision.*** The regulatory and administrative supervision and control over management companies has as a main goal; the promotion of MCs with more substance and solid operational base. Therefore, providing a higher level of investor protection, whereas they have no direct connection with MC's appointing nor do they have a direct contact with it. The importance of this supervision avails in hindering conflicts of interest and guaranteeing transparency of MC's activities. The supervision comes in different forms; external represented in the supervisory power of competent securities authority or internal represented in an auto-control mechanism such as compliance function.

369 ***Supervisory power.*** Competent securities authority exercises an active monitory role throughout the life of MC. This role is similar to that exercised over IC[1100]. The *AMF* sets out conduct of business rules and professional obligations for MCs to comply with. It performs on-site inspections to ensure that MC is acting within the sphere of its program of activity[1101]. It also ensures the compliance with organizational requirements and internal control provisions. The *AMF* may further invoke financial sanctions upon MCs particularly in cases involving default in maintaining authorization conditions permanently valid[1102]. The *AMF* has full discretion to approve or refuse the authorization of MC; it can also withdraw the authorization or delist the company from the registry of MCs as forms of administrative sanctions. The JSC performs a similar power over MC[1103].

370 ***Disciplinary power.*** MC when failing to meet its obligations or failing to maintain the prerequisites valid; is questioned before the securities commission. The commission then performs its investigation and as a result, it reaches a decision considering the company as in breach or not[1104]. Consequently, the commission imposes financial or non-financial sanctions on the infringing company. The non-financial sanctions include withdrawal of authorization. The *AMF* also executes the withdrawal of the authorization in particular cases. Where the

[1100] The aspects of this role shall be further illustrated in Part II
[1101] Stephane Puel and Arnaud Pince (France) in Chris Carroll and Samuel Kay (eds), *Investment Funds: Jurisdictional comparison* (1st edn, Thomson Reuters 2012) page 133
[1102] *AMF,* sanct. Comm., 7 November 2012, n° SAN-2012-18
[1103] The powers of the JSC overrules those of company controller (Article 111 JSL of 2017)
[1104] C. mon. fin., art. L. 621-15 ; Article 21 JSL of 2017

withdrawal is considered as an *ex officio* consequence due to reasons including: the MC no longer meeting its professional obligations required under the authorization. When the MC does not make use of the authorization during the first twelve months or suspends its activities for more than six consecutive months, in addition, if it has been proven that the company obtained the authorization through false declarations or misleading means [1105]. The withdrawal as a disciplinary measure includes all other cases not specifically covered by the *de facto* consequence. In the absence of sound and prudent management[1106], in cases that does not involve the company committing a fault; such as the case of non-respecting the substantial content of its program of activity[1107]. The withdrawal as a sanction does not exist under the Jordanian securities rules. Alternatively, the JSC suspends or annuls the license as a disciplinary measure[1108]. The other form of non-financial sanctions that securities commission may seek is delisting MC from the registry of MCs[1109]. Delisting consists of the decision to liquidate the MC. The *AMF* should not decide to withdraw the authorization as disciplinary measure while reasoning its defense on the core content of the *ex officio* cases[1110].

371 ***Internal supervision.*** MC itself over its own proper actions exercises internal supervision. This supervision takes several forms including compliance function, controlling conflicts of interest and disclosure.

372 ***Compliance function.*** MC as other investment services providers lays down and maintains operational an efficient compliance function that is exercised in an independent manner[1111]. The compliance function should consist of specific missions. Such as control on a regular basis and evaluate the efficiency and adequacy of laid down policies and procedures in order to ensure effective measure of risk detection for non-compliance with professional obligations. Further to, advice and assist concerned persons[1112] in charge of the investment

[1105] C. mon. fin., art. L. 532-10
[1106] CE, 25 Juin 2012, n° 35-0712
[1107] CE, 17 Nov. 2004, n° 25-7402
[1108] Article 21.d JSL of 2017
[1109] C. mon. fin., art. L. 532-12
[1110] CE, 20 Dec. 2000, n° 22-1215
[1111] *AMF*, régl. gén., art. 313-2 ; Article 7 Licensing Regulation of 2005; article 5 Licensing Bylaw of 2018
[1112] The concerned person includes members of management of the MC, members of management of the agents of the MC, employees of the MC or its agents, the individual put in place under the supervision of the MC or its

services in complying with their professional obligations[1113]. The appropriate and independent exercise of compliance function imposes different conditions on the part of the MC. These conditions include; the function consists of necessary expertise, resources and authority, in addition to the access to all the pertaining information[1114]. Designating a compliance officer, titled and attributed a professional card to act as the responsible for the compliance and internal control[1115]. The persons involved in compliance function should not be involved in the activities they control. The determination of the remuneration of the members of the compliance team should not compromise or be a suspect of compromising their objectivity. The MC establishes and maintains operational a periodic control function it is distinct from the compliance function and from internal control mechanisms. This function envisages laying down a program to evaluate and examine the adequacy and efficiency of systems and internal control mechanisms of MC[1116].

373 ***Conflicts of interest.*** MC as other investment services providers undertakes all reasonable measures to detect situations involving conflicts of interest with their provided services. Whether the situation arises within the company, its concerned persons or any person directly or indirectly linked to the company by a relation of control of one side and the clients of the company on the other hand; or it arises between two clients[1117]. MC is not obliged to eliminate situations involving conflicts of interest. It is required to establish and maintain operational an efficient policy to manage conflicts of interest. This policy takes into consideration the size, the organization, the nature, the importance and the complexity of company's activity[1118]. The Jordanian MC does not as a general rule lay down a conflicts of interest policy. Nonetheless, if it chooses so, it is allowed to voluntary establish such a policy. The company is merely obliged to declare and communicate the existing direct and indirect

agents that participate in providing investment services and the externalized individual that provides investment services

[1113] *AMF*, régl. gén., art. 313-2 (I)

[1114] *AMF*, régl. gén., art. 313-3

[1115] *AMF*, régl. gén., art. 313-4; Article 68 Licensing Regulation of 2005; the newly implemented licensing bylaw of 2018 does not address the duties and requirements of the compliance officer

[1116] *AMF*, régl. gén., art. 313-62

[1117] *AMF*, régl. gén., art. 313-18

[1118] *AMF*, régl. gén., art. 313-20

interests it might have with the transactions its performing or the financial instruments with which it is trading.

374 ***Disclosure.*** Disclosure is a form of internal control that entails the communication of financial statements and information to both clients and competent securities commission[1119]. In addition to, keeping record of all the transactions, they performed for their own account and that of their managed portfolio[1120]. In order to be able to perform this communication the MC should put in place and maintain operational accounting policies and procedures[1121]. These policies allow the company to communicate in a timely fashion financial information that offers confident and sincere image of company's financial standing. Further, these policies and procedures should be laid down in a manner insuring the protection of IC's shareholders[1122]. MC communicates its annual financial reports to the securities commission[1123]. The auditors of the company should certify the communication beforehand.

375 ***Better internal control.*** It was mentioned earlier that the effective management of the MC is oriented in the path of having minimum two directors. This condition is the application of the rule of "*quatre - yeux*"[1124]. This rule constitutes that not both directors of the MC should be of senior management. One of the directors should be mandated to represent the company with third party and the other can be the chairman, or an individual specifically mandated the management or determining the orientation of the company[1125].

376 ***Role of IC.*** The governing legal rules do not address the role of the IC in the supervision of the performance of the MC. No explicit statement of the control the IC may exercise over the MC. This silence is debatable in terms of its interpretation. Why should the IC have control over the MC? Why should not it? The MC remains liable for its misconducts and negligence in performing its management activities. The liability stands once a violation of the mandate

[1119] *AMF*, régl. gén., art. 313-61; Article 80 Licensing Regulation of 2005; no such form of disclosure is addressed in the newly implemented licensing bylaw of 2018
[1120] C. mon. fin., art. L. 533-8; *AMF*, régl. gén., art. 313-48; Articles 30 & 56 Licensing Regulation of 2005; no such obligation is addressed under the newly implemented licensing bylaw of 2018
[1121] *AMF*, régl. gén., art. 313-57
[1122] *AMF*, régl. gén., art. 313-59-1
[1123] *AMF*, régl. gén., art. 313-59
[1124] *AMF,* dec., n° 2004-5, Application de la Règle des « quatre yeux » dans les Sociétés de Gestion de Portefeuille
[1125] I. Riassetto n (1087) Page 103

occurs. The liability replaces to some extent the need to provide explicit supervisory role and power for the IC. Nonetheless, the need for this role is not limited to the case of default. The supervisory role is ongoing and can be exercised at all times such as that attributed to the *AMF*. The supervisory role provides shareholders with a higher level of protection in terms of, the influence MC's activities have on their interest and the value of the IC. Nonetheless, the liability of IC remains in place before its shareholders for the behaviors of MC, as no transfer in this case is possible.

377 ***Part I Conclusion.*** The creation of the legal personality of IC takes place once the initial registration is over and the securities commission grants the prior registration approval. The IC chooses its management organization and structure and ahead of commencing the exercise of its activities, it takes on the second phase in the registration process. This phase relates to financial services it provides. IC is obliged to fulfill a list of financial requirements securities rules impose in this regard. The requirements include among other things being subject to the supervision of the competent securities authorities. IC follows a financial registration procedure embodied in a financial license or authorization issued by a domestic securities authority. The procedure is administrative therefore, it consists of several phases including filing an application and issuing an administrative decision. This prior approval of licensing permits the applicant company to exercise its business activities freely. To guarantee the coordination and to safeguard the later arising rights and interests, the competent authority, as an output to assessing the licensing or authorization application, chooses whether to approve or refuse to grant the authorization or license. The legal consequence of the decision the authority reaches differs in these cases. The protective measures require the existence of recourse to the negative decisions, mainly to hinder bureaucracy and prejudices.

378 The access to financial markets by ICs is mainly performed through issuing or listing of financial instruments or securities, Companies are required to register at markets in which, they intend to issue their securities or financial instruments. The IC enjoys the character of an issuer merely in incorporation stages, in order to raise capital. In later stages, it does not follow the set procedures for capital increase or decrease, due to its variable capital. The issuer character is suspended upon the request of the IC. Further, the trade in its own securities may be suspended

upon its request. Its main objective and principle activity is portfolio selection, meaning, pooling assets and collective investment in securities. Therefore, the IC provides financial services. The exercise of these activities requires continuous diligence and care prior and post-performance. Both shareholders and the concerned market request the necessity of this diligence and transparency. Therefore, the two main goals that the diligence should ensure are safeguarding shareholders interest and market integrity. In achieving these goals, IC appoints professional management and counts upon them for the best performance in the interest of shareholders and in a manner guaranteeing market transparency and efficient operation.

379 Overall performance of ICs is regulated and monitored. ICs are subject to continuous supervision throughout their exercise. This supervision begins with the incorporation and continues all along the life of the company. Supervision safeguards shareholders' interests and provides the market with confidence grounds that incentivize investors to access it. Supervision has multiple participants, different stakeholders, the company and competent authorities play a role in the supervision. The following Part II addresses thoroughly the different forms of this continuous supervision.

Part II: Controlling the Performance of Investment Companies: Continuous or One Time Shareholder Protective Supervisory Obligation

380 ***Company's place of interest.*** The company, a moral person, is not isolated. As other elements of the social structure, it interacts with similar natural and moral persons. As participants in the national and global economy the importance, it represents for its partners and the state justifies the interest in its well-functioning. In theory, a well-functioning company results in fulfilling objectives, minimizing global risk exposure and achieving social interest. Therefore, having a satisfied shareholder. Well-functioning of the company requires different levels of performance oversight that of the company and its members of management. Alongside the company is the mass of stakeholders that benefit and are influenced directly or indirectly from the social interest of the company. To safeguard their proper interest a part of these stakeholders enjoys oversight power that they exercise throughout the life of the company including the decision-making process. An example of this sample is shareholders. Meaning, there is a social control exercised over the company. Based on the collective interest as its main reference and motivated by the individual interest of the concerned stakeholder. A new project of law aiming at modifying article 1833 of the French civil code is put in place. The aim of this project is to modify the long-standing concept of companies acting in the common interest of its shareholders to introduce explicitly part of third party stakeholders into the equation[1126]. Third party include those holding labor characters, collaborators, creditors, clients and others.

381 ***Social interest.*** The social interest then consists of a collective interest rather than the individual interest of shareholders. This interest resides in the prosperity of the company. it answers questions relating to the collectivity despite the individual incentives of the participants, the prosperity in this sense is seem as a long-term investment incentive rather than a short-term one. The interest further englobes extra-statutory participants therefore relating the company to the concept of institution rather than having a mere contractual base. The social interest in this regard forms a crucial component of the performance of the company where it is achieved through adequate and efficient performance. Therefore, the interest is connected to the

[1126] ANSA, 'Contrat de Société et Intérêt Social : Plan d'Action pour la Croissance et la Transformation des Entreprises Propositions de loi Entreprise nouvelle et nouvelle gouvernances' (Note, n° 17-054 [2017])

notion of corporate governance. The company adopts internal policies and control measures that confirm with this interest and seeks its achievement, this policy includes laying down organizational and conduct norms that eventually enhance the governance of the company[1127].

382 ***Objective of supervision***. The main objective of supervision is ensuring adequate implementation of the applicable rules to the financial sector. The impact of this objective is exemplified in preserving financial stability and thereby ensuring confidence in the financial system as a whole and sufficient protection for the recipients of financial services. This is justified in the crucial impact the legal environment in which a company does business have on its decisions and performance. The impact entails the regulatory framework proposed nationally by every country addressing legal and illegal actions. Further to the adherence to applicable rules and the efficiency of law enforcement. Therefore, addressing company compliance and enforcement mechanisms whether public or private. The functions of supervisors entail detecting problems at early level and prevent crises from occurring. Failures occur from time to time. The response to a crisis that breaks is to have effective and efficient management that limits the damages to the least possible, a public enforcement mechanism that restores market integrity and clearly defined regulatory framework allocating liabilities and imposing obligations.

383 ***Forms of supervision***. CIU are expected to act in an honest, loyal and professional manner that serves the best interest of investors[1128] while guaranteeing market integrity[1129]. Shareholders of IC and future investors in CIU look forward to accessing the financial market while holding a financial objective. The investment decision is subject to uncertainties. The choice of the IC and other forms of CIU is a method through which, the negative effect of these uncertainties may be minimized to the lowest possible and, it ensures the compatibility with shareholders' original financial objective. Achieving the financial objective includes acting in the best interest of shareholders of IC. Therefore, it puts company's performance in question and subjecting it to different forms of supervision. Due to the multiplicity of the participants in the investment decision, the supervision takes an external and internal form. The investment

[1127] Didier Poracchia et Didier Martin, 'Regard sur l'Intérêt Social' (2012) 9 Revue des Sociétés 475
[1128] C. mon. fin., art. L. 533-11; Article 65.c Licensing Regulation of 2005
[1129] C. mon. fin., art. L. 533-1

decision involves the company, its shareholders, the decision-maker (members of management), the concerned financial market and the competent authority. Every one of them has a role in the oversight of company's performance. An oversight that is continuous, adaptive and consistent with market requirements and investor protection plan.

384 ***Plan***. This part addresses the previously mentioned forms of supervision internal and external. The external supervision in the form of an outsider independent and authoritative supervisor that ensures the proper functioning of the market and its participants. This supervisor takes the form of a competent authority responsible for public enforcement of securities rules and safeguards investors' protection (title 1). An internal supervision exercised at company level, whether directly by the company and its shareholders or indirectly through adhering with the applicable rules (title 2).

Title One: External Administrative Supervision

385 ***State power***. The IC once it obtains its authorization or license and commences the exercise of its portfolio investment activities is not free of the external governmental control. The control remains in place throughout its life. The control and supervision addressed in the securities regulation require the existence of an authority that assures the compliance with the rules and carries out the duties and enforcement provided in them. This authority should be empowered to undertake preventive measures and adopt penalties regarding its subject undertakings in order to guarantee a well-functioning securities market and safeguard investors' interests[1130]. These measures and penalties should not prejudice the regulatory and discretionary powers accorded in the incorporation stage of the IC. The measures, penalties and decisions undertook and adopted by the authority form the key component of the powers and authoritative nature the authority in question enjoys in IC's sphere. The question rising in this regard is the following: who is the responsible authority for the control and supervision? This authority is a public body assigned or created within the IC's country of incorporation or its host country to operate a stable and protective securities market. Therefore, this authority means the existence of a strong governmental oversight.

386 ***Oversight framework***. The governmental securities market oversight as other components of the national administrative body has a set framework differing from one country to the other depending on the size of market and the level of participation. This title provides a concrete understanding to the authority responsible for the control and supervision. It sheds the light on the identification of this authority. Is it a direct individual or cooperative performance or a delegated one? Chapter 1 provides an identification to the institutional governance, in terms of the national organization and the designated authority. As for chapter 2, it provides a concrete analysis to the performance and operation mechanism of the governmental oversight, in the sense that safeguards shareholders' interests and guarantees financial stability.

[1130] Recital 23 UCITS Dir. 2009/65

Chapter 1: Identifying Institutional Framework of the Authority

387 ***Structure of financial supervision.*** How the institutions for financial services supervision are set up and structured is important, because this can crucially affect the quality of financial services supervision, financial stability and financial development. The question rising in this regard is the following: Do similar countries choose similar supervisory structures for financial services? Studying in depth the institutional organization of the external administrative supervision opens the door for a profound understanding of the most efficient form of authority the IC requires and should have. Therefore addressing the most successful framework of a governmental institution. In modern economy a set of doctrinal frameworks are available for countries to choose from when seeking a regulatory reform or a better market stability and investor protection especially in the periods following financial crisis and in an attempt to contain the negative outcomes it generates. The framework includes different approaches employed globally to enhance the supervisory structure. These approaches consist of an institutional, functional, twin peaks and integrated ones (further discussed in section b). The supervisory structure differs in its composition and role on international, regional and national levels.

388 ***Importance of oversight.*** Financial markets and undertakings evolve so do the regulatory systems that oversee them. Generally, regulatory structures and architecture of national supervision arise proceeding national debates, events and economic crises[1131]. This chapter questions whether the existing financial supervisory model is compatible with the IC and securities market needs or there is a need to perform changes and adopt newer and more adequate approaches that achieve financial stability and investor protection. The chapter introduces and analyzes the globally available supervisory structure, further provides an assessment to the applicability of the classical and modern organization theories (used generally in management organization of commercial groups) over the institutional architecture of the external financial supervision (section A). The chapter further illustrates oversight bodies.

[1131] Group Thirty, 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' (2008) < http://group30.org/images/uploads/publications/G30_StructureFinancialSupervision2008.pdf > Accessed 9 October 2017

Those that enjoy regulatory (impose rules) and supervisory (oversight of undertaking through the application of rules) authorities and powers.

Section A: Concepts of Institutional Organization

389 ***Organization theory.*** Most of what is available on the organization theory has its origins in ancient and medieval times. Aristotle is the first to write on the importance of culture for management systems, Ibn Taymiyyah used scientific methods to outline the principles of administration within the sphere of Islam and Machiavelli gave the world the definitive analysis of the use of power[1132]. Organization viewed as a vehicle through which objectives and goals are accomplished. This traditional approach tends to obscure the internal purposes of organization itself; therefore, a different view of the organization introduced it as that mechanism having ultimate purpose of offsetting the forces that undermine human collaboration[1133]. In this view, organization minimizes conflicts. Organization seen as a universal phenomenon of systems of coordinated actions among individuals who differ in their knowledge, preference and interest[1134]. The emphasis in the definition of organization differs depending on the used perspective. From a rational perspective organization is a tool designed to meet pre-defined goals, the natural perspective sees it as a group, as for the open perspective it concentrates on the organization as a self-regulation system that is open to exchanges with its external environment[1135].

390 ***Organization and financial markets supervision***. Organization exists when people interact to implement essentials and reach a certain goal. A financial market that is smoothly functioning requires a system of relationships among functions achieving stability, continuity and predictability in its internal activities and external contacts. The market needs harmonious relationships between the different participants and processes creating it. Meaning an organization of the external oversight that is free from destructive tendencies caused by

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[1132] Jay M. Shafritz and others, *Classics of Organization Theory* (8th edn, Cengage Learning 2015) page 32

[1133] William G. Scott, 'Organization Theory: An overview and an Appraisal' (1961) 4 (1) Journal of the Academy of Management 7 < www.jstor.org/stable/254584 > accessed 02 September 2017

[1134] Henry Mintzberg, *The Structuring of Organizations* (Prentice Hall 1979) page 18

[1135] Ozgur Onday, 'Classical to Modern Organization Theory' (2016) 4 (2) International Journal of Business and Management Review 15 < http://www.eajournals.org/wp-content/uploads/Classical-to-Modern-Organization-Theory1.pdf> Accessed 21 September 2017

divergent interests. The organization of the supervisory authorities requires an overlook on the existing theories and their application in practice. Theories come from practice to serve practice. The following sub-sections illustrate the existing organization concepts classical (sub-section 1) and contemporary ones (sub-section 2) with an overview of their applicability over the IC and securities market.

Sub-section 1: Classical Concept

391 ***Classical theory.*** The classical doctrine deals with the anatomy of formal organization. In a socio-economic sphere, the classical theory is built on four key pillars[1136]. They include as a cornerstone factor the division of labor known as the departmentalization. Further the scalar and functional processes[1137], the structure[1138] and the span of control (scope of power). In another view of the classical theory of organization introduced by Max Weber, power is principally exemplified within organizations by the process of control. The notion of the organization attains through administrative bureaucracy as its most efficient form. Meaning the exercise of control based on knowledge. The classical theory as introduced by the doctrine was criticized and the scholars introduced a neo-classical theory to put an end to the critics of the former theory.

392 ***Neo-classical theory***. The neo-classical theory maintained the four main pillars of the organization theory yet it introduced into the equation the behavioral science[1139]. This theory states that the pillars are subject to modifications by people acting independently or as part of an informal organization[1140]. The informal organization is seen as a natural grouping of people in a given situation. This grouping is influenced by different factors including location, occupation, interests and special issues.

[1136] Edward Franz Leopold Brech, *Organization: The Framework of Management* (Longman 1957) page 11

[1137] Deals with vertical and horizontal growth of the organization respectively. From a pure classical management doctrine, this pillar addresses top management and hierarchy. The scalar is the vertical growth meaning the delegation of authority and responsibilities in addition to the obligation to report. As for the functional it deals with horizontal evolution meaning the division of the organization into specialized parts

[1138] The logical relationships of the different functions and their role in achieving the goals of the organization efficiently. It implies system and pattern

[1139] See: Robert V. Presthus, 'Towards a Theory of Organizational Behavior' (1958) 3 (1) Administrative Science Quarterly 48

[1140] W.G. Scott n (1133) page 10

393 ***Classification of organization.*** Organization generally consists of a structure with specific classification that differs depending on the used criterion. When referring to the criterion used by Weber that is the nature of the legitimacy the organization is then classified into three different forms of authorities. Charismatic, traditional and rational legal authority[1141]. The following paragraphs address the different axes of this classification (paragraph 1) in addition to the applicability within the scope of the IC and financial market (paragraph 2).

§1: *Axes of Classical Classification*

394 ***Rational legal authority.*** Rational legal authority consists of a structure with generalized rules. Logically consistent and claims to cover all possible cases of conduct falling within its jurisdiction[1142]. The constituting rules are universalistic and impartial. Therefore, they apply to any person meeting the logically formulated criteria. They are impersonal; in the sense that the statuses and qualities of the persons falling under its jurisdiction treated as a function of the application of the general rules. As for those not falling within the scope, considered as irrelevant. The fundamental source of control in this type is the impersonal order itself. The scope of this control extends to persons who occupy a specially legitimized status under the rules. Outside this sphere treated as private persons with no more authority than anybody else. According to Weber's theory the list of criteria constituting this form of authority include having a code claiming obedience from the members of the organization. Law in this form of authority is a system of abstract rules applied to particular cases where the administration looks after its interest within the limits of the law. The person exercising the authority obeys the impersonal order. The person should be a member in order to obey the law. Obedience is due to the impersonal order or granting the person the authoritative position and not to the person holding the position or the authority. This authority attained through its most efficient form of organization that is "bureaucracy".

[1141] Max Weber, *The Theory of Social and Economic Organization* (Translated by A.M Henderson and Talcott Parsons, Free Press 1947)

[1142] Ibid page 68

395 ***Characteristics of bureaucracy.*** Within the scope of the legitimacy of power, Max Weber provides a list of characteristics for the bureaucracy[1143]. They include a continuous organization of official functions bound by rules. The rules are stable and comprehensive. Further to, specialization; each office has a defined scope of competence where the tasks are divided between the offices in a form of distinct separate functions. A clearly defined hierarchy of offices. In addition to impersonality in the sense of being able to attend the duties in a fair and objective manner, officials appointed on a professional qualification basis, separation of private and public affairs that eventually avoids conflicts of interest and strict and systematic discipline and control of the officials.

396 ***Traditional authority.*** The system of order constituting this authority is based on a complex criteria that treats this authority as having always existed and been binding[1144]. Therefore, in this type of authority there is no place for new legislation. It is essentially a respect of custom. For example, innovation is justified under this criterion by the fiction of once existing and in force but fell to disuse and now; it is brought back to its rightful position. The traditional authority involves different statuses of persons who exercise the authority[1145]. The status constituting the authority is defined through three things. Firstly, having concrete traditional prescription of the traditional binding order. Secondly, the authority of other persons over the status in a hierarchal sphere. Thirdly, a sphere of arbitrary free grace open to incumbent, free to make decisions based on considerations of utility of substantive ethical justice. Therefore, the persons exercising the authority are not restricted to specific powers. They are in position to claim the performance of unspecified obligations and services as their legitimate right. In this form of authority, there is no separation of private affairs and scope of the authority.

397 ***Charismatic authority.*** It is an authority based on the outstanding characteristic of the individual. It differs than the other two forms of authority in terms of being considered as a revolution. The authority is claimed in conflict with the basis of legitimacy of an established

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[1143] Classical Organization Theory < http://www.hrmguide.co.uk/history/classical_organization_theory.htm > Accessed 10 September 2017

[1144] M. Weber n (1141) page 59

[1145] Dana Williams, 'Max Weber: Traditional, Legal-Rational and Charismatic Authority' < http://danawilliams2.tripod.com/authority.html > Accessed 06 November 2017

fully institutionalized order[1146]. This authority is distinguished through the introduction of a pattern of conduct treated as a definite duty once confirming with it. The authoritative person claims moral authority and legitimacy to give orders to whoever falls within the scope of the pattern[1147]. This authority requires an individual leader that has a charismatic quality proven and recognized as genuine by the followers. The authority is represented by the duty or obligation of the followers rather than their will.

398 ***Connection to classical and neoclassical theories.*** The three forms of authorities introduced by Weber despite their preceding existence to the neoclassical theory may fall within its main elements. The rational legal authority and the traditional authority consist of the four main pillars of organization proposed by the classical theory. The departmentalization exists under the rational legal authority within its universalistic rules that prescribe the different specializations as for the traditional authority the division is considered as preexisting and binding. The vertical and horizontal growth of the organization alongside the structure exist under both authorities within the scope of the codes stating the hierarchal structure of the organization whether explicitly or implicitly. In addition to the span of control as the rational legal authority has a restricted scope of power over the subjects meeting its set criteria. The traditional authority has an open grace form of scope that claims the performance of specified and unspecified obligations and services. The charismatic authority addresses the behavioral science and the possible modifications to the main pillars through the charismatic movements introducing new patterns of conduct and depending on a charismatic leader (the person acting independently under the neoclassical theory). The following paragraph 2 addresses the applicability of these theories and the proposed classification for the IC.

§2: *Application of Classical Theory in Financial Market Sphere*

399 ***Real scope***. The classical theory of organization with its different proposed systems of orders is sociologically introduced generally applied in terms of economic organization of commercial groups. This theory is further connected to behavioral theories and management organization researches. In this paper, we aim to apply the organization theory within the notion

[1146] M. Weber n (1141) page 75

[1147] Martin E. Spencer, 'Weber on Legitimate Norms and Authority' (1970) 21 (2) The British Journal of Sociology 123 < www.jstor.org/stable/588403 > Accessed 06 November 2017

of the institutional structure of financial market activities' authority. The application of the classical theory requires introducing the advantages and disadvantages of each system of order to be able to identify the most proper applicable system over financial market activities.

400 ***Critical overview of authorities***. To some extent, every institution has a level of instability and tends to transform from one form to another to match the changes it faces. On an at all comparable scale, the free market economy cannot function without the rational legal authority[1148]. It is the predominant form of authority. Nonetheless, the individual use of which is criticized and entails both positive and negative consequences similarly does the individual use of the other two types. The traditional authority on the other hand presented as more stable than the other form of the routine order (rational legal authority). The reasoning behind this consideration is found in the cases where the concurrent challenges transforms the rational legal authority into a traditional authority directly or indirectly through the influence of the charismatic movements. The rational legal authority generally functions through imposing and enforcing. Its structure is not exhaustive of the social structure. The individual application of this form of authority leaves a space for potential risks of not having an exhaustive scope of powers and authority. In terms of the financial market this risk translates into the possibility of having an authority that is not competent in all that concerns the market participants and market activities therefore leading to minimal investor protection framework. There are strains between the scope of this authority and the parts that are predominantly traditionalized. In the sense that the predominant authority entails two forms of orders the legislative one and that based on customs. The rational legal authority depends on the coexistence of the custom and charismatic movement as means to undermine the instability of the prevailing institutional system. The charismatic authority as a sole institutional system is unstable and temporary it is rather an intermediate with long-term effects depending on the choice of one of the other two types of authority. A charismatic leader holding special quality and capable to influence and inspire[1149]. The preferable and more stable system by the sociologists is the traditionalized one as the

[1148] M. Weber n (1141) page 76

[1149] Jeffery D. Houghton, 'Does Max Weber's Notion of Authority Still Hold in the Twenty First Century?' (2010) 16 (4) Journal of Management History 449 < https://doi.org/10.1108/17511341011073933> Accessed 06 November 2017

strains of the rationalized one strengthens and enforce biased treatment of the parts covered within its scope.

401 ***Authority of Investment Company***. In terms of the IC, charismatic authority cannot individually be the prevailing system of order due to the continuous introduction of patterns of conduct without having a stable and consistent institutional structure. This form of authority is necessary for the IC, yet as a movement to induce innovation and legislative changes that the rational legal authority requires in most cases. The latter is very strict in its application. The rational legal authority has a relatively strict scope of application that weakens the control of financial markets in terms of the statuses that fall outside its scope. They fall outside the scope because they do not meet the criteria preset in its constituting rules. Nonetheless, the traditional authority cannot solely serve the prerequisites of the financial market and the form of activities exercised by the IC. The traditional authority does not hold minimum strictly specified powers. Positively interpreted in having an application depending on the assumption that it is competent and it is extended to cover all the possible statuses. Negatively in the sense that this loose structure means that, the IC does not have a concrete prescription of the competent authority, its powers and scope of jurisdiction leading to risks of cost and efficiency. Shareholders of the IC within the sphere of this authority do not witness legislative amendments that serve the market stability and enforce their protection due to the philosophy of preexistence of the rules and their binding character. The question rising in this regard is the following: what does the IC require in the supervisory structure? The preferable institutional structure of the supervision and external control is having a hybrid permanent structure consisting of the three axes of the organization theory. The basis of the structure is a rational legal authority that has universalistic and impartial rules specifying the scope of jurisdiction and application. Therefore, covering all the possible statuses and addressing the different market participants and levels of financial activities. Open to changes to cope with the demands of the stability of the financial market, the investor protection framework and reducing uncertainty, while maintaining the hybrid structure and without having to transform from one form to the other. The change performed through charismatic movements. It introduces new patterns of conduct that serve the subjects of the authority and open the door to effect amendments to the existing rules. The authority should also be able to claim the performance of unspecified powers within the limits of law in order to

avoid the rigidity of the classical administrative system, yet in a manner not presenting the institutional system as arbitrary or bias. Both classical and neoclassical theories seen as not asking the right question in terms of the organization. Therefore, a modern theory of organization introduced treating the organization as a system of different mutual dependent variables. This theory is accompanied with contemporary legal notions of organization that influence the choice of the proposed hybrid structure of the classical theory (further explained in the following sub-section 2).

Sub-section 2: Modern and Contemporary Concepts

402 ***Modern organization theory.*** The rise of this theory came to address the organization as a total system and to distance the analysis from the different pillars by asking a different angle of questions. This theory has a conceptual base of analysis. It treats organization as a system with different mutually dependent variables[1150]. This theory studies the relation of structure to behavior[1151]. The distinction of this theory found in the questions it lays down; not previously dealt with by classicalists and neoclassicists. The main questions asked within the analysis this theory performs include; what are the strategic parts of the system? What is the nature of their mutual dependency? What are the main processes in the system those that link the parts together and facilitate their adjustment to each other? What are the goals of the system? Consequently, to asking these questions the theory puts together the final ingredients of the system. The system within its scope consists of four main ingredients: parts, interactions, processes and goals, therefore looking at the system in its totality[1152]. The main parts constituting the system are individuals, formal arrangement of functions, informal organization, status and role patterns and physical setting. The parts are interdependent. They interact together through processes including communication, balance (having harmoniously structured relationships) and decision making to achieve the goals of the system. The goals include growth, stability and interaction. The closest theory introduced in this scope as being similar to the modern organization theory is the general system theory[1153]. This closeness and similarity is in terms of treating the

[1150] Lawrence J. Henderson, *Pareto's General Sociology: A Physiologist's Interpretation* (HUP 1935) page 16
[1151] Mason Haire (ed), *Modern Organization Theory* (John Wiley and Sons 1959) page 76
[1152] James G. Mason and Herbert A. Simon, *Organizations* (John Wiley and Sons 1958)
[1153] Interdisciplinary study of systems, involving broadly applicable concepts and principles, as opposed to concepts and principles applicable to one domain of knowledge

organization as an integrated whole[1154]. The main difference between these two theories is the level of system subject matter. The general system theory addresses every level of system. As for the modern theory, it focuses on the human organization.

403 ***Application over Investment Company.*** Extending the scope of application of this modern management theory to cover the structure of the authority responsible for the external control over ICs requires justifying the degree of implementation of its different ingredients within the scope of organization of a public authority. The authority consists of different interdependent parts that may include the different competent authorities and informal industrial organizations that share a common physical setting. The parts interact with each other through harmonized set of rules and a level of communication that achieve the main goals of the authority. Guaranteeing the stability of the market and safeguarding investors' interests.

404 ***Legal concepts.*** A mere legal setting that seeks financial security proposes an authority established by law to earn its legitimate existence and has a set of rules that presents a framework of its span and scope of control. The contemporary legal concepts presents the authority outside the scope of the organization theory. The authority is considered regulatory in the sense of having specific powers and enforcing nature (further explained in paragraph 1) or merely prudential in terms of having a role that is close to the social responsibility (paragraph 2). The legal notions presented more like forms for the exercise of the main activity "supervision" rather than organization concepts.

§1: *Regulatory Authority*

405 ***Definition.*** The regulatory authority is an independent body or system that exercises an autonomous authority over an area of activities in a supervisory or regulatory capacity. This authority deals with regulatory law and rule making. In the sense that it codifies and enforces rules and regulations. Further, it imposes supervision and oversight for the benefit of the large public. Its independence stems out of the necessity for expertise in performing certain supervisory and regulatory tasks such as the case of the supervision and regulation of the financial market activities. Further the need to the rapid implementation of the rules and

[1154] W. G. Scott n (1133) page 15

regulations. This form of authority enforces standards set usually by sectorial or prudential propositions.

406 ***Functioning mechanism.*** It is an authority that exercises a regulatory role. This role consists of having powers, functions and missions prescribed by law. Having a strict procedural framework that set its decision-making process including being transparent in its communications and having reasoned, non-arbitrary and responsive decisions that are open to legal review. The regulatory role closely connected to the regulatory intervention and regulatory management system. They form part of its global role. The regulatory management system is the processes through which regulation develop, is enforced and adjudicated[1155]. The system supports the objectives of the regulation or that of the reform in terms of economic performance, effectivity and efficiency. Further, enhance democratic values in the sense of having a participative and responsive government. The system consists of three basic mutually reinforcing components: high-level regulatory policy, measurable and explicit standards for regulatory qualities and regulatory management capacity[1156].

407 ***Financial regulatory authorities.*** Financial regulatory authorities exercise their activities of monitoring and regulating in two main financial fields banks and financial markets. Our main concern is financial markets (the trading venue for ICs). They are structured to insure the smooth functioning of the market, investigate, gather information and have a non-profit goal. A financial regulatory authority exists in every country. These authorities cooperate regionally and internationally. The cooperation on an international level is found in the representation of the different national market authorities in the International Organization of Securities Commissions (IOSCO)[1157]. On a regional level, the European authorities such as the formerly existing authority of CESR[1158] replaced by the ESMA since 2011. On a national level, the French financial regulatory authority is represented in the *Banque de France* and the *AMF*. As

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[1155] Peter Ladegaard, 'Good Governance and Regulatory Management' (Regulatory Management and Reform Seminar, Moscow, Nov. 2001) < https://www.oecd.org/governance/regulatory-policy/2724495.pdf > Accessed 27 September 2017

[1156] According to the suggestions made by OECD member countries

[1157] Sets global standards for securities market regulations (See official website < http://www.iosco.org/ > for further information)

[1158] Representation of EU MS market authorities. Coordinates the communication between different local authorities and advices on regulatory framework on a European level

for the Jordanian financial regulatory authority, it consists of the Jordanian Central Bank, the Insurance Commission and the JSC.

408 ***AMF.*** The *AMF* is an independent public entity[1159]. Created through the merger of the predecessor financial authorities the French stock market regulator (*COB*) and Financial Markets Council (*CMF*). *COB* and *CMF* represented respectively administrative and professional authorities. The control of the market during their coexistence created difficulties and challenges. Envisaged in the existence of multi applicable rules from different sources without respecting the hierarchy of norms[1160]. Therefore, the outputs were contradictory in terms of the same financial transaction. Investor protection was the engine that urged the continuous request of the financial reform in order to safeguard the invested savings, develop the investments and restore investors' confidence in the financial market[1161]. The creation of the *AMF* was for the sake of streamlining. The *AMF* has as a main mission maintaining orderly financial markets. In the process of accomplishing its mission, the *AMF* approves the rules applicable to financial markets and market infrastructures[1162]. Supervises corporate finance of the listed companies and authorizes financial services[1163]. Ensures the regulatory compliance and disclosure of market participants[1164]. Undertakes disciplinary and sanctioning decisions[1165]. Investigates and inspects[1166]. It plays an essential part in the structure of financial regulators[1167]. All of which to fulfill its regulatory independent character. The *AMF* scope of supervision and control cover collective investment products including IC. The body that issues the authorization to the IC permitting it to exercise its portfolio investment activities.

409 ***JSC.*** JSC was established in 1997 as a regulatory independent authority in the process of separating supervisory and executive roles within the scope of securities markets[1168]. Up to the

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[1159] Loi n° 2017-55 du 20 janvier 2017 conferred this character on the *AMF*
[1160] Jean-Paul Valette, *Droit de la Régulation des Marchés Financiers* (Gualino Editeur 2005)
[1161] Ibid page 81
[1162] C. mon. fin., art. L. 621-1
[1163] C. mon. fin., art. L. 621-8, C. mon. Fin., art. L. 621-8-1
[1164] C. mon. fin., art. L. 621-9
[1165] C. mon. fin., art. L. 621-12
[1166] C. mon. fin., art. L. 621-11
[1167] C. mon. fin., art. L. 621-6
[1168] Information available on JSC official website < http://jsc.gov.jo/Public/Arabic.aspx?site_id=2&Lang=1&Page_Id=2004&Menu_ID=14&Menu_ID2=12 >

latter date the Amman securities market faced several challenges in terms of supervision and control over the rise of the number of market participants. The implementation of the securities law in 1997 envisaged a new era of financial regulation. The main missions of the JSC are envisaged in the regulatory and supervisory roles it holds. The JSC ensures investors' protection and development of the national securities market[1169]. The JSC enjoys disciplinary and sanctioning powers directly related to its supervisory role[1170]. It exercises the role of the financial regulator by laying down the different applicable rules to financial transactions[1171]. In the process of de-jurisdiction of financial related decisions on an administrative level the JSC presents a level of jurisdiction *a priori* to administrative courts[1172]. The JSC has a scope of jurisdiction that covers all Plc. Including IC. The following paragraph 2 addresses the other form of authorities introduced by legal doctrine.

§2: *Prudential Authority*

410 ***Rise of prudential supervision.*** In a financial market framework exists a financial regulatory policy and rules applicable to the different market participants. Following the financial crisis, a connection was made between this policy and the supervision. This connection resulted out of various studies, such as those conducted on an EU level to reach a resolution for the crisis and prevent from recurrent actions. One of the main reports that addressed this connection is the *Larosière* report addressing the financial market stability. It proposed this connection and considered policy and supervision as interdependent in the sense of having a competent and well-designed supervision influences the efficiency of the regulatory policies[1173]. The report addresses this supervision and specifically the prudential one. Supervision is the cornerstone activity of the authority. The authority in this concept exercises its main activity of supervision nevertheless this supervision may be complemented with a regulatory nature such as the authority mentioned in the former paragraph or it may hold a basic supervisory role without any disciplinary or sanctioning powers such as the case of prudential supervision. The

[1169] Article 8 JSL of 2017
[1170] Article12 JSL of 2017
[1171] Article 12.s JSL of 2017
[1172] Article 12.f JSL of 2017
[1173] De Larosière Group, 'The High-Level Group of Financial Supervision in the EU' (Chaired by Jacques Larosière, Brussels 2009) < http://ec.europa.eu/internal_market/finances/docs/de_larosiere_report_en.pdf > Accessed 10 September 2017

latter is a form of supervision that permits the authority to oversee the financial market and its participants without having a say on their behaviors.

411 ***Forms of prudential supervision.*** Within this prudential authority exists two forms of prudential supervision[1174]. One, an authority exercising a micro-prudential supervision and the other macro-prudential supervision. These two forms of supervision exercised by different authorities that form what is known as a System of Financial Supervision (SFS) introduced exclusively on an EU level[1175]. This approach of the EU brings us closer to the modern organization theory. As the SFS is a multi-layered system of prudential authorities of both forms micro and macro[1176], (meaning a system of mutual interdependent variables as the modern theory proposes). This European approach introduces a system on a European level that eventually affects and includes a national subordination and intervention[1177].

412 ***Micro-prudential authority.*** The main objective of micro prudential authority is to supervise and limit the distress of individual financial institutions (micro level). Therefore, providing a protection for the investors in these institutions. This authority views the financial system as exposed to common risks. It aims to mitigate and prevent the risk of contagion and subsequent negative externalities especially in terms of investors' confidence in the system. On an EU level, multi layered authorities exercise the micro-prudential supervision. The various authorities can be separated depending on two criterion; sectoral area (banking, insurance and securities markets) or level of supervision and regulation (EU or national). The role of the national authority is particularly seen in this form of supervision rather than the macro one. The national authorities conduct the day-to-day supervision over the financial market and its different participants. The perfect example for an EU agency that exercises the supervision on a

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[1174] E. Wymeersch n (479) page 243

[1175] The ESFS is composed as follows: ESRB, ESMA, ESA (EBA and EIOPA), joint committee of ESA and competent or supervisory authority in the MS (Article 2 Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L 331/84)

[1176] Doris Kolassa, 'European System of Financial Supervision ESFS' (European Fact sheet 03/2017) < http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_3.2.5.html > Accessed 10 September 2017

[1177] Competent national supervisory authorities form part of micro prudential supervision this includes France's competent authorities

micro level is the ESMA[1178]. An independent European authority enjoys a legal personality[1179] and acts in the interest of the Union as whole. The ESMA is a sectoral agency specialized in securities markets covering all market participants including UCITS[1180]. An example of a national authority that exercises the micro-prudential supervision is the *ACPR*[1181].

413 ***Macro-prudential authority.*** The main objective of macro prudential authority is limiting the distress of the entirety of the financial system. The aim is to ensure financial stability[1182]. It is concerned in protecting the overall economy from significant loses in real output. Financial stability is a real condition for the real economy to provide jobs, credits and growth. The authority pays attention to other forms of risks that affect the entire system. They are common and correlated shocks. In addition to the shocks, that affect parts of the financial system and triggers contagious knock-on or feedback effects. When this form of supervision was suggested, the aim was to ensure financial stability on a global European level. The main European body responsible for this form of supervision is the ESRB[1183]. On a national level, the perfect example is the role of the central banks in the national financial system oversight and the Higher Council of Financial Stability in France[1184].

414 ***Connection micro and macro***. Both forms of prudential supervision play a major role in ensuring financial stability. They intertwine and to some extent complement each other. Having a meaningful macro-prudential supervision impacts the supervision on a micro level and vice versa micro supervision cannot effectively safeguard financial stability without adequately taking into account the developments on a macro-level. Having arrangements in place that properly acknowledge the interdependence of micro- and macro-prudential risks permits all

[1178] ESMA Reg. 2010/1095
[1179] Article 5 ESMA Reg. 2010/1095
[1180] Article 1 ESMA Reg. 2010/1095
[1181] C. mon. fin., art. L. 612-1; Loi n° 2017-55; not considered as a moral person (CE, 9 déc. 1999, n° 363834), established consequently to the merger of several authorities (*ACAM, CEA, CB and CECEI*). It is competent in the sectors of banking and insurance (C. mon. fin., art. L. 612-2). Its main mission is preserving the stability of the financial system (C. mon. fin., art. L. 612-1)
[1182] Recital 6 Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L 331/1
[1183] Main objectives and missions include the contribution to prevention or mitigation of systematic risks that impact financial stability of the union (Article 3 Reg. 1092/2010)
[1184] C. mon. fin., art. L. 631-2-1

stakeholders to have sufficient confidence to engage in financial activities[1185]. Tensions also rise between micro and macro-prudential supervisions. To exploit fully the complementarities between the domains of both policies, minimize frictions and ensure an efficient use of the different policy instruments; it is essential to have a constructive cooperation and adequate flow of information between both supervisions[1186]. The basis for cooperation between the two supervisions served through having sound and shared diagnosis of the determining factors of the crisis. Further cooperation ensured through a mix composition of the authorities exercising each of the two forms of supervision. In the sense of having members representing one authority within the board of the other.

415 ***Output of prudential supervision.*** The prudential supervision main tasks include issuing recommendations, warnings, guidelines, and monitoring their follow-up by market participants[1187]. On a micro level, the authorities conduct economic analysis, assure compliance with legal rules and foster investor protection[1188], further to, implanting technical standards[1189].

416 ***Investment Company authority***. From a Jordanian stand, the micro and macro-prudential supervision are envisaged in the same authority, as the cases financial authorities deal with are dominantly national. The prudential supervision is exercised by the JSC. The JSC is concerned with the development and the stability of the securities market in Jordan. It lays down standards and policies for its global functioning framework[1190]. Therefore, the regulatory authority in Jordan performs both forms of supervision. This dual role presents the authority as legally valuable and bestows over its suggestions and recommendations an implicit legal nature despite their prudential consistency. The institutional framework within the scope of the IC consists of a regulatory authority or authorities as suggested legally and confirming with the modern theory

[1185] Recital 30 Reg. 2010/1092

[1186] Fredric Boissay and Lorenzo Capiello, 'Micro Versus Macro- Prudential Supervision: Potential Differences, Tensions and Complementarities' (2014) ECB Financial Stability Review 135 < https://www.ecb.europa.eu/pub/fsr/shared/pdf/sfcfinancialstabilityreview201405en.pdf?666514071375fbc9111c22effdacff9f > Accessed 25 September 2017

[1187] Article 3 Reg. 2010/1092

[1188] Article 8 ESMA Reg. 2010/1095

[1189] Article 8 ESMA Reg. 2010/1095; another example of implementing prudential standards are those introduced in the Dodd-Franck Act, extending the scope of protection to include the public by imposing disclosure obligation to mitigate risks. Therefore protecting potential, current and future investors

[1190] Article 12 JSL of 2017

of organization. This framework closely connected to the assigned powers and resources to the authorities. Its basis is the legitimacy and independence criterion (further illustrated in the following section b).

Section B: Designating the Authority

417 ***Definition of authority.*** The authority is the power to enforce law, command, determine, judge and exact obedience[1191]. The most obvious entities invested with this form of power include governmental bodies and agencies. Based on the former statement the authority may be defined as the public agency or corporation enjoying administrative powers in a specified field. The authority is then a right or permission coupled with the power to act or order others to act.

418 ***Forms of authority.*** There are different forms for the authority categorized following the scope of power it enjoys[1192]. Apparent authority exemplified in the relationship between a principal and an agent in terms of giving actual signs of the authority[1193]. Express or limited authority it is the written set of instructions specifying the exact scope of the authority. Implied authority flows indirectly from the position held, further to the general authority the broadest form of authority has a global power to act[1194].

419 ***Authority vs. power.*** There is a difference between authority and power. Power is defined as the ability and capacity to perform an act and generate change in a said legal relationship[1195]. Max Weber introduced an obvious distinction between authority and power. He defines the power as the relationship within which one person could impose his will regardless of any resistance from the other. As for the authority, considers it as existing when there is a belief in the legitimacy of that power or imposed will. They interconnect, as power exists alongside the authority. The authority is more or less the setting and the power is the action. In this chapter and particularly in this section the talk surrounds an authority performing the external oversight over IC. The use of the term authority is accompanied with an adjective. The first sub-section

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[1191] American Heritage Dictionary, n (78)
[1192] Burton's Dictionary, n (790)
[1193] William J. Stewart, *Collin's Dictionary of Law* (Collins 2006)
[1194] S. Sheppard 2011, n (651) page 89
[1195] Burton's Dictionary n (790)

identifies this accompanying adjective and the second suggests a plural form for the term based on the existing supervisory framework.

Sub-section 1: Assigning Proper Term for External Oversight

420 ***Concerned authority.*** Throughout the thesis, the focus was oriented towards the financial market authority as the main concerned authority. We did not address the term competent authority nor did we discuss the possibility of having several responsible authorities alongside the financial market authority. The financial market authority has an essential and inseparable role in the life of the IC. Introduced as the main supervisory and regulatory authority in terms of the functions, control and measures it is empowered with. It is responsible for the external oversight of the IC and its related activities. The role of the market authority extends to include shareholders of the IC in terms of their proper protection. The concerned authority may include multiple authorities or be limited to a sole authority. This sub-section aims to define the proper term when addressing the external state oversight and public enforcement over capital market participants including the IC (paragraph 1). Once the term is defined, the sub-section addresses the legitimacy interpreting the authoritative nature of the authority (paragraph 2).

§1: *Description of State Oversight*

421 ***Different terms.*** The authority responsible for the external oversight differs in its designation from one system to the other. The designation influences the scope of powers of the authority, the nature of decisions and the challenging of these decisions. The authority may be referred to as an administrative authority, supervisory or competent. The term that fits more IC is related to the role the authority exercises in the course of activity of the IC.

422 ***Administrative authority.*** Administrative authority refers to public officials, bodies, commissions or institutions concerned with two main public issues even if they are granted both or only one of them. Implementation of government policies and enforcement of duly enacted laws[1196]. They are the creation of the administrator.

[1196] West's Encyclopedia n (341)

423 ***Supervisory authority.*** The supervisory authority is that responsible for monitoring the work of others, in a manner ensuring the achievement of targets[1197]. This authority consists of supervisors assigned a supervisory power. Assigning such a term to the authority exercising the external oversight over IC and securities market may seem uncertain in terms of the scope of power of this authority. The authority in this sense is more likely to be understood as having mere prudential power rather than actual control and enforcing power.

424 ***Competent authority.*** Competent authority is a term used to address the national authority responsible for carrying out the duties mentioned in a specific legislation within the scope provided for in that same legislation. This term used in the UCITS Directive to address, the authorities designated by the MS to fulfil the duties of the competent authorities stated in the directive[1198]. The competent authorities are public authorities or bodies designated as competent in a specific duty through appointing[1199]. According to EU rules, the UCITS competent authority is the one responsible for supervising the UCITS and its compliance with the provisions falling inside and outside the scope of the directive[1200]. The authorities are given powers supervisory and investigatory deemed necessary to exercise their functions[1201]. The UCITS competent authority performs directly its powers in a collaborative manner with other authorities within the same MS or similar authorities in other MS. This performance is under the responsibility of the competent authority if the tasks are delegated to other entities or by application to the competent judicial authorities[1202].

425 ***IC authority.*** Choosing the term that fits best the IC requires the analysis of the impact of every term on the IC's performance, the form of oversight, the consequences to the violation of rules and the response to arbitrary or unsatisfying decisions. The term competent authority is the most proper term used to designate the external oversight over IC. This term addresses a public body similar to that consisting the administrative and supervisory authorities. The term competent authority is more general when designating the authority responsible for the IC. Both

[1197] Collins Dictionary of Business 2005, n (5)
[1198] Article 2.1 (h) UCITS Dir. 2009/65; article 97.1 UCITS Dir. 2009/65
[1199] Article 97.2 UCITS Dir. 2009/65
[1200] Article 97.3 UCITS Dir. 2009/65
[1201] Article 98 UCITS Dir. 2009/65
[1202] Article 98.1 UCITS Dir. 2009/65

terms administrative and supervisory may be included within the global term of competence. The administration and the supervision are closer to characters, forms of power and description rather than a designation of the authority. The sole use of either terms may draw a limitation on the scope of activity of the authority and its enforcing power. Being only supervisory may lead to considering the authority as prudential rather than regulatory. Being an administrative authority limits the possibility of delegation of tasks to third party entities. The competent authority is an administrative authority that is responsible for the implementation of public policies and enforce the enacted rules and legislation. As well, a supervisory authority exercises its supervisory power and role over the IC and other market participants. The decisions of the competent authority are contestable such as other administrative decisions (negative or positive) through challenging procedures provided by law by way of jurisdictionalization of the administration or de-jurisdictionalization. The use of a general term as the competent authority opens the door for having multiple competent authorities and not just one exclusive authority. The preferred term to designate the authority responsible for the external oversight on a continuous basis in terms of the IC is "competent authorities". Where do these competent authorities find their legitimacy? A question addressed in the following paragraph 2.

§2: *Legitimacy of Authority*

426 ***Legitimate authority.*** Financial activities and services when performed are influenced by an array of legal domains such as company law, securities regulation, contract law, audit and accounting standards, labour law and tax law. These domains affect the choice of the competent authority. The choice bestows implicitly on the competent authority the legitimate nature and competence. Having the competence to exercise its functions and powers while respecting the rules of law. This legitimacy or having a legal value results out of the characters consisting the authority and the rules establishing such authority. The legal value of the authority is connected to the decisions the authority issues. The applicability of these decisions within its limits of jurisdiction and while following the set legal proceedings. The legitimacy of the authority remains debatable. Does the authority find its legal value in the mere reference to the law? Alternatively, in the functions and powers it exercises. The mere reference to the law may not be enough, as the competent authorities are not usually mentioned as is in the constitution. It is the legislator's choice to insert them or not. The viewpoint of the functions and powers of the

authority suggests that the authority is necessary and indispensable for the state of law[1203]. The legitimacy of the authority is related to specific criteria the independence, the efficiency and the regularity.

427 ***Independent authority.*** The doctrine introduced two criterion to identify an independent authority organic and material[1204]. Organic criterion consists of lack of individual legal personality, connection to the public treasury and reinforced statutory guarantees. Material criterion addresses the exercise of effective powers; regulatory and disciplinary. In the legislation rarely, we see a list identifying the existing independent authorities[1205]. The authority in its establishing rules is qualified as independent or not. The independent authority is defined as the administrative organism acting in the name of the state and holding a real power not subordinate to the authority of the government or that of the beneficiaries[1206]. The creation of an independent authority considered an important specificity and particularity facing the traditional organization principles[1207]. The *CE* attributed the quality of Independent Administrative Authority (IAA) over a number of authorities based on legislative and jurisprudential determinants or characteristics conforming with those laid down by the *CE*. The independent authority that exercises its competence within the framework of the market economic is attributed powers differing from other IAA. The IAA plays a vital role, an intermediary between administration and justice, it is subject to neither, yet it completes the economic framework[1208]. The powers attributed to the IAA include regulation, recommendation, proposition, supervision, control, investigation, authorization, arbitration and sanctioning[1209]. Not all IAA are attributed the entirety of these powers the number differs from one authority to the other. The financial market authority enjoys the same powers granted to IAA nonetheless it holds a moral

[1203] J.P Valette n (1160) page 83
[1204] Ibid
[1205] The newly issued law of 2017 in France is dedicated to the character of independent authorities administrative and public ones (Loi n° 2017-55)
[1206] CE, Les Autorités Administratives Indépendantes (Réflexions sur les Autorités Administratives Indépendantes, rapport public 2001) 52 EDCE 253 <http://www.conseil-etat.fr/content/download/368/1132/version/1/file/rapport-public2001.pdf >
[1207] Ibid page 284
[1208] Jacques Chevallier, 'Autorités Administratives Indépendantes et la Régulation des Marchés' (1995) 1 Justice et Economie 81
[1209] CE Rapport Public 2001 n (1206) page 307

personality that other IAA do not have. This personality allows the qualification of the financial market authority as an independent public authority rather than mere administrative one.

428 ***Importance of regulatory role.*** As part of the powers attributed to the IAA is the regulation. Therefore, this authority enjoys a regulatory role. This role permits the authority to complete the control exercised by the judicial authority[1210]. Judges may be limited in certain circumstances (especially in terms of expertise). The permanent and preventive character this authority enjoys explains the efficiency of its regulatory role. The efficiency is related to the margin of action the authority enjoys and performs especially in terms of repressive issues. In the economic sphere, including the financial markets, the repressive function is discussed as an indispensable instrument. This function is closely connected to the sanctioning power the authority enjoys in certain circumstances. The sanctioning power opens a debate on the level of impact the extension of the administrative sanctions has on the role of judges in exercising the litigation function. The decision of de-jurisdictionalization of certain conflicts from the control of the courts into the jurisdictional control of the administrative authority have practical advantages[1211], they include rapidity, efficiency, simplicity and prevention. The administrative authority imposes a legal system of administrative sanctioning. This system drives the authority away from classical concept of administrative authorities and brings it closer to the character of judges while avoiding contradictory resolutions and overlapping. A disadvantage for the administrative repression is the uncertainties surrounding this form of repression as it does not present similar guarantees as typical criminal judges, what is known as *justice hors du juge*[1212].

429 ***Other criteria.*** The efficiency that grants the authority the legitimacy and legal value is connected to the incontestable competence and expertise of its members and collaborators. The competence introduces a rapid and effective authority in its resolutions and decisions. As for the regularity, it comes as a response to the uncertainties of the administrative repression. The regularity requests the authority to have minimum guarantees, being impartial, independent

[1210] Paul Quilichini, 'Réguler n'est pas Juger, Réflexions sur la Nature du Pouvoir des Sanction des Autorités de Régulation Economique' (2004) 20 AJDA 1060
[1211] Ibid
[1212] Pierre Delvolvé in Rapport sur la Colloque de Justice Hors du Juge (1984) 4 Cahier Droit Entreprise p. 18

respects the legislative framework and the procedures set within which[1213]. As part of the regularity is the opportunity the authority has in terms of the consultations, guidelines, decisions and recommendation it may provide for professional and other market participants. The different criteria of the legitimacy noticeable in terms of the financial market authority. The question rising in this regard is the following: are there any other competent authorities within the scope of the IC? The following sub-section 2 answers this question.

Sub-section 2: Multiplicity of Authorities

430 ***Multiple or single.*** The main question this sub-section deals with is the preference in using the term competent authority in a singular or plural form. Singular meaning having a single competent authority responsible for everything that concerns financial market participants. Plural in the sense that the responsibilities connected to the financial market are shared between several competent authorities. The issue of singularity or multiplicity of the competent authority opens the debate on cost related issues, public oversight efficiency, overlapping and conflicts of jurisdiction. There are potential risks facing the plurality of competent authorities. The singularity means that the IC is subject to one single authority (an all in one), is the IC in practice subject to a single competent authority? Meaning can we consider the securities market authority as the sole competent authority that covers the IC? In practice and in the related rules various public institutional bodies other than the securities authority have certain jurisdiction over the IC such as the SDC and companies controller. Singularity or plurality requires an understanding of the role and impact of every authority on the performance of the IC within the intended financial market, designating the competent authority in reviewing the violations of securities rules and shareholders rights, in addition to, explaining the possible hierarchy of authorities (paragraph 1). Corporate governance rules and requirements address public oversight such as other components of the financial activity. These requirements highlight the previously mentioned risks arising in a multi-layered supervisory system (paragraph 2).

[1213] J.P Valette n (1160) 85

§1: *Authority Established by Statute*

431 ***Supervisory model.*** On a macro level, the choice of a single competent authority is encouraged in modern economy. The singularity addresses the competent authority responsible for the prudential supervision and that of conduct of business (investor protection, market conduct and corporate governance) for the different sectors constituting the financial system (banking, insurance and securities market). Therefore, no reference to the singularity and plurality in terms of the securities market alone. On a micro sectorial level, international standards introduce the principle of allocation of responsibility among various authorities and organization. This means having multiple regulatory regimes while clearly identifying the allocated responsibilities. The clear identification ensures more efficient and broader coverage of all the aspects of the market and used as means to reduce the costs of duplication. The macro level presented different supervisory models for the national competent authority. The choice of the model sets the singularity or plurality. In the sense that considers the level and degree of integration, existing between the authorities and bodies allocated the public oversight despite its form. The available supervisory models are sectorial, integrated or hybrid[1214]. The models provided on the macro level may be extended to cover the micro sectoral level, meaning the securities market and other competent authorities.

432 ***Sectorial model.*** The sectorial model proposes separate authorities or bodies that exercise the external oversight[1215]. Therefore, dividing the responsibilities between multiple authorities depending on the type of financial undertaking addressed. The authorities in this model have exclusive competences and limited scope of jurisdiction. A perfect example for this division is the JSC, Insurance commission and the Jordanian Central Bank. This model is qualified as non-unified institutional supervision where different supervisors and rules exist for the different undertakings. Therefore, zero level of integration.

433 ***Integrated model.*** The integrated model groups supervisory authorities of different sectors of the financial activities into one autonomous integrated authority. The proposed

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[1214] See: Charles Goodhart et al. and the Bank of England, *Financial Regulation: Why, How, and Where Now?* (Routledge 1998)

[1215] Stephen Lumpkin, 'Supervision of Financial Services in OECD Area' (OECD, 2002) < http://www.oecd.org/finance/insurance/2089622.pdf > Accessed 18 April 2018, pages 9 and 11

integration in this model can be either full or partial. This model is qualified as functional oriented in the sense of having common rules for similar financial activities regardless of the performer. Having different types of integrated supervision encourages the talk of a hybrid model that is neither fully sectorial nor fully integrated. This hybrid model introduces a full sectorial integration and a partial one.

434 ***Full sectorial integration***. Full sectorial integration means to cover the entirety of sectors constituting the financial systems (banking, insurance and securities market)**.** The unification suggested in this form of integration covers the prudential supervision and not the regulatory one. Nonetheless, it is applicable over the regulatory supervision covering the control of the conduct of business. This complete sectorial integration includes three types. Full sectorial and functional integration, twin peaks and full sectoral and partial functional integration[1216]. The fully sectorial and functionally integrated authority is that responsible for all supervisory functions (both forms prudential and conduct of business). The twin peaks is a model consisting of two sectorial integrated bodies that cover some supervisory functions. As for the full sectorial and partial functional is the model that introduces the functions that are shared among different bodies. The common character between the different types of full sectorial integration is having one supervisory authority covering the three segments of the financial sector.

435 ***Partial sectorial integration.*** From its title partial sectorial integration is seen as a model covering two third of the three segments of the financial sector, regardless of which two[1217]. This model has three different sub-models integrated supervision of banks and insurance companies, integrated supervision of banks and securities markets and an integrated supervision of insurance companies and securities markets. The perfect example for this form of partial integration is France. The French system put together banks and insurance companies under the *ACPR* and the *Banque de France* and granted the *AMF* the full supervision of securities markets.

[1216] Martin Cihak and Richard Podpiera, 'Integrated Financial Supervision: Which Model?' (2008) 19 (2) North American Journal of Economic and Finance 135
[1217] Ibid page 137

436 ***Micro IC supervisory level.*** The securities market in most supervisory and regulatory approaches is connected to sectorial supervision. Shaped and cut to fit its needs and particularity. Within the scope of the IC, the securities market authority arises as the main competent authority responsible for the external oversight. Taking the form of a company obliges the CIS to undergo the common structural procedures of Plc. under the Jordanian rules. This obligation puts the company's controller in a position of a competent authority especially in terms of the continuous supervision it exercises over the structure of the IC. The company controller is not a full independent public authority unlike the JSC. The IC deposits its issued securities with the SDC. The IC is a member in the SDC. The SDC exercises a degree of supervision and control over the IC[1218]. This leads to the concept of multiplicity of competent authorities. The new JSL of 2017 took a different approach oriented towards a more integrated competent authority. The JSL granted the JSC a higher position in the establishment and continuous structural supervision of the IC, over that enjoyed by the companies control department. The requirement of the prior approval of the JSC before the initial registration at the company's registry[1219], in addition to transferring the supervisory and organizational role normally exercised by the companies control department to JSC[1220]. The new approach of the Jordanian legislature did not repeal the existence of the company controller nonetheless; it aims to provide a more coordinated supervisory model. This coordination requires an understanding of the risks and efficiency related issues when choosing an integrated or sectorial supervision in addition to qualifying this approach as wise or not (further explained in the following paragraph 2).

§2: *Coordinated Investment Company Supervisory Structure*

437 ***Impact of integration.*** The presence of more integrated financial authorities is associated with higher quality and consistency of supervision across the supervised undertakings[1221]. The structure of the regulation and supervision is an aspect affecting the efficiency and effectivity. Having an oversight divided in responsibilities among different authorities should be clearly

[1218] Articles 80 & 83 JSL of 2017
[1219] Article 98 JSL of 2017
[1220] Article 111 JSL of 2017
[1221] Martin Melecky and Anca Maria Podpiera, 'Institutional Structures of Financial Sector Supervision Their Drivers and Historic Benchmarks' (2013) 9 Journal of Financial Stability 428

articulated and designed. This prerequisite finds its reasoning in the public interest. The public interest requests the elimination of duplicated support functions and an increase in the efficiency of the authorities. Further, it seeks the potential increase of synergies in the sense of having an easier transfer of expertise. The integration and coordination of the different elements of the supervisory structure is a method used in the process of limiting regulatory gaps, ensure competitive neutrality between different market participants, and provides investors with clean and solid external supervisory system that protects their interest alongside ensuring market integrity. The question rising in this regard is the following: how can we achieve the most efficient and effective coordination among IC's competent authorities? The solution is in having a high level of communication and cooperation between the different authorities that form the system of interdependent authorities. The level of integration among the authorities affects four main areas of supervision. Regulatory governance[1222], prudential framework, regulatory practices[1223] and financial integrity.

438 ***Counter arguments.*** The multiplicity and integration of the supervisory structure faces counter arguments. In terms of having less effective supervision in case of unclearly defined objectives, not easily achieved synergies in a scenario of minimally harmonized regulation in terms of the different competent sectors and possible extension of moral hazards problem across the financial sector. The non-coordination of the different elements of the supervisory structure increases costs related risks, inefficiency, conflicts and overlapping eventually affecting risks incurred by investors and their benefits. On the other hand complying with the international standards and adopting good corporate governance practices impact the quality of the supervision and increase the efficiency and effectivity of oversight within securities market.

[1222] The interaction between the government and the public when shaping regulations that affect their business community. Measured through the accessibility of regulations, ability to challenge them, assessing their impact and the public engagement in their preparation. Addresses two main aspects transparency of rulemaking and accountability. (Global Indicators Group, 'Better rules of the Game: Introducing New Global Indicators on Regulatory Governance' (World Bank 2016) < http://rulemaking.worldbank.org/~/media/WBG/CER/Documents/Presentation-Global-Indicators-of-Regulatory-Governance.pdf > Accessed 11 October 2017)

[1223] Practices ensuring high quality of regulations, their efficiency and effectivity. Their main principles include predictability, accountability and transparency

439 ***Corporate governance requirements.*** Corporate governance practices inspired and influenced by a variety of legal influences that may cause unintentional conflicts, overlaps and risks. They frustrate the ability to pursue the objectives and goals behind the requirements. Limiting the level of frustration requires an oversight that is aware of the risks and conflicts and is actively limiting and eliminating them. According to corporate governance requirements, the effective supervisory structure requests a clear allocation of responsibilities of supervision, implementation and enforcement[1224]. Further, in terms of the potential conflicts of objectives they should be managed through clear governance provisions. Overlapping and contradictory support and resolutions coming from the different authorities should be monitored and controlled in a manner hindering the duplication of the decisions and applicable rules that increase the chances of compliance costs over market participants. Therefore, less return for shareholders due to the increase in operational costs.

440 ***Investment Company structure.*** The particularity of the IC requires a supervisory structure that is effective and efficient. In the sense of having an oversight, that identifies appropriately the regulatory objectives (market integrity and transparency). An oversight establishing mechanisms that achieve and monitor the objectives through licensing and authorization, imposing reporting and disclosure obligations and controlling the exercise of financial activities. An oversight that lays down an enforcement framework and corrective action for the violations and the lack of compliance (inspection and sanctioning). Generally, no one model of supervision has proven unambiguously superior in achieving all the objectives of the securities regulations and the proper functioning of the IC. Within the Jordanian scope, the IC is subject to multi interdependent competent authorities that has the JSC as their superior and constant reference. The portfolio investments provided by the IC bestows the superiority onto the JSC over other authorities. This superiority impedes compliance costs IC may incur due to having a supervisory structure that is not fully coordinated neither integrated. Having an authority that has a global competence provides the shareholders of IC with a designated administrator holding the necessary expertise and qualifications. To ensure the efficient external oversight of IC the competent authority holds as a main element a supervisory mechanism

[1224] OECD 2015 n (875) page 13

updated and modernized to accommodate financial evolution, market realities, and global integration (further illustrated in the following chapter 2).

Chapter 2: Supervisory Mechanism of Competent Authority

441 ***Efficient mechanism.*** An effective supervisory structure requires a well-established oversight with clearly defined objectives. An oversight ensuring adequate implementation of the financial regulation that seeks financial stability and economic development through responsive actions and procedures. Most importantly an oversight that restores investors' confidence in the financial system. To fulfil its objective the authority lays down an effective and efficient mechanism controlling the performance of the securities market. The question rising in this regard is the following: what is an efficient and effective supervisory mechanism? It is a mechanism consisting of different elements composing its general framework. Including, behaving in a manner that is not intrusive otherwise, the intrusiveness translates into costs on the financial sector. Further, guaranteeing an efficient supervision with lowest compliance costs possible. Achieving the efficiency and effectivity is closely connected to the available securities regulatory regime. The effective oversight rises from having well defined regulatory objectives. The role of the oversight represented in the control and monitoring of the achievement of these objectives. In fulfilling this role, the authority takes all the necessary enforcement and corrective actions to remedy the violations and ensure a non-costly compliance. The authority further ensures the existence of a minimum set of standards applicable to market participants. The following chapter addresses the supervisory mechanism laid down for securities market and IC. First, it introduces the elements constituting the system including the composition of the authority and its scope of jurisdiction (section A). Then it discusses the powers of the authority (section B) those exercised in the process of achieving the objectives of the regulation and that of the supervisory system.

Section A: Elements Constituting Supervisory System

442 ***Composition of system***. Supervisory, regulatory and enforcement authorities should have the resources and potentials to fulfil their duties in a professional and objective manner. Their rulings should be timely, transparent and fully explained. The Supervisory, regulatory and enforcement responsibilities should be vested with bodies that are operationally independent and accountable in the exercise of their functions and powers, have adequate powers, proper resources, and the capacity to perform their functions and exercise their powers, with respect to

corporate governance[1225]. Some countries choose to have politically independent securities supervisors. They achieve this independence through the creation of a formal governing body (a board, council, or commission) whose members are given fixed terms of appointment[1226]. These bodies should be able to pursue their functions without conflicts of interest and their decisions should be subject to judicial or administrative review[1227]. In order to follow developments, the authority will have a significant demand for fully qualified staff to provide effective oversight and investigative capacity, which will need to be appropriately funded. In the process of identifying the elements of the supervisory system the following sub-sections address the objectives of the authority in connection with the objectives of the securities regulation (sub-section 1). In addition to addressing the scope of jurisdiction of the authority and its cycle of performance on national and international levels (sub-section 2).

Sub-section 1: Objectives of Authority

443 ***Main objective***. The main objective of the authority is supervision of all its forms. The supervision is exercised through oversight of market activities and crisis management. To have a fully functioning supervisory system the authority may apply substantive control directly or by way of delegation to another competent body of its choice[1228]. Further by ensuring that all material information are properly disclosed. Alternatively, by adopting a combination of both approaches. The functioning, role and powers vested with the authority closely connected to the securities regulatory objectives. The authority is the main body responsible for the implementation and enforcing of the enacted securities rules. The implementation process requires an autonomous and independent authority (paragraph 1) that holds an effective role in the oversight and essential powers that allows it to achieve efficiently the objectives of the set regulations (paragraph 2).

[1225] OECD 2015 n (875) page 15

[1226] The *AMF* has a board consisting principally of experts and professionals in the field (C. mon. fin., art. L. 621-2)

[1227] Members of the board of *AMF* hinder from cases involving conflicts of interest (C. mon. fin., art. L. 621-4); members of the council of the JSC disclose their interests and ownerships ahead of occupying their posts (Article 11 JSL of 2017)

[1228] Committee I Investment Companies Funds and Trusts, 'Basic Principles of Investor Protection for Collective Investment Undertakings' (1980) 8 (12) International Business Lawyer 313 < http://heinonline.org/HOL/Page?handle=hein.journals/ibl8&div=114&collection=journals&set_as_cursor=8&men_tab=srchresults > accessed 17 September 2015

§1: *Autonomy: Financial and Functional*

444 ***Missions.*** What do investors want? Fair, honest and orderly markets. Market integrity is an important aspect of public interest. It is achieved through fair and efficient capital markets. The authority fulfils the demands of the investors when exercising properly its missions in achieving regulatory objectives[1229]. Having an orderly market meaning the existence of a continuous supervision over market activities. A form of supervision guaranteeing the integrity, fair and equitable treatment spreading the balance among market participants. The orderly market consists of general elements forming its general framework they include, clear trading rules and procedures, oversight over market participants, review of trading products, market accessibility and regulatory authorization. The authority further ensures transparency. A transparent market requires full material disclosure and data accessibility. The authority in this regards implements the disclosure obligation set by law and controls its content. The authority further prohibits unfair trading the prohibition is based on a regulation that detects and deters market manipulation and market abusive practices. The authority controls and monitors the activities on the market, ensures their fairness and that investor protection is safeguarded at all times. The authority further detects conflicts of interest and maintains standards and rules for market access criteria. The authority addresses risk management. It lays down the necessary standards that foster the confidence in the capital market and promotes financial stability[1230] in addition to, introducing means of risk assessment and management and monitoring the competence of market participants. These regulatory objectives result into two main missions for the authority. Micro mission in terms of safeguarding investments, ensuring the receipt and disclosure of material information and maintaining an orderly financial market[1231]. Mission on a macro level to maintain financial stability of international and regional financial markets[1232].

445 ***Financial resources.*** Being an independent authority enjoying a moral personality and financial autonomy, the securities market authority has its proper financial resources and funds. The financial resources of the authority derives from what it owns and holds in its position, in

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[1229] Technical Committee of IOSCO, 'Supervisory Framework for Markets' (May 1999) < https://www.iosco.org/library/pubdocs/pdf/IOSCOPD90.pdf > Accessed 11 October 2017

[1230] Perfect example is prudential power and supervision exercised by financial authorities

[1231] C. mon. fin., art. L. 621-1 ; Article 8.a JSL of 2017

[1232] A duty imposed on the *AMF* to maintain financial stability on an EU level. Related to the cooperation and arrangement between national financial market authorities

addition to the contributions and fixed fees due by its subject undertakings[1233]. There are two forms of fees due to the authority. Fixed fees and contributions. Fixed fees paid for publications of declaration, examinations of PO, notification and authorization of commercialization of foreign CIS and the cases of document deposits and the control exercised over the deposit. Contributions due to the authority as a result of the control it exercises over subject undertakings including the IC. Cases of due contributions include the procedural stages of the IPO. The two categories of due amounts find their distinction under French rules and not the Jordanian ones. Within the sphere of the JSC, the due amounts are included in one category and considered as contributions paid upon request[1234]. The financial resources of the JSC consists of the contributions, imposed fines, grants and donations, the allocated allowance in the government's budget in addition to any other resources approved as such by the cabinet[1235]. The budgetary means of the JSC are satisfyingly diversified. The JSC receives public financing that guarantees well-functioned authority. The diversification and the limitation of the public financing presents the authority as more independent and oriented to serve the interest of the public and the securities market. The most important part of the funding of securities authority is the contributions. They form an essential part of the role played by the industry and market participants in the efficiency and benefits of the supervisory system[1236].

446 ***Human resources.*** Monitoring the financial stability and guaranteeing investors' protection requires an authority that consists of a college of experts competent in financial market activities. The professionalism and expertise is a prerequisite to all market participants, hence a natural consequence to be required in the authority that controls expert undertakings. The rules addressing the organization of the financial market authority requests professionalism, expertise and experience in both financial and legal matters, to be present in the members of board[1237] or council[1238] managing the authority.

[1233] C. mon. fin., art. L. 621-5-3 ; Article 27 JSL of 2017

[1234] Article 27 JSL of 2017

[1235] Article 28 JSL of 217

[1236] EU recently proposed the necessity to have market participants and the industry as key players in the financing of European supervisory system (Commission, 'Communication on Reinforcing Integrated Supervision to Strengthen Capital Markets Union and Financial Integration in a Changing Environment' COM (2017) 542 final < http://ec.europa.eu/finance/docs/law/170920-communication-esas_en.pdf >); L. 2017-55, art. 18, 19

[1237] C. mon. fin., art. L. 621-2

447 ***National authority governance.*** The *AMF* has a board that plays the role of its principle decision-making body. It is composed of sixteen members varying in their background; including government officials, professionals and experts in financial market activities (representing the majority of the board nine members) and a representative from the *Banque de France* (guaranteeing the coordination between the different segments of the financial system)[1239]. Another collegial body exists under the umbrella of the *AMF*, having full decision-making autonomy in terms of sanctioning and enforcement 'sanctioning committee'[1240]. Consists of twelve non-board members dominated by experts and professionals in financial activities. Five consultative committees comprising of twenty experts that advice the board on regulatory changes and policies that support the *AMF*. The JSC on the other hand has a council responsible for its daily functioning, sanctioning and decision-making process[1241]. The council of the JSC has the general power to run the authority without having another co-collegial body that shares the functions and powers[1242]. It consists of five non-government officials members. Private independent individuals holding the experience and expertise in financial and legal matters[1243]. The JSC is supported with multiple subordinate directorates responsible for the functioning of the supervisory framework of the authority. A small composition of the council of JSC in comparison with the French governance. The quality is more important than the quantity nonetheless, the council's composition is small, presented as insufficient and could open the door for ineffective and inefficient supervision. The French approach is more adequate and compatible with the needs of the securities market and ICs. The French approach is compatible with the size of the securities market existing in France and its connection to the EU level. The Jordanian securities market is rather limited in its exposure to systematic risks and conflicts this limit is connected to the size of the Jordanian market. The supervision takes into consideration the size of the market. Having one body responsible for the exercise of all the supervisory functions and holding the entire supervisory power seems from the exterior as more integrated yet when reviewed closely, it sounds arbitrary. Having an enforcement committee that is independent from the council provides a higher level of investor protection. Particularly

[1238] Article 10.a JSL of 2017
[1239] C. mon. fin., art. L. 621-2
[1240] C. mon. fin., art. L. 621-1 IV
[1241] Article 10 JSL of 2017
[1242] Article 12 JSL of 2017
[1243] Article 10 JSL of 2017

this division does not leave the decision to grant the authorization and withdraw it with the same body. Therefore, providing multiple appeal destinations the investors may seek for the different decisions before going through courts. If such dual collegial bodies exist in Jordan, they require clear and extensive allocation of responsibilities and the level of interdependence and integration between them. Further, a mandatory cooperation and exchange must exist between the two bodies while maintaining a degree of independence. All of which to have a regulatory and enforcement bodies promoting market integrity, safeguarding investors' interests and guaranteeing their protection. The financial market authority in its establishing rules is attributed supervisory powers alongside other functions, consequently it may choose to maintain the performance of its main mission of oversight or delegate it to another body. The following paragraph 2 explains this option.

§2: *Delegation of Supervisory Powers*

448 ***Supervisory role and power.*** The securities market authority assumes a supervisory role. In the sense of a position assigned to and forming an essential part of the structure of the supervisory system. This role played particularly by the authority based on specific attributions. The attributions presented in the form of supervisory and discretionary powers. They are attributed to permit the authority to perform the tasks and duties it is expected to complete according to its role. The securities market authority in exercising its supervisory function covers the entirety of CIU. The authority have the option to delegate partially its supervisory function among other ones to another body. The question rising in this regard is the following: who is this body? The term body used on a general scale meaning, any public or private body to which the authority chooses to attribute part of its functions on a temporarily or permanent base.

449 ***Form of delegation***. The delegation to another body may be of regulatory or executive powers. Further, it may be to a body holding administrative autonomy and independence. The delegation of the regulatory powers is criticized and argued against as ineffective and unnecessary. The counter arguments entail the doubt of realistic and effective possibility to ensure the accountability and the review, the independence runs counter to the principle of

accountability and review and possible result of legislative abdication[1244]. The main concern of counter argument of delegated regulatory authority are accountability and control. Substantive and procedural limits may be undertaken to ensure them. There are two main factors to determine these limits autonomy (limits on independence) and control (extent of the imposed supervision).

450 ***Autonomy and control.*** To ensure the autonomy there must be a level of independence that the delegated body enjoys. Little independence undermines the advantages these bodies enjoy over the ordinary administration and absolute independence places this body beyond the reach of control. In this sense, the delegated body is not a department or a directorate existing within the sphere of the authority. This argument concerns an independent public body such as having an agency delegated the regulatory responsibility. The context of an agency autonomy is based on three elements the creating statute, the relationship with legislative and executive powers and appointment procedures for the members[1245]. The issue of the creating statute differs if the agency is established legislatively or executively. Meaning does it have an actual discretionary power defined clearly without depriving it from its role or reducing in any way this role to a mere executor. Further, this creation introduces the concept of judicial review of decisions. As for the relationship with other powers, it is addressed in the location of this body on the governance chart, is it in an equivalent horizontal framework or vertical in the sense of being subordinate and subject to continuous evaluation? The appointment of the members meaning does the body have a condensed form of governance that unit the extreme diversities and segmentation or it follows the general administrative appointment available nationally. Ensuring the control over the body is exercised through ensuring a balance with autonomy. Meaning, the body reports to an authority through clearly defined mechanisms of supervision. They include executive oversight, budgetary evaluation, procedural control, judicial review and network coordination[1246].

[1244] Xenophon A. Yataganas, 'Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies' (2001) Jean Monnet Working Paper 3/01 < http://www.jeanmonnetprogram.org/archive/papers/01/010301.html > Accessed 16 October 2017

[1245] Ibid page 41

[1246] Ibid page 42

451 ***Delegation of executive power.*** Under the principle of separation of powers, the executive power is considered as an independent and distinct body granted certain functions differing and separate from those of the legislative and judicial powers. The executive power mentioned in this paragraph is not meant as one of the three main powers within the state rather it means the execution and enforcement of laws. Meaning the mere exercise of the executive functions. Within the framework of the securities market authority, it refers to the administrative functions and tasks performed on a daily basis. They include reviews, inquiries and investigations. The perfect example of the delegation of the executive power within the scope of the authority is that made to the supporting directorates. The executive power in this context does not entail decision-making and public enforcement rather covered under an executory and performance framework.

452 ***Investment Company and delegation.*** Seeking delegation or self-execution is a matter of internal structure of the securities market authority. In order to have a smoothly operating securities market more measures should be adopted to ensure rapid and effective enforcement process. The question rising in this regard is the following: does the financial supervisory system in Jordan suffer from a crisis of governance? The term governance used in the sense denoting the importance of cooperation and positive interaction among different public authorities in different spheres of responsibilities and at different geographical levels. The institutional balance plays a major role in the regulatory process. The JSC does not perform any form of regulatory delegation. Nonetheless, it performs an executive one through its supporting directorates that allow efficient and effective functioning of the authority. The JSC delegates the investigatory function and permits the competent directorates within its structure to execute inspections [1247]and detect the violation of securities regulation[1248] on a continuous basis and long term. Nonetheless, the decisions issued following the investigations that hold a disciplinary character are issued directly by the council of the JSC[1249]. The concept of delegation of powers not as part of an internal structure but rather to an independent body such as an agency is not feasible for a market with the size of the Jordanian one. It results in operational costs, regulatory amendments and a level of coordination that the JSC is better off without it. The supervisory

[1247] Article 17 JSL of 2017
[1248] Article 21.a,b JSL of 2017
[1249] Article 21.d JSL of 2017

system under the Jordanian law is not in a crisis, yet eventually requires a slight restructuring in terms of the governance of the JSC. Having an enforcement committee separate from the council is seen as positive and effective step on different aspects; investor protection and the stability of the market. Nonetheless while considering the size of the Jordanian securities market an increase in the number of the members of the council might be a better answer to the market and IC requirements. The stability of the market and investors protection is achieved on a macro level through having an authority that has well defined scope of jurisdiction in its different national, regional (cross-border) and international dimensions. The following sub-section 2 addresses the cooperation and coordination that allow the competent authority to function effectively and efficiently within the financial system and ensues investors' protection even beyond its geographical scope of jurisdiction.

Sub-section 2: Scope of jurisdiction

453 ***Definition.*** The scope of jurisdiction entails the scope of the authority's rule making and enforcement power[1250]. The allocation of jurisdiction has vertical and horizontal dimensions. Horizontal in terms of the scope of the subject-matter jurisdiction more or less on a national level within the context of the state's territory it concerns particularly the designation of the undertakings subject of the control and supervision of the authority. Further the integration among the different authorities regulating the different segments of the financial system, cases of having a sectoral supervision. Vertical, in terms of the hierarchal relationships meaning, to whom the securities authority reports and is it subject to higher authority. Does it cooperate with other authorities on an international or regional level? The clear definition of the scope of jurisdiction of the securities market authority is necessary for financial institutions. They have a pre-set and clear overview to whom they belong and report. It is similarly important for investors as it provides them with an obvious appellate body with protective nature. On an extra territorial level, an evident scope of jurisdiction explains the possible geographical extension of the discretionary powers of the authority. An example for this extension is the principles of

[1250] *Collins English Dictionary* (12th edn, 2014)

home country control[1251] and mutual recognition[1252] existing within the EU supervisory framework of financial markets[1253].

454 ***Strategy.*** The multi-lateral supervisory system should be supported by a strategy of consistency and coherence among its different components. The creation of coordinating bodies and instruments on national and international level is one option and direct exchange and arrangements between the different authorities is another. This sub-section deals with the territorial competence of the securities authority (paragraph 1) and the cooperation procedures it follows to achieve an effective supervisory system and a healthy and smoothly operating securities market for the IC (paragraph 2).

§1: *Territorial competence*

455 ***Conditional scope.*** The institutional provisions regulating the supervision of financial markets in a national territorial context differs from one country to the other depending on the level of integration among the financial segments. The scope of territorial jurisdiction under the Jordanian rules is fully sectoral. Every sector of the financial system in Jordan is competent within the sphere of the segment with no connection to the others. JSC's scope of jurisdiction covers solely capital markets and does not in any way extend or interact with the remaining sectors (banking and insurance). The JSC has a limited list of subordinate undertakings. They include issuers, licensees, registered individuals, capital market, SDC, collective investment fund and the investment company[1254]. The oversight exercised by the JSC does not cover banks and insurance companies; leaving the Jordanian financial system sectoral to its furthest extent. The banking sector is controlled by the Jordanian central bank[1255]. Banks are established as

[1251] Defined as 'attributing the primary task of supervising financial institutions to competent authorities of member states of origin. The authorities of the member state, which is the destination of the service, whilst not deprived of all powers, would have a complementary role' (Commission, 'White Paper on Completing the Internal Market' (White Paper) COM (85) 310 final); Eva Lomnicka, 'The Home Country Control Principle in the Financial Services Directives and the Case Law' (2000) 11 (5) European Business Law Review 324

[1252] A single authorization valid and recognized in the entirety of the European community

[1253] Karel Lannoo, 'Supervising the European Financial System' (2002) CEPS Policy Brief 21/2002 < http://aei.pitt.edu/1987/ > Accessed 17 October 2017

[1254] Article 15 JSL of 2017

[1255] Article 37 Banking Law no. 28 of the year 2000

Plc[1256], further, they exercise financial activities licensed generally by the JSC alongside their banking activities. The fact that they exercise banking activities as a main object introduce these undertakings as subjects of the supervision and licensing of the central bank. Abiding to securities regulation is not required from banks; nonetheless, they abide to the rules stating the information constituting the annual reports due to the central bank[1257]. As for the insurance sector, regulated and supervised locally by the insurance commission[1258]. Insurance companies also incorporated as Plc[1259], they are authorized and controlled by the insurance commission[1260]. The scope of jurisdiction of the JSC and the other authorities is limited to the territorial framework of Jordan, unlike the *AMF*. According to the principle of mutual recognition, the authorization issued by the *AMF* is valid and recognized by all MS, similarly the authorization issued by the competent authorities in the remaining MS is recognized as valid by the *AMF*.

456 ***Pro-integration approach.*** The sectoral approach of the Jordanian supervisory framework has advantages. Sectoral supervision is a specialized form of supervision that is close to the business. A lower profile of supervisors allowing them to fully focus on the sector, clearly defined mandates that makes it easier to manage the overall performance of the competent authority, a strategy that is better adapted to the influences of risks and nature of the business exercised in the sector further to stimulating inter-agency competition[1261]. The pro integration see more advantages in an integrated financial system. They see the integration as a one-stop shop for authorizations, easily adaptive to the evolution in complex financial products, reduces regulatory arbitrage, delivers neutrality, lower supervisory fees, more transparent to consumers, and eases the cooperation between sectoral supervisors[1262]. Providing healthy and stable environment where securities market and the IC can develop and function efficiently imposes greater role and expectation on the part of the financial market authority. The authority enhances its role through upgrading the efficiency of financial undertakings operating in the market and improves their performance. Therefore, enabling the undertakings to provide better

[1256] Article 93 JCC
[1257] Article 68 Banking Law
[1258] Established in 1999 as an administratively and financially independent organization; Article 5 Insurance Regulatory Law no. 33 of the year 1999
[1259] Article 93 JCC
[1260] Article 45 Insurance Regulatory Law
[1261] K. Lannoo n (1253) page 4
[1262] Ibid

services in a healthy competitive environment positively reflected on investors, institutional requirements and the Jordanian market as a whole. One of the main elements of the regulatory strategy provided by financial market authorities to complete their supervisory framework is the coordination with modern international criteria and the cooperation and exchange on national and international levels (following paragraph 2 illustrates the cooperation arrangement procedures).

§2: Cooperation and Arrangements

457 ***Importance of communication.*** The crucial factor of an effective supervisory system is not the fact that functional supervisors are under a single roof rather it is in their communication. The integrated system may incur globally spreading risks over the entirety of the financial market. Therefore, undermining investor's confidence in the financial market as a whole, in addition to, incurring investors' financial risks that could have been avoided if a minimum communication was guaranteed. It is enough to have one failure on the part of an institution to witness a widespread effect in the combined regime. The effectiveness of the whole market is brought into question. The exchange of information and cooperation between financial market authorities has an increasing importance due to the internalization, harmonization and interdependence of financial services and markets.

458 ***Form of cooperation.*** The cooperation and arrangements within the financial system are performed either internally between the different competent authorities of the financial sectors or externally through the exchange and communication with competent authorities of other countries or the authorities and agencies existing on a regional or international level. The clarification that should be made in this context is that the level of cooperation differs in its nature and scope. It can be a mere exchange, communication, arrangement or a simple inquiry. Despite the form of coordination the authority chooses to have with other authorities, the cooperation does not in any way prejudice the respective competences of these authorities. the communicated information enjoys a confidential character to guarantee clean competence under

the different market segments further they have limited scope of use and utility merely to help the authority in its operation[1263].

459 ***National level.*** The cooperation on a national level exists particularly in fully sectoral or quasi-integrated financial supervisory systems. Meaning, distinct authorities that supervise and control the three segments of the financial system. The financial sectors are interdependent. Financial products evolve and intertwine to create complex ones that cannot be solely regulated and supervised under one authority or the other. The necessity of a level of cooperation among different competent authorities of one country arises in order to foster market integrity and financial stability. Similar and related financial activities are exercised under the different sectors this requests an authority that is aware and up to date with the changes and innovations occurring in parallel markets even if the subject undertakings are not directly affected. The authority should be aware of newly innovative product that should be integrated or an unprecedented infringement or action that should be regulated. The operation of one financial sector influences the remaining ones. The degree of influence differs depending on the size of the market. The cooperation on a national level differs from one country to the other. Ranges from zero to full cooperation.

460 ***Cooperation between Jordanian markets.*** There is zero supervisory cooperation among the financial sectors constituting Jordanian financial system. The sectors exercise their control and supervision separately with no reference or communication among them. This lack of cooperation is due to a regulatory silence. The law does not request from the JSC to establish any form of arrangements with the insurance commission or the central bank[1264]. An individualist system. Neither do the Jordanian rules impose a mandatory representation of the members of every authority within the board or even the meetings of the other. The silence is crucial. The fact that the financial system choose a sectoral approach is understandable due to its existing advantages of having a clearly focused and specialized supervision. Nonetheless, to secure the financial market a level of cooperation and coordination should exist. The financial sectors eventually exist under a single market roof and economy. Having no exchange of signals

[1263] C. mon. fin., art. L. 631-1 III

[1264] On the other hand a representative of the JSC attends GAM of the ASE (Article 14.h Internal Bylaw of ASE of the Year 2004)

deprives the financial market from the advantages of having an inter-agency competition and affect the varied skills and specialization of supervisors on the monitoring of potential dangerous exposures that may end-up being contagious and harm investors' interest.

461 ***Cooperation between French markets.*** Reviewing the French approach to the cooperation provides further arguments supporting the necessity of the cooperation. The French rules address two forms of national cooperation among the competent authorities that proposes a cooperation on a micro level direct between the authorities and a macro prudential level that supervises the financial stability. The proposed cooperation combines the *AMF*, *ACPR* and *Banque de France*. The proposed cooperation is performed through the communication of useful information and reference to accomplish their respective missions[1265]. This cooperation includes non-financial market authorities such as the competition authority within the sphere of commercialization practices. The cooperation is implicit in the required representations of members of each sector within the board of the other[1266]. On a macro prudential level, French rules established a higher council for the financial stability. Includes as members the different actors of the financial sectors. The *Haut Conseil de Stabilité Financière* composes of the president of the *AMF*, governor of the *Banque de France*, the president of the *ACPR* alongside other professionals in financial and economic fields[1267]. The council exercises a global supervision covering the entirety of the financial system in order to preserve financial stability and ensure the capacity of contribution to cross-border economy. The council lays down a macro-prudential policy and ensures clear missions that support the cooperation and exchange of information between financial undertakings, members and members with the council[1268].

462 ***External level.*** The competent authority may choose to cooperate on an extra territorial level with other competent authorities. In the sense of coordinating with similar competent authorities operating within a regional or international sphere. The most obvious example is the cooperation provided under EU rules between the different competent authorities within MS and that with ESMA. The EU legislation adapted to the shortcomings of the financial crisis in

[1265] C. mon. fin., art. L. 631-1
[1266] C. mon. fin., art. L. 621-2
[1267] C. mon. fin., art. L. 631-2
[1268] C. mon. fin., art. L. 631-2-1

terms of including mandatory cooperation procedures. Further tasking the ESMA with an active role in building a common supervisory culture and consistent supervisory practices applied consistently throughout the union[1269]. Consequently, MS entered into a Multilateral Memorandum of Understanding (MMOU) on the exchange of information and surveillance of securities activities[1270]. Following the financial crisis the ESMA Regulation tributes the former efforts and proposes entering into a new MMOU that is compatible with the new regulation[1271]. The new MMOU addresses the cooperation relating to securities and financial markets as an obligation in the union law and beyond it. Therefore, cooperation arrangements between competent authorities within every MS is performed on an individual level directly between the authorities[1272] and multilaterally with the ESMA[1273]. This obligation is henceforth applicable to the *AMF*[1274]. The JSC is expected, under securities rules, to establish a coordination with regional, international and foreign securities commissions[1275]. Further to exchange, the information with other securities commissions that information supporting the foreign commission in its investigation and relate to the licensees and their scope of activities[1276]. This exchange is conditioned to the request of the foreign commission and only in cases, involving a mutual treatment if the JSC makes such a request. An obligation that does not apply internally in terms of the cooperation with the authorities regulating the remaining financial sectors. An adoption of the cooperation arrangements between different market segments is crucial for the smooth and the well-functioning of the Jordanian financial system.

463 ***Investment Company approach.*** Whatever the approach to financial supervision of a particular jurisdiction, any system must strive to have effective coordination among supervisory authorities, central banks, and finance ministries. Authorities should seek maintaining good contacts and interaction at operational and principal levels. Coordination and communication

[1269] Article 29 ESMA Reg. 2010/1095
[1270] Entered into under the CESR (CESR, 'Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities' (1999) 05-335 < https://www.fca.org.uk/publication/mou/fsa-mou-cesr-securities.pdf >)
[1271] Article 16 ESMA Reg. 2010/1095
[1272] Article 101 UCITS Dir. 2009/65
[1273] ESMA, 'Guidelines on Cooperation Arrangements and Information Exchange: Between Competent Authorities and Competent Authorities and ESMA' ESMA/2014/298 of 27 March 2014
[1274] C. mon. fin., art. L. 631-1
[1275] Article 12 JSL of 2017
[1276] Article 23 JSL of 2017

can and do create challenges, even in jurisdictions that have an integrated regulator, the challenges are often greater when there are a larger number of regulatory authorities. The supervisory system of securities market and IC if not integrated is still interconnected to other financial sectors. Taking a fully sectoral supervision such as the Jordanian one, the coordination is required on an extra territorial level and not nationally. The different sectors of the financial system operate separately leaving the investor protection, their level of awareness and investment knowledge and the financial stability at stake of the side effects and contagious risks of market innovations. The cooperation is essential for the smooth operation of ICs other sectors and their participants influence them. The financial system exist as whole and not sector wise. The financial stability is guaranteed globally for the entirety of the financial system and not sector based. The operation of the competent authority of securities market is connected to specific powers enjoyed by the authority. The exercise of these powers is limited by the governing rules. Arbitrage and intrusive authority is hindered through challenging and redress mechanism imposed by the securities rules. The following section B illustrates these powers and their legal framework.

Section B: Powers of Competent Authority

464 ***Definitions and differences.*** Power, function and responsibility three terms involved in the discourse of the competent authority. Being public and official authority directly bestows upon the authority a power. The governing legal rules nonetheless state a list of functions for the authority and an indirect responsibility of its actions. The responsibility is clear in the notion of contestable of decisions. The terms might be mixed and used as alternatives; they further differ in the nature and the capacity they bestow. Power is the ability or official capacity to exercise control, act or do something effectively[1277]. it is defined as the possession of control or command over others[1278], a natural consequence to the authority the competent authority enjoys. The function is the action or purpose for which a person is suited or employed, meaning a person's role or occupation. Defined as *the actions and activities assigned to, required of or expected of a person*[1279]. Therefore, it is a natural action or intended purpose of a person in a

[1277] American Heritage Dictionary 2011 n (78)
[1278] Collins Dictionary 2014, n (1250)
[1279] American Heritage Dictionary 2011 n (78)

specific role[1280]. The functions of the authority are the duties exercised by the authority on a regular basis in the process of fulfilling its bestowed powers. As for responsibility, it is a form of answerability, being responsible for an action or taking responsibility for the consequences of actions[1281]. The responsibility for the actions includes those performed directly by the person or by those for whom he is responsible. In a different legal context responsibility defined as the ability or duty to decide or act upon one's own or someone else's decisions without supervision[1282]. It is then the scope or extent of one's activities. All the terms are used in this section. This section addresses the powers of the authority directly exercised and those delegated to subordinate bodies (sub-section 1). When addressing these powers the related functions are explained. Further, this section addresses the answerability of the authority (sub-section 2) whereas; the decisions issued by the competent authority are binding yet contestable. The process of their challenging is made before a body that the authority answers to.

Sub-section 1: Designating Source of Power

465 ***Discretionary vs disciplinary.*** The competent authority enjoys an authoritative nature represented in an organization of powers and functions it enjoys and exercises as part of the operation and supervision of the financial system. The powers identified as having two general characters discretionary or disciplinary. They interact despite their predominant characteristics. Having a discretionary power means an authority that is able to decide, control and regulate on its own discretion[1283]. The competent authority functions in light of the governing legal rules, yet in an operational framework that it personally sets. In exercising its discretion, the authority administers the capital market and controls subject undertakings including the IC. As for the disciplinary power, it entails a corrective and preventive form of authority. The disciplinary nature involves enforcement, constituting and using discipline[1284]. Discipline is performed through imposing punitive or retaliatory actions. The exercise of either one of the two powers does not necessarily require a prior existence of the other, as they exist separately. They are exercised individually depending on the circumstances in question. The question rising in this

[1280] Collins Dictionary 2014 n (1250)
[1281] Collins Thesaurus of the English Language (3rd edn, 2008)
[1282] Collins Dictionary 2014 n (1250)
[1283] Ibid
[1284] American Heritage Dictionary 2011 n (78)

regard is the following: who exercises either of the two authorities? The competent authority have personalized powers and functions that it exercises directly and others delegated to its board and competent body constituting its internal governance[1285]. This sub-section addresses both forms of power in all their contexts those exercised by the authority (paragraph 1) or delegated (paragraph 2).

§1: Competent Authorities' Discretionary Power

466 ***Location of power.*** Competent authorities enjoy powers and have functions that allow them to operate on a daily basis. In addition, it permits them to achieve their objectives in having a stable financial system where investors' protection is guaranteed and maintained. The powers and their related functions are exercised as part of the authoritative nature of the authority. Their enjoyment is not exclusive to the financial market authority. In the context of securities market and the IC, JSC, capital market, company controller and SDC exercise control over the IC. The powers attributed to each competent authority are stated in their governing legal rules. They may be categorized depending on their nature into various categories including administrative, supervisory, organizational and regulatory powers.

467 ***JSC.*** The JSC and in the process of achieving its objectives enjoys a group of powers and exercises functions directly; yet being a moral person these functions are exercised by its council as a representative. As part of the JSC's administrative power is charging fees for the proceedings followed by the licensees and subject undertakings[1286]. The fees are charged for the registration of securities, submitting a prospectus, listing of securities, granting licenses and for the membership in the SDC. The fees form part of the financial resources of the authority[1287]. The JSC further exercises a supervisory power[1288]. It constitutes of the supervision of subject undertakings in terms of the control of the securities' issuing process and issuers' material disclosure[1289] including the submitted annual reports[1290]. Further to the hierarchal supervision of

[1285] Article 98.1 UCITS Dir. 2009/65
[1286] Article 27 JSL of 2017; the *AMF* requires its subject to pay fixed contributions as a result of its financial autonomy (C. mon. fin., art, L. 621-5-3,4)
[1287] Article 28 JSL of 2017
[1288] The *AMF* exercises a similar power of supervision and control over its subject undertakings (C. mon. fin., art. L. 621-9)
[1289] Article 8.b JSL of 2017

the capital market and the SDC[1291]. The JSC enjoys an organizational power exampled in the organization procedures it undertakes to regulate the issuing of securities, the disclosure, the licenses, the capital market, the SDC and the IC[1292]. As part of the organization and regulation of the issuing process, the JSC reviews the submitted prospectuses and their attached documents[1293]. Consequently to its different powers the JSC has functions including guaranteeing complete and accurate material disclosure of investor necessary information[1294]. The JSC has the discretion to request the performance of inspections and reviews to determine the potential or actual occurrence of a violation of securities rules[1295]. The JSC may further investigate the circumstances and requests information it deems necessary to implement properly the securities rules[1296], through a competent body within its structure or by appointing experts and professionals to perform the investigation and the inspection[1297]. As for the regulatory power, the JSC adopts the necessary bylaws that state the financial solvency standards required by financial companies[1298].

468 ***Securities market (ASE).*** The securities market exercises its powers over its members and the issuers of securities admitted for listing on it. The main objective of the securities market is to operate and control the market on a regular basis[1299]. The market enjoys several powers including a supervisory power. This power entails the supervision and control of the trading on the venue[1300] and the adoption of a code of conduct laying down the best practices required by members of the market[1301]. A typical administrative power consisting of the preparation of market activities reports in addition to publishing them[1302]. An organizational

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[1290] Article 43.a JSL of 2017
[1291] Article 8.b JSL of 2017
[1292] Article 8.b JSL of 2017; as part of *AMF* general regulation are rules applicable to issuers and market infrastructures (C. mon. fin., art. L. 621-7)
[1293] Article 41.a JSL of 2017
[1294] Article 8.b JSL of 2017; *AMF* communications and disclosure helps it in fulfilling its supervisory and control missions (C. mon. fin., art. L. 621-8-4)
[1295] Article 17.a JSL of 2017
[1296] Article 17.b JSL of 2017
[1297] Article 17.d JSL of 2017; agents of the *AMF* perform investigations and inspections (C. mon. fin., art. L. 621-9)
[1298] Article 8.b JSL of 2017; the *AMF* lays down a GR that provides the applicable rules throughout the exercise of its missions (C. mon. fin., art. L. 621-6)
[1299] Article 4 Internal Bylaw of ASE of the Year 2004
[1300] Article 5.c Internal Bylaw of ASE of the Year 2004
[1301] Article 5.h Internal Bylaw of ASE of the Year 2004
[1302] Article 5.z Internal Bylaw of ASE of the Year 2004

power represented in the adoption of the necessary measures and procedures guaranteeing adequate and transparent trading[1303]. A power of intervention through performing inspections, reviews and investigations[1304]. The market has a discretionary power to inspect with or without a prior notice to the concerned member[1305]. Throughout the inspection, the market reviews the entirety of the records and documents of the member and has the right to request copies. Most importantly, the market has a disciplinary power. This power includes the ability to suspend the trading of securities and ceasing the activities of the member[1306]. Further to the ability to impose administrative sanctions over the members[1307]. The sanctions include a simple alert, a warning or notice and fining. The scope of powers of the market is limited if the actions or financial standing of one of its members threatens and influences negatively the global investors' interest or the entirety of the market[1308]. In these circumstances, the power transfers to the JSC the role of the market stops at the mere reporting of the incident[1309].

469 ***SDC.*** The SDC is the sole entity in Jordan responsible for the registration and deposit of securities, transfer and safekeeping in addition to the clearance and settlement of securities transactions[1310]. Recognized as the sole numbering agency for the assignment of International Security Identification Numbers (ISIN). The SDC performs the aforementioned functions in addition to a series of powers including an administrative power represented in charging membership fees[1311]. A regulatory power entailing the adoption of internal regulation and bylaws necessary for its operation and binding to the members[1312]. Intervention power involving an inspection of the members with or without prior notice performed by the delegated staff in

[1303] Article 5.a Internal Bylaw of ASE of the Year 2004
[1304] Article 65.a JSL of 2017
[1305] Article 34 Internal Bylaw of ASE of the Year 2004
[1306] Article 65.c JSL of 2017
[1307] Article 36 Internal Bylaw of ASE of the Year 2004
[1308] Article 65.d JSL of 2017
[1309] Article 39.b Internal Bylaw of ASE of the Year 2004
[1310] Article 75 JSL of 2017
[1311] Article 82.a JSL of 2017; Article 8 SDC Membership Internal Bylaw of 2004; the default in payment of the fees results into a violation of securities rules (Article 80.d JSL of 2017)
[1312] Article 76 JSL of 2017

the SDC[1313]. Disciplinary power involves sanctioning actions such as fining the members[1314]. In addition to seizing the securities[1315].

470 ***Company control department.*** The company controller has the power to oversee and control the incorporation of all forms of companies that choose Jordan as their state of incorporation[1316]. The control covers the IC[1317]. The powers of the company controller extend to cover post-incorporation period and throughout the life of the company. Incorporated as Plc. the IC falls under the new implemented rule that transfers organizational and supervisory functions of the company control department to the JSC[1318]. The question rising in this regard is the following: what are the organizational and supervisory functions? Going through the rules governing Plc. under the JCC, we note that the company controller has several functions spread over the life of the company and the different procedures undertaken by Plc. The dilemma is categorizing these functions under either of the two categories of functions provided by the JSL. Considering the organizational function means transferring the functions relating to post-incorporation of the Plc. and not the incorporation stage. The initial registration of the IC remains within the company control department following an approval by the JSC[1319]. Therefore, the approval of the registration[1320] and the related submissions[1321] and requirements are due to the company controller. The related incorporation procedures include the appointing of an expert to reevaluate the shares[1322]. As for the submissions and reporting made to the company controller following the initial registration but during the underwriting, they may be considered as part of the organizational and supervisory functions of the company controller and can be transferred to the JSC. The reasoning for such consideration is the fact that the company is fully registered in the companies' registry despite the fact that it has not yet commenced the performance of its activities. The problem this transfer introduces is the lack of a clear identification of the subject matter of the transferred functions which leaves the IC unaware of a

[1313] Article 80.b JSL of 2017; Article 4.a SDC Membership Internal Bylaw of 2004
[1314] Article 82.b JSL of 2017
[1315] Article 83 JSL of 2017
[1316] Article 6 JCC
[1317] Article 7.h JCC; Article 209.a JCC
[1318] Article 111 JSL of 2017
[1319] Article 98.a JSL of 2017
[1320] Article 94.a JCC
[1321] Article 92.a JCC
[1322] Article 97 JCC

reporting and disclosure obligation to the JSC and not the company controller. Further, it puts the shareholders of the IC in the dark while not knowing to whom they address the requests to convene a GAM. The need for a clear definition of the transferred functions hinders the rise of such problems and proves an adequate regulatory intervention. Furthermore, due to the recent application of the JSL no explanatory or jurisprudential interventions took place in this regard.

471 ***Transition.*** The aforementioned powers despite their variance are exercised directly by the competent authorities in the process of achieving their objectives. The authorities delegate partially or totally their powers to be exercised by their supporting bodies including their boards, the presidents or the supporting staff and directorates. The following paragraph 2 explains in details this delegation.

§2: *Delegated Powers*

472 ***Definition***. A delegated power is giving or committing duties and powers to be exercised by way of representation to another person rather than exercising them directly[1323]. The fact that the competent authority is not a natural person requires a representative that issues the decisions and undertakes procedures and actions on behalf of this moral person. For example, the president of the *AMF* is considered its representative before all jurisdictions[1324]. As previously mentioned the securities market authority is operated by its council and supported by its directorates and internal committees. This might avail that the authority does not in fact exercise the powers and performs the functions. The council performs them through what is called a delegated power. Such as the delegation of specific competence to be exercised individually by the president of the *AMF* without the need to have a collegial vote[1325].

473 ***Council of JSC.*** The powers and functions of the council of the JSC are undertaken to achieve the main objectives of the JSC in guaranteeing financial stability and investors' protection. Therefore, its main function is drawing up the general operational policy of the JSC[1326]. The council has a discretionary power that allows it to issue approvals and decisions

[1323] Collins Dictionary 2014 n (1250)
[1324] C. mon. fin., art. L. 621-2
[1325] C. mon. fin., art. L. 621-5
[1326] Article 12.a JSL of 2017

concerning the different requests and applications submitted by subordinate undertakings. They include the approval of trading and listing of securities outside the scope of the ASE[1327]. Approving the registration and incorporation of a collective investment fund[1328]. Approving the scale of fees charged by both the ASE and the SDC[1329]. The council issues decisions relating to the registration of securities[1330] in addition to the licensing[1331]. The council exercises an administrative power in designating the fees charged by the JSC[1332], further designating a scale for the fees and commissions charged by financial companies[1333]. The council performs a budgetary function as part of its administrative power represented in the preparation of the JSC's annual budget[1334]. It is the main regulatory responsible within the JSC. Issues a code of conduct regulating the relationship between the commission's staff and the investors[1335], further to issuing all the necessary rules and regulations to operate the JSC[1336] and guarantee an adequate implantation of the securities rules[1337]. The council lays down corporate governance rules[1338] and adopts auditing principles and standards[1339]. Most importantly, the council is the main body responsible for the preparation of the proposals for securities rules amending bills[1340]. The council has an intervention power that allows it to undertake immediate corrective measures when the investors' protection requires such actions[1341]. These measures may be a temporary remedy until the violation or the harmful act is controlled and ceased. Hence putting an end to the lack of compliance or irregularity[1342]. As part of the intervention and a form of

[1327] Article 12.b, c JSL of 2017
[1328] Article 12.o JSL of 2017
[1329] Article 12.e JSL of 2017
[1330] Article 12.d JSL of 2017
[1331] Article 12.z JSL of 2017
[1332] Article 12.t JSL of 2017
[1333] Article 12.k JSL of 2017
[1334] Article 12.r JSL of 2017
[1335] Article 12.s JSL of 2017
[1336] Article 12.s-1 JSL of 2017
[1337] Article 34.a JSL of 2017; Article 53.a JSL of 2017
[1338] Article 12.n JSL of 2017
[1339] Article 12.l JSL of 2017
[1340] Article 12.k-1 JSL of 2017
[1341] Article 19.a JSL of 2017; under the scope of the *AMF* it consists of a measure requiring a prior request of the *AMF*'s secretary general to the competent court (C. mon. fin., art. L. 621-13); a corrective measure may consist of assigning an administrator to the subject undertaking by the *AMF* (C. mon. fin., art. L. 621-13-1)
[1342] C. mon. fin., art. L. 621-14

preventive action, the council may choose to publish the violations[1343]. The council through a process of delegation of delegation[1344] may convene a hearing requesting the deposition of the concerned licensee[1345]. As part of the control, the JSC exercises over its licensees the council is delegated a disciplinary power, granting it the ability to impose administrative sanctions such as fining the licensees[1346]. Alternatively, punitive such as the suspension of trade[1347], ceasing the issue of securities[1348], suspending the activities of the licensee[1349]. In addition to annulling, limiting and suspending the license it previously issued[1350]. The council is further considered as an appellate and review body. It reviews the decisions of the ASE and the SDC[1351]. The decisions of the ASE are contestable primary before the council ahead of seeking the administrative courts[1352].

474 ***Board of ASE.*** The main function and role of the board of ASE is to supervise the stock exchange and the performed transactions in order to guarantee fair and honest treatment and safeguard investors' interests. In achieving this role, the board administers and operates the stock exchange[1353], has a discretionary power to approve or refuse membership applications[1354], in addition, the board exercises its regulatory power to issue and implement the necessary rules and regulation for adequate operation of the market and efficient supervision of market participants. The rules regulate listing and trading of securities, governs the internal governance of the market, disclosure of members and the charged fees and commissions[1355]. Before using its disciplinary power the board seeks corrective measures by the members such as requesting

[1343] Article 20 JSL of 2017; this publication is limited under EU rules to cases that do not jeopardize financial market, be detrimental to the interests of investors or cause disproportionate damage to the involved undertakings (Article 99.3 UCITS Dir. 2009/65)
[1344] A competent body in the JSC moderates the hearings (Article 21.c JSL of 2017)
[1345] Article 21.a JSL of 2017
[1346] Articles 21.d and 22 JSL of 2017; *composition administrative*: an agreement between the *AMF* and the subject in violation to compensate the damage caused by the violation and misconduct as an alternative to disciplinary sanctions (C. mon. fin., art. L. 621-14-1); Anthony Aranda Vasquez, 'Une Première Application de la Composition Administrative en Matière d'Abus de marché par l'Autorité des Marchés Financiers' (2017) 256 Petites Affiches 6
[1347] Article 12.h JSL of 2017
[1348] C. mon. fin., art. L. 621-13-2
[1349] Article 21.d JSL of 2017
[1350] Articles 12.h-1, 60.a, 109 JSL of 2017
[1351] Article 81.c JSL of 2017
[1352] Article 73.a JSL of 2017
[1353] Article 24.a Internal Bylaw of ASE of the Year 2004
[1354] Article 10 Internal Bylaw of ASE of the Year 2004
[1355] Article 24.b Internal Bylaw of ASE of the Year 2004

the removal of the harmful and violating act[1356]. If such removal is not enough or not possible the board may impose administrative sanctions including fining the members[1357] or annulling their membership[1358]. To limit the challenging before courts the board provides alternative dispute resolution for the disputes arising between members or members and their clients[1359].

475 ***Investigatory power.*** The investigatory power is a power oriented to observe and inquire into in detail. A power designated to find information and ascertain facts. It is performed by a competent body within the JSC, conditionally delegated the power as it reports and answers to the board of the JSC[1360]. This body performs an official investigation based on speculations or request of the board. Similarly, in France, the agents of the AMF perform the investigation and does not necessarily involve an official summoning by the collegial body. Meaning the respect of the right to defense guaranteed constitutionally is not required in this stage of investigation. This statement was affirmed by French jurisprudence[1361]. The official investigation entails reviewing and examining the records of the licensee, inspection of the related documents and circumstances. The investigation leads to organizing deposition hearings, summoning witnesses[1362] and assigning experts and professionals throughout the process of investigation[1363]. The investigation is prior stage to the sanctioning. The decision entailing the opening of an investigation does not have to be reasoned such as the sanctioning decision[1364]. The investigatory power delegated to the competent body does not entail sanctioning actions even if the outcome of the investigation came positive. The board of the *AMF* evaluates the result of the investigation and issues a decision thereof. The decision entails the opening of a sanctioning procedure that is performed before the sanctioning committee and not the board while granting the right to one board member to attend the sessions held before the sanctioning commission without having a deliberative vote[1365]. Another form of investigation is performed

[1356] Article 38 Internal Bylaw of ASE of the Year 2004
[1357] Fining a member is principally a decision of the manager of the ASE, the board undertakes such decision if the amount of the fine exceeds the cap stated by law; Article 37.b Internal Bylaw of ASE of the Year 2004
[1358] Article 11 Internal Bylaw of ASE of the Year 2004
[1359] Article 24 Internal Bylaw of ASE of the Year 2004
[1360] Article 15.b JSL of 2017; under the *AMF* it is delegated by the secretary general (C. mon. fin., art. L. 621-9-1)
[1361] CE, 2 juill. 2015, n° 36-6108; CE, 28 dec. 2009, n° 30-1654
[1362] Article 17.c JSL of 2017
[1363] Article 17.c JSL of 2017; C. mon. fin., art. L. 621-9-2
[1364] Affirmed by French jurisprudence: CA Paris, 1er ch. Sect. h, 24 oct 2008, n° 2008-02551
[1365] C. mon. fin., art. L. 621-15

randomly yet regularly by the staff of the JSC, it consists of an inspection with or without prior notice to the licensees[1366]. Investigations are also performed by the ASE, through a delegated power to an investigation committee appointed by the manager of the ASE[1367]. It answers and reports the outcome of the investigations, negative or positive, to the manager. Random and regular visits performed by the agents of the *AMF* to the domicile of subject undertaking respect the procedures laid down by law. A prior warrant should be issued and the visit should confirm with the modality provided by law[1368] especially in terms of the time of the visit.

476 ***Transition.*** The powers accorded to the different competent authorities, form part of a main power guaranteeing the proper implantation and efficient performance of the securities regulations. A well performing securities regulation result in a stable financial system and guarantees investors' protection. The powers and functions exercised by the competent authorities followed by decisions. These administrative decisions are binding to the subject undertakings yet they are not absolute. The following sub-section addresses the performance assessment of these authorities from a mere legal viewpoint.

Sub-section 2: Regulatory Performance Assessment

477 ***Scope of assessment***. The regulatory performance assessment entails assessing the performance of the regulatory authorities through determining the impact of regulators' acts. The assessment aims to examine the level of commitment to achieving the goals of the regulation. Therefore, there is a need to designate the responsibility for the regulatory management and regulatory performance on an administrative level. It is a complex and shared management cross-governmental. The system of assessment includes sector and portfolio specific arrangements. Such as carrying out *a priori* assessment in the sense of applying a regulatory impact assessment (RIA)[1369] through, examining the expected social, economic and legal effects of a proposed regulatory reform, reviewing the capacity and quality of

[1366] Article 53.b JSL of 2017; a simple inspection or a preliminary investigation performed regularly or randomly by the agents of the *AMF* does not require a prior notice. Nonetheless, the notice is required once the decision for the investigation that is followed by a sanctioning stage is required by the secretary general (CE, 5 mai 2013, n° 35-6054)

[1367] Article 35 Internal Bylaw of ASE of the Year 2004

[1368] C. mon. fin., art. L. 621-12

[1369] OECD (2008), Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA), Version 1.0 OECD Publishing, Paris < https://www.oecd.org/gov/regulatory-policy/44789472.pdf >

regulation[1370]. Alternatively, the assessment is performed *a posteriori*. Having a regulation that is recently reformed or evaluating an existing regulation ahead of the reforming proposal. Therefore, it entails evaluating the regulators achievement of objectives through assessing the economic and social impact with regard to powers and resources assigned to them. This form of evaluation consists of various dimensions depending on the nature of the soak evaluation. If the evaluation involves the use of public fund then it falls under the umbrella of an audit. If the evaluation consists of an analysis of decision-making and institutional framework then it falls under a legal evaluation as done within this chapter and illustrates this sub-section. The evaluation may be economically oriented whether self-performed or outsourced generally in an academic framework or on an international level such as the reviews performed by the OECD.

478 ***Regulatory goals***. The goal of the regulation is to provide a treatment for a problem. Bodies implement regulations such as an oversight body. The oversight body is tasked with a variety of functions or tasks in order to promote high-quality evidence-based decision making. The decisions of the external oversight is the natural outcome of the powers accorded to them by statute. Securities regulations accorded the competent authorities powers under an administrative umbrella. They bestowed a mandatory characteristic over the decisions of these authorities. A quality regulation and an effective performance assures that practices of the authorities in terms of inspection, enforcement or mere administrative discretionary decisions respect the legitimate rights of those subject to the enforcement. Further, they should be *designed to maximize the net public benefits through compliance and enforcement and avoid unnecessary burdens on those subjects*[1371]. The following paragraphs designate the decisions that fall under the *chapeau* of legitimacy (paragraph 1) and are therefore subject to administrative and judicial reviews (paragraph 2).

§1: *Decisions Leading to Answerability*

479 ***Framework of decisions***. Competent authorities in exercising their accorded powers issue decisions that are expected to be executed and complied with by their subject

[1370] This thesis performs on a limited scale this form of examination in terms of the proposed regulatory reform to Jordanian securities regulation

[1371] OECD (2012), Recommendation of the Council of the OECD on Regulatory Policy and Governance, OECD, Paris < https://www.oecd.org/governance/regulatory-policy/49990817.pdf >

undertakings. The question rising in this regard is the following: what are these decisions? Generally, the decisions are issued under the name of its relevant competent authority to regulate the actions of the subjects and control their interactions among them and with the securities market. Therefore, these decisions may be negative or positive. Negative in the sense of having a silent decision (no decision)[1372], in the sense of a refusal or a disciplinary decision. Positive meaning a decision is issued by the authority despite its content further to the case of having a decision entailing an approval or a redress. The decisions of the competent authority have a legal value and they are binding to the concerned subjects[1373]. The legal value of the administrative decision is affirmed by administrative jurisprudence. The decision is considered as valid and legitimate as long as the contesting party does not prove otherwise[1374]. Such as other administrative decisions, the non-compliance with these decisions is considered a violation of law[1375]. The binding nature of the decision does not deter the contestability of the administrative decision. The issued decision by the competent authority should be reasoned[1376]. Decisions lacking reasoning are a place of contesting before administrative courts, as the reasoning is the explanation according the decision its legitimacy[1377]. The concerned subjects of the authorities' decisions should be aware of the decision in order to comply with it. The authority in this sense chooses its method of notification through publication in the official gazette, publication electronically, personal notification to the subject of the decision or any other means of notification the authority may deem fit[1378]. The fact that the subject of the decision is informatively aware of the decision is another form of notification[1379]. The decisions of the *AMF*'s sanctioning committee should be issued within a reasonable timeframe. The

[1372] Article 7.b Administrative Justice Code of 2014

[1373] This opens the discussion on the relationship between the public and the administration under administrative law; sanctioning decisions pronounced by the sanctioning committee of the *AMF* should confirm with the principle of legality. In the sense of having a sanction based on a violation of an obligation set in securities rules (CE, 9 Oct. 1996, n° 17-0363)

[1374] Jo. co. admin., 24 Jan. 2017, n° 517/2016; Jo. Co. admin., 11 Jan. 2017, n° 391/2016; Jo.co. admin., 23 Jan. 2017, n° 208/2016

[1375] Article 18 JSL of 2017

[1376] Article 21.h JSL of 2017; the decisions of the *AMF* and those of the sanctioning committee should also be reasoned nonetheless the decision entailing the opening of an official investigation is not included in this obligation (CE, 12 juin 2013, n° 1037)

[1377] Article 7.a (5) Administrative Justice Code of 2014; Jo. co. admin., 03 Jan. 2017, n° 229/2016

[1378] Article 8.a Administrative Justice Code of 2014; the sanctioning decisions are made public (C. mon. fin., art. L. 621-15 al. V)

[1379] Article 8.b Administrative Justice Code of 2014; affirmed by the administrative jurisprudence Jo. co. admin., 11 Oct. 2015, n° 154/2015; Jo. co. admin., 7 feb. 2016, n° 443/2015

length of the proceeding do not result in the annulment of the administrative decision[1380] unless the lengthy proceedings prevent the exercise of the right to defense[1381].

480 ***Examples of decisions***. The decisions issued by competent authorities influence the position of investors and shareholders. positive decisions approving licensing, authorization, registration, membership or redress provide investors with a form of seal and prior assessment of company's financial standing that they may not be able to conduct due to the limitation of their investment knowledge and experience. As for negative decisions such as pecuniary sanctioning or suspending the activities of the company, they affect the value of company's shares and its liquidity consequently influencing shareholders. An example for a positive decision of the council of the JSC is approving the license application[1382]. A negative decision is that entailing a refusal to license, annulling a previously attributed license[1383] or refusing to register securities[1384]. The ASE's board issues positive decisions in terms of approving the membership[1385], permitting the listing or trading of securities on the market[1386]. Negative decisions such as refusing the membership application or withdrawing the membership[1387]. The SDC issues decisions that relate to the deposited securities. The SDC may decide to seize the securities of any of its members[1388]. As for the company controller, while taking into consideration the newly implemented rule transferring the duties from the company controller to the JSC[1389], the decisions issued by the controller that may fall under the notion of answerability is that approving the incorporation of the company. The company controller does not issue this decision directly it reports its decision to the minister of industry and trade and the latter is the one that issues the final decision[1390].

[1380] *AMF* Sanctioning Commission decision of 7 Juin 2007, n° SAN-2007-19
[1381] CA Paris, 1re ch., sect. H, 26 nov. 2008, n° 51/14613
[1382] Article 58 JSL of 2017; *AMF* authorization and visa
[1383] Article 60 JSL of 2017; *AMF* withdrawing the authorization
[1384] Article 3.b Issuing Regulation of 2005; a sanctioning decision pronounced by the sanctioning commission; the punishable person is the moral person and the natural person subject to the control of the authority
[1385] Article 10.a Internal Bylaw of ASE of the Year 2004
[1386] Article 3 Listing Regulation of 2016
[1387] Article 11 Internal Bylaw of ASE of the Year 2004
[1388] Article 83 JSL of 2017
[1389] Article 111 JSL of 2017
[1390] Article 94 JCC

481 ***Execution and aftermath***. Who executes the decisions of competent authorities? The president of the JSC is considered its representative, signatory and has as his main role the execution of council's decisions[1391]. The ASE also has an executive manager appointed by its board post the approval of its GA. This manager manages the ASE on a daily basis and is considered as its representative (similar to the general manager of other Plc.)[1392]. The SDC also has a board and an executive manager that operate the center and execute the decisions issued therein[1393]. Once the decision is published and the concerned subject became informed of it, the decision enjoys the characteristics of the administrative decision; legitimate, binding and should be complied with by the concerned subject. Nonetheless, the decision is not absolute it is contestable and subject to annulment, further explained in paragraph 2.

§2: *Challenging and Redress*

482 ***Expected authority exercise***. Regulatory authorities must exercise their authority only within the scope permitted by their legal powers. In the sense of having no abuse of power and treating alike cases in a similar manner. They sanction and control subject undertakings to its rules and not those undertaking covered by other competent authorities[1394]. Therefore, justifiable reasons for their decisions, and for any departure from regular practice. Guaranteeing this adequate and fair exercise requires embedding explicitly these principles in the governing legal rules. As a form of protection for the subject of the authorities from arbitral actions and abuse of discretionary authority, the law provides for appeals processes in the form of administrative and judicial reviews. Therefore putting the subjects on semi equal footing with the authority and preserves the integrity of the regulatory system[1395].

483 ***Contestability***. The legal nature of administrative decisions present them as non-absolute, meaning they are contestable and challenged judicially[1396]. This contestability is performed on two different degrees administrative and judicial reviews. The administrative review is

[1391] Article 13.a JSL of 2017; similarly the president of the *AMF*
[1392] Article 25 Internal Bylaw of ASE of the Year 2004
[1393] Article 76 JSL of 2017
[1394] The *AMF* follows in its decisions the concept of administrative specialty, therefore it sanctions its subject undertakings and cannot extend its power to banks or insurance companies (*AMF* Sanctioning Commission decision of 13 march 2013, n° SAN-2013-07)
[1395] OECD 2012 n (1371) page 15
[1396] Article 8 Administrative Justice Code of 2014; C. mon. fin., art. R. 621-44

performed within the scope of the competent authority without any judicial intervention (first level challenge). It may be automatic, performed by one authority over the other without the need to having a subject contesting the decision. Such as the review the JSC performs over the decisions of the SDC, it examines the compatibility and compliance with securities rules[1397]. Further, it can be upon contestation made by one of the concerned subjects (the prevailing form of review). The contestability is not the only form of challenge the concerned subjects seek. They may request the removal, limitation or suspension of a corrective measure undertook by the authority. The JSC is empowered with the ability to impose a disciplinary measure such as suspending the activities of the licensee or the trading of a security as an immediate measure to contain or minimize the harm of investors' interests[1398]. Such a measure is taken without respecting the right to defense. The challenge of the subject for such a measure is through a request to convene a deposition hearing and the permission to submit counter proof and evidence for the suspected action[1399]. This is a challenge prior to issuing a final disciplinary decision by the authority.

484 ***Place to contest***. The entirety of the decisions of the competent authorities are subject to contestation and challenge. The question rising in this regard is the following: where does the subjects contest the decisions? On a preliminary stage, the subjects contest the decisions administratively at the competent authority. The decisions of the JSC's council are objected directly before the council within a period of fourteen days following the informed notification of the decision[1400]. The council has the right to accept entirely or partially the objection as well as the possibility to refuse it. The council issues a decision concerning the objection within a period of fourteen days following its registration at the JSC. This final administrative decision must be reasoned and particularly if negative is contestable before administrative courts as a posterior stage of challenge[1401]. Within the French context the challenging "*recours*" is divided between two courts. Challenging before the *CE* of the decisions of authorization and sanctioning that has as their subject matter one of the persons or undertakings covered by the

[1397] Article 81.c JSL of 2017
[1398] Article 19.a JSL of 2017
[1399] Article 19.d JSL of 2017
[1400] Article 21.h (1) JSL of 2017
[1401] Article 21.h (2) JSL of 2017

control of the AMF[1402]. As for other forms of decisions not related to the former ones they are contestable before the court of appeal "*Cour d'Appel de Paris*"[1403]. The decisions issued by the board or executive manager of the ASE are objected first before the board of the ASE if they entail a disciplinary sanction such as fining[1404]. The entirety of the decisions of the ASE that relate to securities are objected beforehand before the council of the JSC within fifteen days following the notification of the decisions to the concerned member[1405]. The council issues a decision concerning the objection within fifteen days following its submission. The decision of the council is contestable before administrative courts within thirty days following the informed notification[1406]. As for the decisions that do not relate to the securities such as the refusal or suspension of membership in the market the law does not directly state their contestability. Therefore, the general rule of administrative law is applied they are contestable before administrative courts if the ASE is considered as a public entity[1407]. Stating the contestability of the remaining forms of decisions ASE's board issues; averts from the debate concerning the competent court and the character of the decisions issued by the ASE.

485 ***Regulatory silence***. The decisions of the SDC are not objected first before the council of the JSC. Despite their content, they are considered as administrative decisions issued by a public entity[1408] contestable directly before administrative courts. The decisions are merely reviewed by the JSC without any possible objection before the SDC or the council. This regulatory silence grants the SDC a larger slice of independence than the ASE, which is understandable due to the major role SDC, performs in securities' depositing process.

[1402] C. mon. fin., R. 621-45; an example of the competence of the *CE* is the case of urgent suspension of the execution of the decision. The emergency is justified through having an administrative decision prejudicing in a sufficient severe and immediate manner the public interest or the situation or the interest of the petitioner (CE, 11 fevr. 2003, n° 27-6376). A perfect example for this prejudice is the influence on the reputation (CE, 6 Juin 2008, n° 31-6001)

[1403] C. mon. fin., R. 621-45 al. II ; the request to stay the execution of the sanctioning decision is made before the CA. The plaintiff should prove that excessive consequences result from the execution of the said decision (CA Paris, 28 janv. 2010, n° 09/24356)

[1404] Article 37.c Internal Bylaw of ASE of the Year 2004

[1405] Article 73.a JSL of 2017

[1406] Article 73.b JSL of 2017

[1407] Possible under Article 3 of Internal Bylaw of ASE of the Year 2004

[1408] Article 3 SDC Internal Bylaw of 2004

486 ***Company control department***. The decision concerning the incorporation of the IC and its registration in the company registry is undertook by the minister of industry and trade[1409]. The minister's decision is considered an administrative decision contestable directly before administrative courts[1410]. As for the decisions of the company controller, they do not fall within the context of administrative decisions explained in this chapter. The decision of the company controller are not final they require a ministerial approval due to the organization of this department. It is a subordinate and supporting directorate. Neither an IAA nor an IPA. It forms an essential part of the internal governance of the ministry of industry and trade.

487 ***Who contests***. The fact that the decisions of the competent authority are contestable is not innovation in itself. It is a natural consequence to their administrative character. The debatable issue concerns who can contest these decisions? In addition, how contesting can be considered as legal proof for the protection of investors and shareholders in IC? Every person (natural or moral) having a personal interest in the contested decision may contest before the competent court[1411]. Does the shareholder in the IC has such an interest in the decisions issued by competent authorities? The personal interest exists, what affects the company consequently influences its shareholders. From a theoretical legal viewpoint, the interest of shareholders may be proved for purposes of the challenge even though shareholders were not directly mentioned in the contested decision. On the other hand, the decisions of the competent authorities are issued in the name of the company and on an administrative level, the company is responsible before the authority and it is the one subject of the violations and sanctions. A natural consequence is having the IC contesting the decisions on behalf of its components. The first objection before the authority is explicitly limited to subject undertakings and not open for shareholders. The law addresses members, registered individuals and licensees. In the French sphere, the persons or undertakings sanctioned in the decision of the sanctioning commission are solely permitted to contest the decisions before the *CE*. The principle of interest for challenges before administrative judges does not apply for challenges made by third party for *AMF*'s sanctioning decisions[1412]. Even the manager of the sanctioned undertaking cannot

[1409] Article 94.a JCC
[1410] Article 94.b JCC
[1411] Article 5.h Administrative Justice Code of 2014
[1412] CE, 30 oct. 2007, n° 30-1380

contest the sanctioning decision taken against the company he manages if he was not personally sanctioned within which[1413]. The jurisdiction of the administrative judge in France is limited to cases and subjects stated in the securities rules.

488 ***Protective obligations.*** The governing securities rules impose obligations on the part of the competent authorities and their staff that provide a higher level of protection for investors. Such obligation includes the confidentiality of the information reviewed and examined through inspections and investigations[1414]. It is a means to contain conflicts of interests resulting from the abuse of the information throughout the market therefore threatening market integrity. Further, the newly implemented JSL obliges the JSC to publish regulatory reform proposals for the public to review them and provide their notes, comments, suggestions and opinion[1415]. The obligation extends to considering the proposed notes and comments in the regulatory reform[1416]. A further obligation is the obligation imposed on the *AMF* to respect the fundamental constitutional rights and liberties in the sanctioning process[1417].

489 ***IC shareholders' interest.*** Identifying the competent authority responsible for the external governmental oversight is of great importance to the IC and its shareholders. How can this importance be qualified? Shareholders' interest require the existence of efficient and effective external oversight. The connection is found in the supervision and control the competent authority exercises over the IC and other market participants. The form of exercised supervision sectoral or integrated influences the level of protection provided within the securities market. Further, the impact the form has on financial stability and market evolutions. The external oversight exercised by the competent authority if efficient results in achieving the objective of the securities regulation. Therefore, restoring the confidence in the market and providing cost friendly investment environment. The supervision and control if effective results in having a higher level of compliance with securities regulation in addition to providing a protective legal environment open to full material disclosure, redress and challenging. The

[1413] CE, 28 nov. 2014, n° 36-2868
[1414] Applicable to the entirety of competent authorities; Article 34.h Internal Bylaw of ASE of the Year 2004; Article 65.b JSL of 2017; Articles 20 & 25 SDC Internal Bylaw of ASE of the year 2004; Article 24 JSL of 2017; professional secrecy of the participants in the performance and operation of *AMF*'s missions (C. mon. fin., L. 621-4)
[1415] Article 16.a JSL of 2017
[1416] Article 16.b JSL of 2017
[1417] CE, 12 juin 2013, n° 35-9245

continuity of the governmental supervision and control is a dependent performance. The operation of competent authorities is connected and limited to their subject undertakings. The supervision and control is exercised over the members and subjects of competent authorities. Such exercise cannot exist and guarantee an orderly market if the IC and other market participants do not function within the intended securities market. The administrative control coexists alongside other forms of control. The exercise of these forms of control belong to the IC and its shareholders. Therefore forming what is known as an internal control (further illustrated in the following title two).

Title Two: Internal Control: Self vs. Sub-Supervision

490 ***Notion of control.*** The control, in company law, is a notion relates principally to the power the parent company has over its affiliates or to address the general missions of auditors. Further, it traditionally relates to the function of ownership of voting power in both its forms absolute (being a majority shareholder) or working control (capacity to mobilize votes despite minority ownership)[1418]. Nonetheless, this notion is richer in its consistency than it appears. Linguistically, it is the power to direct or master something or someone. Further the power to supervise the conduct and performance of this thing or person. Therefore, control is exercised through managing and supervision. In the sphere of the IC, the question that arises is who exercises this managing and supervision. This exercise relates to a long-standing statement of considering sustainable business and solid shareholder protection as prerequisites to the efficiency of business activities. To ensure this level of efficiency, and at the same time safeguard shareholders' interest, different legislations introduce the concept of shareholders' control and supervision over management, along with the introduction of the CIS as the most proper framework to solve problems of professional decision-making that previously concerned individuals when deciding to invest in financial markets[1419].

491 Since most shareholders do not get involved in the day-to-day work of the company they own shares in, their interest remains at stake. They are concerned in the maintenance and expansion of their returns. Therefore, every company strives to fulfill the needs of its shareholders and safeguard their interest. Safeguarding through enhancing business performance through clear allocation of responsibilities. Further clearly stating shareholders rights and company duties in addition to disclosing financial standing and publishing financial structure.

492 ***Plan.*** The control this title addresses is that exercised internally within the company. Internal control is a form of continuous supervision guaranteed in the governing legal rules for the benefit of the participants in the investment process. It can be direct such as the control

[1418] Adolf Berle, 'Control in Company Law' (1958) 58 (8) Columbia Law Review 1212

[1419] Giorgio Consigli, "*Asset-Liability Management for Individual Investors*" in Stavaros Zenios & William Ziemba (eds), *Handbook of asset and liability management* (Vol II: Applications and case studies, Elsevier 2007) page 754

shareholders exercise over management performance (chapter 2) or indirect through allocating responsibilities and obligations that should be adhered to by the company and its members of management (chapter 1).

Chapter 1: Indirect Control

493 ***Focus of control.*** Who has a real right of control? Who has a mere right of information? The dichotomy of the notion of control within the sphere of company rules is found in the study of the social organs of the company[1420]. Certain organs of the company have the power to decide its functioning they manage, administer and operate the company; therefore, they master the moral person. Particularly they include members of management (board and general manager). The remaining organs of the company hold a supervisory role such as GA and auditors. Is shareholders' control direct or indirect? On an internal level of the company, the control of shareholders' may take either forms. The focus of this chapter is the indirect control. The question rising in this regard is the following: what is an indirect control? An indirect control is that derivatively granted. In the sphere of IC, indirect control performed through attributions and allocation of obligations and responsibilities on members of management. The execution of these obligations in a timely fashion while fulfilling company's main objectives and in the interest of both the company and its shareholders is a key point in maintaining a sustainable course of work and providing solid protection of shareholders' rights and interests. At the heart of this form of control, shareholders' do not exercise a real control. The law imposes obligations on members of management they should comply with and fulfill. The control and role of shareholders' come at a later stage, envisaged in a private enforcement measure or a mere supervisory role during GAMs.

494 ***Exercise of indirect control.*** Governance of companies should promote respect for the rule of law, board accountability and equitable treatment of shareholders and appropriate cooperation with stakeholders[1421]. Effective financial regulation is essential to support a stable and well-functioning financial system. Therefore, indirect control requires a level of financial education and consumer and investors' protection to exist. Considered as an important element of its framework. Indirect control leading to safeguarding shareholders and investors' interest is

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[1420] Etienne Grosbois, 'Responsabilité Civile et Contrôle de la Société' (DPhil thesis, Université de Caen 2012) page 25

[1421] Declaration on Propriety, Integrity and Transparency in the Conduct of International Business and Finance (May 2010) C/MIN(2010)3/FINAL; accessible on the following website < http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=261&InstrumentPID=433&Lang=en&Book=False >

achieved in a transparent market where the accountability and responsibility is encouraged by providing fair and transparent information and advice and promoting financial awareness. The following sections address the transparency of the IC market (section A) in addition to the accountability related to IC and its organs (section B).

Section A: Financial Protection in the Sphere of Market Integrity

495 ***Scope of protection.*** Financial protection is a main contributor in financial stability[1422]. Responsible behavior by financial services providers contributes to economic empowerment in the sense creating a protective investment environment for the interests of investors and users of financial markets. Financial protection requires the existence of a significant level of oversight. The supervisory framework ensures the adoption, respect and compliance with three main pillars of the financial protection regime. The main pillars constitute of fair treatment, transparency and accountability. Financial protection regime addresses retail investors as consumers of financial products and services. The regime is divided into two main stages. Prudential supervision performed by competent authorities in the market safeguarding the global concept of market integrity in addition to, an enforcement active plan guaranteeing financial literacy and awareness in addition to dispute resolution and recourse actions.

496 ***Consumer vs. shareholder.*** The consideration of retail investors as consumers emerges an important consequent question. Are shareholders included in this categorization? Can they benefit from the protection regime applied nationally within securities market? Providing an answer to these questions requires defining who the consumer is. The consumer is defined legally as natural persons acting outside their trade, business, profession or craft[1423]. This definition is provided generally for consumers who seek products or services including yet not limited to financial services consumers[1424]. Departing from this definition the financial consumer is that acting outside its profession, trade or craft within a financial venue that

[1422] Nataliya Mylenko, 'Oversight frameworks and practices in 114 economies - full report', Washington, DC, World Bank Group (2013) < http://documents.worldbank.org/curated/en/775401468171251449/Oversight-frameworks-and-practices-in-114-economies-full-report > page 1

[1423] Article 2.1 Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64; C. consom., art. liminaire

[1424] The financial consumer was excluded from the scope of application of the Dir. 2011/83 (Article 3.3; Recital 32)

provides financial products or services. Therefore purchasing products or receiving a service. The definition in this regard applies to retail investors and not professional ones. The distinction between the two forms of investors under this definition is clear. The financial regulation provides a similar distinction in terms of the governing legal rules. The regulation provides a higher level of requirements and prerequisites in financial products and services targeting retail investors. These rules take into consideration the level of experience, knowledge and financial literacy of the investor. An obvious example of financial consumers is those seeking loans and credits in the banking sector.

497 ***Vulnerability.*** In qualifying shareholders, as consumers or not we shall provide a thorough analysis to the applicability of the elements consisting the character of a consumer over the shareholder. Two main elements bestow the character of the consumer. Vulnerability and the lack of knowledge. Consumers are vulnerable. The vulnerability is relative. Consumers when facing market players are vulnerable. Even amongst them, the level of vulnerability differs depending on their educational and cultural level. Doctrine provides different definitions to vulnerable consumer depending on the focus factor. For example vulnerable consumers seen as those who have diminished capacity to understand the role of advertising, product effects or both[1425]. They are similarly seen as those who are *more susceptible to economic, physical, or psychological harm in, or as a result of economic transactions because of characteristics that limit their ability to maximize their utility and well-being*[1426]. These definitions focus on the difficulty that consumers have in playing the role traditionally expected of consumers by classical economics "rational maximizers of their own utility"[1427]. Shareholders are not vulnerable in the sense provided here for consumers. Shareholders have a role in the financial market differing from that of the conventional consumer. Shareholders contribute to companies

[1425] Debra J. Ringold, 'Social Criticisms of Target Marketing: Process or Product' (1995) 38 (4) American Behavioral Scientist 578

[1426] Craig Smith and Elizabeth Cooper-Martin, 'Ethics and Target Marketing: the Role of Product Harm and Consumer Vulnerability' (1997) 61 (3) Journal of Marketing 1 < www.jstor.org/stable/1251786 > Accessed 10 November 2017

[1427] Peter Cartwright, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation' (2011) Financial Services Research Forum < https://www.nottingham.ac.uk/business/businesscentres/crbfs/documents/researchreports/paper78.pdf > Accessed 09 November 2017

they form part of by way of providing funds, information and discipline[1428]. Whether considered as owners of the company or owners in the limit of their participation or share ownership. They have a claim on earnings that consumers, of the final product or services of the company, do not enjoy. Both shareholders and consumers considered stakeholders of the company. The difference lies in the control, redress and recourse actions that consumers do not have in a conventional situation (concept of shareholders primacy norm they stand over and above other stakeholders[1429]), despite not having the final say in the majority of the decisions and actions undertook by the company.

498 ***Knowledge.*** In terms of knowledge, shareholders and consumers may be on equal footing. Shareholders of IC do not necessarily hold a higher level of financial literacy or awareness. Here arises the role of the disclosure obligation in providing consumers of financial services and shareholders of the service providers with the necessary information to make their investment decision. Shareholders and consumers are not alternative terms. Nonetheless, the case of having a shareholder consumer is possible[1430]. What is good for shareholders is not necessarily good for consumers and vice versa. The maximization of wealth and value differs if the aim of the company is to maximize that of its shareholders or of its consumers. Consumers and shareholders are not located at the same side of the financial services line. The concept of share ownership puts shareholders outside the scope of a financial consumer. Yet they are considered as investors and they benefit from the regulatory protective measures imposed in a given financial market.

499 ***Market protective measures.*** Consumer protection in securities sector is critical to the development of the integrity of securities markets. The relationship between an undertaking providing investment services and products to customers, such as an intermediary, investment adviser or CIU and its customers is the basis for fair, sound and efficient functioning of

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[1428] Justin Fox & Jay W. Larsch, 'What Good are Shareholders?' (2012) Harvard Business Review < https://hbr.org/2012/07/what-good-are-shareholders > Accessed 09 November 2017

[1429] David G. Yosifon, 'The Consumer Interest in Corporate Law' (2009) 43 University of California Davis Law Review 243 < https://lawreview.law.ucdavis.edu/issues/43/1/articles/43-1_Yosifon.pdf > Accessed 09 November 2017

[1430] Robert G. Hansen & John R. Lott, 'Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers' (1996) 31 (1) Journal of Financial and Quantitative Analysis 43 < https://www.jstor.org/stable/pdf/2331386.pdf >

securities markets[1431]. The financial protection regime includes key principles that secure a high level of investor protection within the different sectors of the financial system. Two main principles that guarantee market integrity are transparency and disclosure in addition to the control of market conduct. The following sub-sections provide a thorough explanation to these principles and their role in safeguarding the interest of IC's shareholders.

Sub-section 1: Transparency in Operation and Performance

500 ***Transparency definition.*** Transparency is the antidote of an ailing market. It refers to an environment in which the objectives of policy, its legal, institutional, and economic framework, policy decisions and their rationale, data and information related to monetary and financial policies, and the terms of accountability, are provided to the public in a comprehensible, accessible, and timely manner[1432]. Transparency is not defined in legal texts. The sole definition that can be found in this regard is doctrinal.

501 ***Importance of transparency.*** Transparency is a key factor contributing to market efficiency and effectivity. Transparency permits effective market discipline that in its turn is a central provision for good corporate governance that guarantees market stability and restores investor confidence in the market[1433]. The connection between good governance and transparency is deep. Transparency is a major aspect of good governance it is the means through which investors can assess the value of the company and risks of its operations. Transparency is achieved through disclosure. Every undertaking functioning within a financial market has a disclosure obligation. The IC has a similar obligation. On an international level, the promotion of transparency took a major part in international declarations. The need for a corporate disclosure policy was addressed in the PIT declaration. It means having a policy tailored to the

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[1431] World Bank Group, 'Good Practices for Financial Consumer Protection' (2012) < http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/Good_Practices_for_Financial_CP.pdf > Accessed 09 November 2017 page 33

[1432] IMF Monetary and Exchange Affairs Department, 'Support Document for the Code of Good Practices on Transparency in Monetary and Financial Policies' (Part I Introduction, 2000) < http://www.imf.org/external/np/mae/mft/sup/part1.htm#appendix_III >

[1433] Bill Witherell, 'The Role of Market Discipline and Transparency in Corporate Governance Policy' (Banque de France International Monetary Seminar, Paris, May 2003) < http://www.oecd.org/corporate/ca/corporategovernanceprinciples/2717763.pdf > page 1

size, nature and activity of the company. Further ensures accurate and timely disclosure of material information including potential operational risks.

502 ***Subject of Disclosure.*** The disclosure obligation consists of the dissemination of information deemed as material for securities market, investors and the public. The obligation requires full, accurate and effective dissemination. The question rising in this regard is the following: what information fulfil the disclosure obligation? Disclosure is performed in several stages throughout the life of the company. The issuer and the natural persons operating the company or holding major shareholding in other undertakings are subject of this obligation. French rules address the disclosure and communication of regulated information. Paragraph 1, provides a thorough explanation to the levels of disclosure of the regulated information. As for paragraph 2, it introduces the format and requirements connected to the disclosed information.

§1: *Continuous Disclosure*

503 ***Stages of disclosure***. In the process of accomplishing market transparency undertakings including the IC, performing within the securities market have an obligation to meet the set disclosure requirements. The aim of these requirements is to help investor reach a well-informed investment decision, in addition to permitting them to understand the actual financial situation and overall performance. Disclosure has several stages depending on the period of company's life we are addressing. The first stage of disclosure is that made pre-sale. Meaning the disclosure of the information necessary to make a well-informed investment decision. In this stage, principally the issuer prepares and publishes prospectuses and KIID in European MS. Pre-sale disclosure is mandatory unlike marketing communication and advertisements made by market participants. Another stage of disclosure is that made in the point of sale. Such disclosure is of information that has immediate impact on the investment decision. The information disclosed in this stage are material and may be a turning point in the investment process. A perfect example of this information is that of percentage of share ownership and memberships of boards in similar companies. Generally, the impact of this form of information is a means to hinder conflicts of interests or serious share price change. Another example of this stage of disclosure is the analytical and evaluative services providing information on the market

for investors[1434]. The final stage of disclosure is that made regulatory and continuously post-sale. Disclosure of timely and accurate information regarding company's activities, financial situation, non-financial performance, adherence to responsible investment principles, and foreseeable risks[1435]. Disclosure is made to the public (reaching the widest possible audience) parallel to competent authority. The first two stages of disclosure formerly addressed in part I. this paragraph focuses on periodic and ongoing disclosure.

504 ***Periodic disclosure***. Periodic disclosure is a regular disclosure made with the competent authority and disseminated with the public. Listed companies should hold the market regularly informed of their situation and their perspectives through publications and communication. Periodic disclosure is an obligation legally imposed on issuers[1436]. They make this disclosure on an annual, half-yearly and quarterly basis of their financial and accounting information.

505 ***Annual report***. Disclosing annually in the form of an annual report prepared at the level of the company[1437]. Consists of company's annual accounts, consolidated accounts for group of companies, management report[1438], auditing report[1439] in addition to a declaration of the responsible persons for the content of the annual report[1440]. Specifically for IC the *AMF* provides a minimum content requirement for annual reports that include alongside the previously mentioned information a description of the remuneration policy paid by the company to its personnel in addition to the method of their calculation[1441]. Further, IC includes in its

[1434] Principle 23 IOSCO Objectives and Principles of Securities Regulation
[1435] Principle 13 IOSCO Objectives and Principles of Securities Regulation
[1436] For the purposes of this obligation, French rules introduce a definition for the issuer. Defined as any person or an entity that trade their securities on regulated markets
[1437] C. mon. fin., art. L. 451-1-2 ; Article 43.a (1) JSL of 2017
[1438] Prepared by the board (C. com., art. L. 225-100). Consists of a detailed description of company's activities and financial performance, the results of its achievements, description of principle and potential risks the company is facing, characteristics of the principle internal control and risk management procedures in addition to the description of its profits and losses and the measures taken to maintain the losses (C. com., art. L.225-100-1; Article 4.b Disclosure Regulation of 2004)
[1439] Article 73 UCITS Dir. 2009/65
[1440] *AMF*, régl. gén., art. 222-3
[1441] *AMF,* instr. 2011-19, art. 33; Article 68.1 UCITS Dir. 2009/65

periodic reports a statement of its assets and liabilities in addition to the composition of its portfolio[1442].

506 ***Half-yearly report***. Issuers prepare half-yearly reports[1443]. This report provides a description to the complete accounts of the preceding semester, in addition to biannual activity report that indicates the important events occurring during the first semester in addition to the referral to principle transactions[1444]. The activity's report also mentions company's assets and liabilities, its portfolio composition, indications of distributed dividends and a recap of the redemption cap for the passing semester[1445]. The half-yearly report includes a declaration from the persons responsible for its content in addition to attaching auditors report[1446]. Under the Jordanian securities rules the half-yearly report is not included in the obligatory periodic disclosure in the JSL yet it is mentioned in the Disclosure Regulation.

507 ***Quarterly report***. The issuer produces a third type of periodic reporting, a quarterly report[1447]. The *AMF* general regulation do not mention this form of report yet it referred to it in its instruction DOC-2011-19 when addressing procedures and requirement of UCITS' periodic disclosure[1448]. Under the Jordanian securities rules the issuer is obliged to publish the results of its initial activities. These results state net assets and liabilities of the company, minority rights, net distributed dividends, a *resumé* of company's activities in addition to a comparative analysis to the numbers of the current year with preceding ones[1449]. This publication is similar in its content to the biannual activity report requested under French rules. Nonetheless, the Jordanian obligation requests this disclosure annually and separate from the annual report. The qualification of whether shareholders are better off with a biannual activities report or an annual one is necessary. This report shares similar content with half-annual and annual reports. Requesting this report annually undermines the importance of the annual report and provides this report with more importance. Shareholders and potential investors are more intrigued in

[1442] Schedule B – Annex I UCITS Dir. 2009/65
[1443] Article 68.1 (c) UCITS Dir. 2009/65; Article 6 Disclosure Regulation of 2004
[1444] *AMF*, régl. gén., art. 222-6
[1445] *AMF,* instr. 2011-19, art. 32
[1446] *AMF*, régl. gén., art. 222-4
[1447] C. mon. fin., art. L. 451-1-2 IV ; Article 43.a (2) JSL of 2017
[1448] *AMF,* instr. 2011-19, art. 32
[1449] Article 3 Disclosure Regulation of 2004

being informed of the activities and the outcomes of the performance of the company, through a summarized content rather than having to go through the annual report whose content may be beyond their knowledge or basic comprehension. Shareholders and potential investors are better off if this report became part of half-yearly report. Half-yearly report in Jordan includes similar information to that mentioned in the activity report. It is more convenient to shareholders and investors to have such an analysis at an early stage in the financial year ahead of reviewing the complete analysis.

508 ***Ongoing disclosure.*** Ongoing disclosure is the disclosure of material information deemed vital to ensure an informed market and investor. This information influences the value of the company within the market and potential risks of operation. The obligation imposed on issuers to make public material information that they know of[1450]. This includes the information that comes to the knowledge of the company post the communication of its periodic reports and hold a change for previously published information[1451]. Meaning the information that may influence investment or disinvestment decisions. This form of disclosure requires issuers to be in coherence with their financial information. This ongoing disclosure consists of a special disclosure. The specialty is related to particular forms of disclosure relating to share ownership and rights related to shares[1452], shareholders agreement[1453], statements of intent[1454], trading of senior managers in company's shares[1455], board decisions that influence the value of securities on the market[1456], changes in AOA[1457], and material changes in the assets and liabilities of the company[1458]. Further to the information relating to disputes and lawsuits that the company forms part thereof[1459].

509 ***Importance of Special disclosure.*** The entirety of the special disclosure relates to a piece of information having crucial influence on the overall financial situation of the company.

[1450] Article 43.d JSL of 2017; Article 8 Disclosure Regulation of 2004
[1451] *AMF*, régl. gén., art. 223-5
[1452] *AMF*, régl. gén., art. 223-21; Article 8.a (3,6) Disclosure Regulation of 2004
[1453] *AMF*, régl. gén., art. 223-18
[1454] *AMF*, régl. gén., art. 223-7
[1455] *AMF*, régl. gén., art. 223-6
[1456] Article 8.o Disclosure Regulation of 2004
[1457] *AMF*, régl. gén., art. 223-19
[1458] Article 8.a (1) Disclosure Regulation of 2004
[1459] Article 8.k Disclosure Regulation of 2004

Disclosure of the changes in share ownership and the rights related to shares is connected to the cases of having major holdings due to a purchase, issuing of new securities or changes in ownership due to dilutions, takeovers and mergers. These changes influence the price and value of shares on the market. The disclosure of the changes in the statements of intent is of importance to shareholders and potential investors in determining and evaluating cases of conflicts of interest. Reporting of trading by senior manager in company shares is important in cases of having an operation subject to suspicion of significant impact over the securities and the rights of their holders. The disclosure of current disputes and lawsuits is necessary to define the impact of such legal proceedings over the profitability and financial standing of the company. Both ongoing and periodic disclosure have a common aim that is to provide shareholders, potential investors and the market with an overview of company's financial situation and the procedures of risk management. The question rising in this regard is the following: How are the disclosed information disseminated? The following paragraph 2 provides an exhaustive answer to this question.

§2: *Accuracy and Timing of Disclosure*

510 ***Effective dissemination.*** Appropriate transparency is ensured through a regular flow of information. The information include what is called under French rules "regulated information". Regulated information is a term used to designate documents and information provided by listed companies to the public and communicated to competent authorities. They include annual report, half-yearly report, management report, corporate governance report[1460], reports indicating governmental payments, the communication of audit fees, information related to the total number of voting rights and shares constituting the capital, models of buybacks, material information, shares related information and the disclosure made with the competent authority[1461]. The disclosure obligation is imposed on issuers[1462]. They are required to make full and effective dissemination of information to the public and the competent authority. The effectivity and complete dissemination is achieved through accurate, clear, integral and timely

[1460] C. com., art. L. 225-37
[1461] *AMF*, régl. gén., art. 221-1
[1462] C. mon. fin., art. L. 621-18

publication of the information[1463]. Meaning a publication that reaches the largest public possible within a short period of time using procedures that ensure the integrity of information[1464]. Under French rules, issuers' diffusion obligation covers the entirety of regulated information except for the information that relate to crossing the share participation threshold. The disseminating of this category of information is made directly by the *AMF*[1465].

511 ***Preparation.*** Financial reports and statements disseminated by issuers consist of technical explanations and details, they provide snapshot of the risk exposure and the decisions undertook by the management. Their readability and consistency is a place of importance for shareholders and potential investors. Governing legal rules address the necessity to prepare these documents in an accurate, precise and clear manner[1466]. To achieve such requirements the competent authority control the content and the presentation of the information. The competence is further endorsed in the governing legal rules. Under French rules the regulated information are prepared in French language or any other commonly used language in the financial field[1467]. The terminology of the information should take into consideration the level of financial literacy of the public. The financial protection regime introduces the principle of "know-your-customer" to address the necessary protection for investors lacking financial literacy and awareness. The French *Cour de Cassation* affirmed this concept in considering the profession of an investor or having a management shareholder as enough evidence for the existence of a level of financial knowledge and competence[1468]. The accuracy imposes the obligation to avoid misleading information and having an up to date disclosure (arises the importance of the ongoing disclosure of changes in disclosed information). As an example for full and precise disclosure, the ongoing disclosure of material information with the Jordanian

[1463] *AMF*, régl. gén., art. 221-3
[1464] *AMF*, régl. gén., art. 221-4 II
[1465] *AMF*, régl. gén., art. 221-3
[1466] *AMF*, régl. gén., art. 223-1
[1467] *AMF*, régl. gén., art. 221-2; a similar requirement under the Jordanian rules is made under the newly enacted law addressing the protection of the Arabic language. This law imposes an obligation on public authorities and companies to use the Arabic language in its correspondences, communications and records (Article 3 Law on the Protection of the Arabic Language of 2015). This rule may be applicable to the language of the disclosure. This rule does not prevent the companies from using any other foreign language nonetheless, they are required to attach an Arabic translation
[1468] Cass. Com., 7 Avril 2010, n° 09-13972

competent authority is provided in a detailed report[1469]. The preparation of financial documents and statements is a crucial process in the dissemination of the information. The documents at the level of preparation should consider three main principles of being accurate, precise and clear. Meaning full and effective disclosure prepared in accordance with internationally accepted auditing principles and standards[1470].

512 ***Diffusion process.*** Financial documents and statements in addition to any material information having significant impact over the value of the company in the market should be disseminated in a complete and effective manner to the public[1471] and the competent authority[1472]. This dissemination is made either electronically[1473] or through written press[1474]. The listed company has two options in publishing its regulated information; either it diffuses the information directly on its website and electronically with the competent authority or indirectly through a primary information provider[1475]. The issuer is considered as complying with its disclosure obligation if the electronic dissemination reached the largest possible public in the shortest period of time[1476]. If transmitted to media it provides full information in a manner ensuring secure transmission, minimizing the risk of data corruption and unauthorized access, and allows total certainty as to the source of the transmitted information. Further if the dissemination permits the public to clearly identify the issuer, the purpose of the information, and the date and time at which the information were transmitted[1477]. Listed companies make financial disclosure through written press. This disclosure should be at a frequency and in a presentation format considered appropriate given the type of issued financial securities, the size of the company and shareholder base[1478]. This disclosure should not be misleading and should

[1469] Article 9 Disclosure Regulation of 2004
[1470] Article 14 Disclosure Regulation of 2004; *AMF*, Recommendation DOC-2016-09: Financial Statements; Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19 (known as the accounting directive)
[1471] *AMF*, régl. gén., art. 221-3
[1472] *AMF*, régl. gén., art. 221-5
[1473] *AMF*, régl. gén., art. 221-5
[1474] *AMF*, régl. gén., art. 221-4 VI
[1475] *AMF*, régl. gén., art. 221-4 IV
[1476] *AMF*, régl. gén., art. 221-4 II
[1477] *AMF*, régl. gén., art. 221-4 II
[1478] *AMF*, régl. gén., art. 221-4 VI

be consistent with the regulated information disseminated electronically. In addition to the periodic and ongoing disclosure, listed companies disseminate their corporate governance report[1479] in addition to the observations of auditors[1480] to the public in a similar manner to the dissemination of regulated information[1481]. This disclosure follows the deposit made with the *greffe* of the *Tribunal de commerce*.

513 ***National dissemination.*** The disclosure within the sphere of Jordanian rules is also made in soft and hard copies yet in a rather different manner. The public dissemination is mandatory for the entirety of regulated information, periodic[1482] and ongoing[1483]. The method of dissemination is made through written press, electronically by way of email send to securities holders or through any means of public diffusion accepted by the JSC[1484]. On the other hand, the dissemination is optional for quarterly reports[1485]. On an EU level, financial documents are provided in a durable medium, by way of website or a paper copy upon the request of the investor[1486]. The methods of dissemination provided by French rules are consistent with the concept of durable medium[1487]. The effective disclosure requires constant accessibility to an unchanged reproduction of the information for an adequate period of time for the purposes of the disclosed information. EU rules state an obligation to provide investors with financial documents free of charge upon their request[1488]. In France regulated information are stored and centralized to be permanently accessible through a dedicated website operated by the Directorate of Legal and Administrative Information[1489]. In Jordan, the JSC provides on its general website a heading dedicated to disclosed information by listed companies[1490]. The accessibility is open for recent and ancient publications and communication of listed companies

[1479] C. com., art. L. 225-37; C. com., art. L. 225-68
[1480] C. com., art. L. 225-235
[1481] *AMF*, régl. gén., art. 222-9
[1482] Annual report: Article 5 Disclosure Regulation of 2004; half-yearly report: Article 6.a 5 Disclosure Regulation of 2004
[1483] Article 8 Disclosure Regulation of 2004
[1484] Article 43.c JSL of 2017
[1485] Article 43.c JSL of 2017
[1486] Article 75.3 UCITS Dir. 2009/65
[1487] A means enabling investors to store the addressed information. They remain accessible for future reference during an adequate period of time while allowing an unchanged reproduction of the information (Article 2.1 (m) UCITS Dir. 2009/65
[1488] Article 75.3 UCITS Dir. 2009/65
[1489] http://www.info-financiere.fr/; C. mon. Fin., art. L. 451-1-6
[1490] http://jsc.gov.jo/public/Arabic.aspx?site_id=2&Lang=1&Page_Id=3424&menu_id2=147

for the period of ten years following the date of storage on the French database[1491]. The Jordanian rules do not provide for such archive requirement. It is a matter of internal archiving procedure.

514 ***Timely disclosure.*** The dissemination of financial and material information should be made regularly and in a timely fashion as provided for in the governing legal rules. Depending on the type of disclosed information, the time limit requested for the disclosure also differs. Annual reports hold the longest period for disclosure three months following the end of the financial year[1492]. The half-yearly report submitted and made public one month following the end of the concerned period[1493]. The quarterly report is published thirty days following the end of the relevant quarter[1494]. As for the ongoing disclosure, the publication is made immediately once the company is informed[1495]. The question rising in this regard is the following: what happens if the listed company does not comply with the time limits provided for the disclosure?

515 ***Failure to disclose.*** The amending transparency directive considers the failure to make public regulated information within the set time limit as a breach of the disclosure obligation[1496]; therefore, it provides the competent authority in the MS with a sanctioning power over the cases entailing such breach[1497]. This statement is adopted under French law in the financial and monetary code[1498], despite the explicit exemption of OEIC from the application of the transparency directive[1499]. The exercise of this power by the *AMF* is made on several steps.

[1491] The period was changed from five to ten in the latest European amendments of the Transparency Directive; C. mon. fin., art. L. 451-1-6

[1492] Article 5 Disclosure Regulation of 2004; a longer period is provided in French rules four months (C. mon. fin., art. D. 214-31-2)

[1493] Article 6.a Disclosure Regulation of 2004; longer period provided in French rules two months following the end of the relevant half (C. mon, fin., art. D. 214-31-2)

[1494] Article 43.a (2) JSL of 2017; they are not mentioned as obligatory in the *AMF* general regulation nonetheless the referral to this form of report is made in the Instruction 2011-19. The publication of this report is required for the IC two months following the end of the relevant quarter (*AMF*, Instr. DOC-2011-19, art. 32.II)

[1495] Article 8 Disclosure Regulation of 2004; rapidly disclosed under French rules (*AMF*, régl. gén., art. 223-5)

[1496] Article 28.a Amending Transparency Dir. 2013/50

[1497] Article 28.b Amending Transparency Dir. 2013/50; Boubou Keita, 'L'Applicabilité Directe et Rétroactive du Règlement MAR en Matière de Répression des Manquements à la Communication Financière ' (2018) 1 Bull. Joly Bourse 23 ; *AMF* Sanctioning Commission decision of 21 december 2017, n° SAN-2017-15

[1498] C. mon. fin., art. L. 621-14 I; Sylvie Salles, 'Nouvelle Affirmation de l'Objectif de Préservation de l'Ordre Public Economique – A Propos des Sanctions Administratives Prononcées par l'AMF' (2017) 43 Gazette du Palais 24; Cons. cons., déc. n° 2017-634 QPC, 2 juin 2017

[1499] Article 1 TD 2004/109

First step, a public declaration of the non-compliance. The declaration designates the concerned person and the occurring breach. Second step is an order issued by the board of the *AMF* requiring the undertaking after hearing its deposition, to cease the conduct constituting the breach in a process known as an administrative injunction[1500]. Third step is to request a judicial injunction to cease the irregularity and remove the effects of the breach[1501]. A request made by the president of the *AMF* with the president of the Tribunal of Grand Instance of Paris. Generally, the *AMF* can at all times resort to administrative sanctioning pecuniary or not under its general sanctioning power previously explained in title 1. As part of indirect investor protection, the *AMF* maintains a list of the companies failing in their disclosure obligation accessible on its website. The Jordanian rules do not provide particular administrative actions for the failure to disclosure. The failure qualified as a breach of securities rules and redressed under the general rules provided in the JSL. The most obvious sanction imposed in this regard include the suspension, limitation or annulment of the license post a deposition hearing of the licensee in question[1502]. The lack of specialized immediate measure when facing a failure of disclosure affects the value of the financial protection regime provided for investors in the securities market. The applicability of the general sanctioning rules is good but not enough. The JSC is advised to provide a list of the breaching listed companies on its website. On the other hand, the JSC publishes regularly a reminder for listed companies to provide it with their disclosed financial information.

516 ***Conduct and disclosure.*** The effectivity and evolution of market transparency influences the effectiveness of market discipline. The disclosure alone is not enough to provide the intended level of investor protection. Shareholders and potential investors need clearly set rules of conduct of IC on the market. Company's conduct on the market if transparent and clean restores the confidence of investors in the market and ensures a well-functioning financial market. The following sub-section 2, addresses securities market operation. In the sense, that provides practical and legal examples of abusive market practices and the legal means used to prevent them.

[1500] C. mon. fin., art. R. 621-37; Amélie Bellezza, 'Les Apports de la Loi Sapin II en Matière Financière' (2017) 3 Revue de Science Criminelle et de Droit Pénal Comparé 544
[1501] C. mon. fin., art. L. 621-14 II
[1502] Articles 60 & 109 JSL of 2017

Sub-section 2: Market conduct

517 ***Cleanness and integrity.*** Markets depend on investors. Investors use markets that they trust. If investors believe that the market is manipulated this will lower the chances of them seeking this market. To restore and maintain investors' confidence in the securities market, the market should set as its main objective having transparent behavior and outlawing abusive market behaviors. This objective is achieved through a regulatory framework that prohibits market manipulation and market abuse practices, sanctions such practices and employs preventive and detective measures to avoid the rise of such practices within the securities market. Fulfilling the disclosure obligation by market participants is a key factor for a transparent and clean market yet it is not enough on its own. Particularly the disclosure of inside information forms the core component of a well-functioning securities market. Therefore, this disclosure requires the existence of a legal obligation and prohibition. An obligation to disclose and a prohibition for the unlawful use or disclosure. Inside information alongside other abusive actions, negatively affect the securities market. The following paragraphs address main market abusive behaviors (paragraph 1) and the regulatory action taken to incumbent their effect (paragraph 2).

§1: *Violative Practices on the Market*

518 ***Definition.*** Market abuse practices are those conducts holding a violation of the market integrity and the collective interest of investors. The conducts have two main natures or categories. First insider dealing relating to unlawful use of inside information. The conducts in this category hold significant risk and losses partially over investors in the sense creating inequality between them therefore violating market integrity. The second category includes market manipulation meaning, the behaviors that leads to a modification in the proper functioning of securities. Behaviors included in this category do not necessarily hold negative impact over the market, yet; their prohibition and prevention is due to an attempt to safeguard the confidence in the securities market. These actions do not generally hold a violation of the equality between market participants. What these actions do is manipulating the market to orient the investment decisions in a specific path.

519 ***Initiated operations.*** The first category of market abuse practices includes a set of behaviors that hold the character of initiation. There is a person that initiates a specific behavior that is later qualified as market abusive. The main requirement for the qualification of these forms of behaviors are inside information. Inside information as the precise and confidential information having an influential nature over the financial value and the realized operation[1503]. It is an information that was not made public, concerns directly, indirectly an issuer, or the securities. This information if made public is presumably having sensible effect over the concerned securities or their derivatives[1504]. It is an information that the reasonable investor may use as the basis for its investment decision[1505]. Inside information does not include investment recommendations and analysis provided in financial and economic studies[1506]. The question rising in this regard is the following: what are the behaviors qualified as market abuse practices and hold an initiative character? The behaviors include three forms of practices that are prohibited in the governing securities rules: insider dealing, unlawful disclosure of inside information, and market soundings. In addition to a forth form that is qualified as so under national legal rules that is the failure to disclose inside information.

520 ***Insider dealing.*** Insider dealing is defined as the use of insider information. Not any use insider dealing requires the use of the information for one's own account or the account of third party by acquiring it or disposing it directly or indirectly, or by way of amending or cancelling an order or transaction[1507]. This form of insider dealing is particularly seen in cases involving an informed person such as members of management. Another form of behavior mounts to insider dealing is the use of inducements and recommendations referred from an informed person recommending this person to engage in insider dealing[1508]. The recommendation is of disposing, or acquiring the information relating to a security or cancelling or amending an already placed transaction or order. Jordanian rules do not provide a detailed explanation to the forms of behaviors consisting the use of inside information as the MAR does. The law uses the term

[1503] Definition provided by the French jurisprudence (Cass. Crim., 26 Juin 1995, n° 93- 81646); *AMF* Sanctioning commission decision of 29 September 2017, n° SAN-2017-08; Anne-Catherine Muller, 'Information Privilégiée: Sensibilité de l'Information', *AMF* SAN-2017-08, *Revue des Sociétés*, 2018 (1), p. 64
[1504] As defined in MAR article 7
[1505] Article 2 JSL of 2017
[1506] Article 2 Disclosure Regulation of 2004
[1507] Article 8 MAR; Article 105.o JSL of 2017
[1508] Article 8.3 MAR; Article 105.h JSL of 2017

'exploitation' to address the use of the information. The term is elastic, can be extended to cover the disposing and acquiring of information and the exploitation to realize a financial gain whether the information related to a security has or not a priory placed order or transaction. Nonetheless, the term 'exploitation' requires further regulatory interference to lay down a satisfying definition. An insider or an informed person principally performs insider dealing.

521 ***Insider.*** Who is the insider? There are three forms of insiders depending on the degree of connection to the listed company. Primary, secondary and tertiary[1509]. A primary insider is the person who possesses inside information due to being a member of the administration or management of the listed company[1510]. A secondary insider is the person who holds inside information due to its profession or duties or the exercise of employment[1511]. An example for this category are the employees in securities market, agents of the competent authority, an investment services provider receiving information from an agent of the competent authority. A tertiary insider is any person that does not fall under the first two categories and comes across inside information such as having a holding in the listed company or being involved in a criminal activity[1512]. The insider may be a moral or natural person.

522 ***Prohibiting insider dealing.*** Insider dealing is considered a market abuse practice prohibited under governing legal rules. The prohibition is for any person that engages or attempts to engage in insider dealing or recommends or induces another person to engage in insider dealing[1513]. The prohibition under the Jordanian rules does not include the attempt to engage in insider dealing. The law considers as a prohibition the exploitation of the information or trading in securities based on inside information[1514]. The attempt to engage in insider dealing came as an inducement to investor protection and market integrity in the regulatory process on an EU level. The fact that Jordanian rules do not explicitly state the attempt as an equivalent

[1509] David Muresianu, 'L'Information Privilégiée « exogène » : toute Information Privilégiée doit-elle Provenir d'un Emetteur' (2017) 6 Bull. Joly Bourse 411

[1510] An automatic presumption due to the position these individuals hold (Article 23 Disclosure Regulation of 2004); affirmed by French jurisprudence the existence of simple knowledge due to the position (Cass. Crim., 15 mars 1993, n° 92-82263). A simple prove of delegation of powers is enough to transfer the criminal liability if a market abuse practice is in question (Cass. Crim., 19 oct. 1995, n° 94-83884)

[1511] Article 2 JSL of 2017; Article 8.4 MAR

[1512] Article 8.4 MAR

[1513] Article 14 MAR

[1514] Article 105.h,o JSL of 2017; Jo. Co. admin., 5 july 2015, n° 90/2015

abusive practice does not undermine the protective measure provided in the rules. Yet the existence of such prohibition is of good use to maintain market integrity. Nonetheless, this prohibition may impose further burden of proof on the part of the investor or the authority when challenging the practice qualified as an attempt to insider dealing.

523 ***Permitting insider dealing.*** Another detail that the Jordanian rules disregarded is the possibility of having a legitimate behavior not entailing insider dealing. The rules do not mention the possibility of proving that a person may have been in possession of inside information yet implemented and maintained measures and procedures that ensure that the information were obtained in a legitimate course for purposes relating to a position he holds. Further established measures that ensures the person responsible for the decision was not in possession of the information or proving that the concerned person did not make any recommendation or inducement based on the inside information that he holds. These behaviors were considered as legitimate and do not entail insider dealing under the MAR[1515].

524 ***Communication.*** Unlawful disclosure of inside information is another form of market abuse practice entailing the communication of inside information outside the scope of the normal disclosure due to the exercise of an employment, a profession or duties[1516]. The unlawful nature arises from performing a prohibited disclosure by any of the categories of the above-mentioned insiders. The abuse is qualified with simple communication of the information without the need to prove the consciousness of the insider. The market abuse practice does not extend to the communication of information that precede the announcement of transactions in order to measure the interest of potential investors in this transaction in addition to the conditions it entails including potential size and pricing. This communication is known as 'market soundings'[1517]. The control of the circulation of inside information forms part of the operational and professional obligations imposed on market participants, particularly in terms of

[1515] Article 9 MAR
[1516] Article 105.z JSL of 2017 ; Article 10 MAR
[1517] Article 11 MAR

maintaining operational the necessary measures to prevent unlawful circulation of these information[1518].

525 ***Market soundings.*** Market soundings are introduced in the MAR through an approach made by MS. Market soundings may entail the disclosure of inside information. MAR provides precautionary measures to be taken by market participant ahead of producing market soundings. The disclosing market participants should obtain the consent of the person receiving the market sounding to receive inside information, further inform this person that he/she is prohibited from using or attempting to use this information in a manner resulting into a case of insider dealing or unlawful disclosure of inside information[1519]. Most importantly informing the person receiving the market sounding of the confidentiality of the information and that he/she is obliged to maintain this information confidential. The communicated information should be internally communicated only through pre-determined reporting channels and on a need-to-know basis[1520]. The Jordanian law do not address this form of information communication. The main aim of this European approach is to strengthen the market abuse framework by extending its scope of application to new markets, behaviors and platforms. The recently implemented Jordanian securities law of 2017 has a similar aim. Yet the law does not provide a regulatory framework for such a particular case of disclosure. The reasoning may be in the generality of the existing rules that hinder any unlawful disclosure. The prohibitions under the Jordanian rules came general and their scope of application may be extended to include market soundings; yet implicitly. Eventually market sounding is a form of communication of information if it entails inside information and was considered as unlawfully disclosed then it is prohibited and qualified as a market abuse practice. If it did not include inside information or included but was disclosed lawfully, then the violation does not rise and there is no legal provision prohibiting such form of communication. One case example can be given to market soundings under the Jordanian rules

[1518] *AMF* Sanctioning Commission decision of 14 December 2017, n° SAN-2017-11
[1519] Article 11.4 MAR
[1520] ESMA, 'MAR Guidelines: Persons Receiving Market Soundings' ESMA/2016/1477 of 10 November 2016 < https://www.esma.europa.eu/sites/default/files/library/2016-1477_mar_guidelines_-_market_soundings.pdf >

is the case of disclosure of the intention of the shareholder of an issuer who wishes to acquire ten percent of the total capital of the listed company[1521].

526 ***Market manipulation.*** Market manipulation is the attempt to interfere with free and fair operation of the market by performing activities creating false or misleading appearances on the market[1522]. The activities constituting market manipulation are addressed exhaustively under the MAR. The MAR further prohibits the person engaging or attempting to engage in such behaviors[1523]. On the other hand, the Jordanian rules provide two main broad forms of activities that in one way or the other implicitly cover similar scope to that of the MAR. These activities are not defined under the Jordanian rules as market manipulation practices, they are merely considered as prohibited practices[1524]. Activities entailing market manipulation can be divided into three categories. First category covering behaviors relating to securities entailing the activities relating to a transaction or order placed such as giving false or misleading signals securing the prices of securities, employing fictitious device or using deceptive forms or invention[1525]. This category concerns the attempt to provide a false or misleading image of the size and price of trading (there is a presumption of manipulative action or behavior unless it was proven that it was carried out for legitimate reasons). The second category involves a dissemination of information[1526]. The third category covers uncompetitive practices[1527]. The Jordanian rules state explicitly the first two categories. Nonetheless, the third category can be implicitly covered under the general scope of application of the first category.

527 ***Dissemination of information.*** The second category of manipulative practices include the dissemination of information. Information that gives or is likely to give misleading or false signals concerning securities or secures or is likely to secure the price of a security including dissemination of rumors. Further to the transmission of this information to provide false or misleading inputs in relation to a benchmark or any other behavior manipulating the calculation

[1521] Article 13 Disclosure Regulation of 2004
[1522] Farlex Financial Dictionary (Farlex international 2017)
[1523] Article 15 MAR
[1524] Article 106 JSL of 2017
[1525] Article 12.1 (a,b) MAR; Article 106.b JSL of 2017
[1526] Article 12.1 (c,d) MAR; Article 106.a JSL of 2017
[1527] Article 12.2 MAR

of such benchmark[1528]. This activity is conditional to the actual or presumed knowledge of the person disseminating the information with false and misleading content. Another form of dissemination of information is the case involving a person taking advantage of a regular or occasional appearance in the media to cast an opinion over a security. This activity is conditional to the person, who has previously taken positions relating to the security in question, profits from the impact of the opinion and exists a case of conflicts of interest that was not properly disclosed to the public[1529]. The Jordanian rules provided another general framework for this form of activity. They address rumors and information that are misleading or false affecting the price of a security or the reputation of the issuer. If the information influence the securities or the transaction other than the price, they are governed under the first category. The dissemination is general under the Jordanian rules. There is no limit on the form of dissemination.

528 ***Dominant position.*** The third category of market manipulation activities include those activities securing a dominant position over a security which has or is likely to have an effect of fixing prices or creating unfair trading conditions. Buy or selling at the opening or closing of the market to influence the decision of potential investors acting based on displayed prices.

529 ***Failure to disclose.*** Disclosure is a core aspect of market transparency and integrity. Understanding the impact inside information may have on the market and its participants, the securities rules took a regulatory step in addressing this importance by including a mandatory imposition to disclose inside information once the company becomes informed with their existence[1530]. In order to provide a level-playing field on the market and avoid any unlawful use of this information. The former paragraph addressed the disclosure obligation and sanctioning imposed on companies who fail to disclose. This failure include inside information[1531]. The competent authority sanctions this failure administratively and not criminally[1532]. The Jordanian rules do not provide any statement concerning the obligation or the failure to disclose. The Jordanian rules distinguish between material information included under the ongoing disclosure

[1528] *AMF* Sanctioning Commission decision of 2 November 2017, n° SAN-2017-09
[1529] Article12.2 (d) MAR
[1530] Article 17 MAR
[1531] *AMF* Sanctioning Commission decision of 13 April 2018, n° SAN-2018-03
[1532] *AMF*, régl. gén., art. 223-2

obligation and inside information. Material information refers to an information or event affecting the investment decision[1533]. As for inside information, it is a confidential information relating to the issuer or the security that may have an effect on the price of the security if made public[1534]. The disclosure obligation and failure to disclose covers merely material information mentioned in the former paragraph. No such obligation is provided for inside information. The question rising in this regard is the following: how can market abuse practices be controlled? Investors' protection and market integrity requires the existence of a set of measures and procedures to counterpart the effects and prevent such practices. The following paragraph addresses control measures performed in three different forms prevention, detection and deterring.

§2: *Controlling Market Abuse Practices*

530 ***Prevention.*** Investors need a clean market they can trust and seek. To guarantee the transparency and integrity of the market the securities rules interfere in a regulatory framework that impose a series of requirements and obligations on market participants in an attempt to prevent the rise of market abuse practices. These impositions form preventive measures. They are performed both internally by the listed company[1535] and externally by the competent authority. They include the disclosure obligation generally[1536] and that of inside information[1537]. The disclosure extends to that of suspicious transactions[1538]. On different setting listed companies should maintain and hold at all times an updated and detailed list of insiders[1539]. This list contains the details of every person that has the access to inside information within the company including employees, contractors or any person during the functioning of its tasks has access to the information, detailing in the list the reasons for including this person in the list[1540].

[1533] Article 2 JSL of 2017
[1534] Article 2 JSL of 2017
[1535] Olivia Dufour, 'Emetteurs, Sécurisez le Traitement de vos Informations Privilégiées' (Interview de Christian Schricke DG de l'ANSA) (2017) 116 (1) Bull. Joly Bourse 9 ; Lydie Boussard, 'L'adaptation des entreprises à la réforme des listes d'initiés: les outils internes au service de la prévention des délits et manquements d'initiés' (2016) 50 Revue Internationale de la Compliance et de l'Ethique des Affaires 16
[1536] Article 4 Disclosure Regulation of 2004; Article 43 JSL of 2017
[1537] Article 17 MAR
[1538] *AMF*, régl. gén., art. 223-6; Article 16 MAR
[1539] Article 18.1 MAR
[1540] D. Muresianu, n (1509) page 412

The list should be communicated to the competent authority. Every person whose name is mentioned in the list should provide an acknowledgement of legal and regulatory duties and should be aware of the applicable sanctions[1541]. The insider list should be maintained by listed companies for a period not less than five years following the date of its update or its drawing up[1542]. The disclosure obligation is imposed on the persons discharging managerial responsibilities[1543] and their closely associated persons[1544] to disclose in details the transaction made to their own account in relation to the securities of listed company they manage[1545]. A close enough obligation is mentioned in the Jordanian rules is the disclosure of share ownership and the changes of this ownership[1546]. This form of disclosure performs a preventive measure against market abuse, particularly insider dealing. It is a highly valuable source of information to investors[1547].

531 ***Detection.*** The detection is as important as the prevention. Detection relates to transaction and order already placed or ongoing. Further, it covers the different practices and behaviors on the market and in the surrounding spheres. The detection is an external and internal control. Both the competent authority and listed companies should establish and maintain effective arrangements, systems and procedures to detect any suspicious orders and transactions. The listed company should lay down a code of conduct and an internal operational policy that its different components comply with. The code of conduct and the internal policy address among other things clean operations and take into consideration the interests of shareholders. Further, it refers to the necessity to manage risk exposure including operational

[1541] Article 18.2 MAR
[1542] Article 18.5 MAR
[1543] Defined as a person within a listed company who is: 'a member of the administrative, management or supervisory body of that entity; or a senior executive who is not a member of the bodies referred to, who has regular access to inside information relating directly or indirectly to that entity and power to take managerial decisions affecting the future developments and business prospects of that entity' (Article 3.1 (25) MAR)
[1544] Defined as 'a spouse, or a partner considered to be equivalent to a spouse in accordance with national law; a dependent child; a relative who has shared the same household for at least one year on the date of the transaction concerned; or a legal person, trust or partnership, the managerial responsibilities of which are discharged by a person discharging managerial responsibilities or by a person referred to, which is directly or indirectly controlled by such a person, which is set up for the benefit of such a person, or the economic interests of which are substantially equivalent to those of such a person' (Article 3.1 (26) MAR)
[1545] Article 19.1 MAR
[1546] Article 12 Disclosure Regulation of 2004
[1547] Recital 58 MAR

risks[1548]. Competent authority exercises the detection as part of its supervisory and investigatory powers. Clearly seen in, inspection and reviews performed at the domicile of listed companies further to the accessibility to the entirety of company's documentation[1549]. The cooperation and exchange of information performed between the home competent authority and other authorities[1550]. In the process of detecting market abuse practices there must be market indicators that qualify a specific behavior as manipulative or not. On an EU level, these indicators are set in details in the MAR[1551]. No such detailed explanation is mentioned in the Jordanian rules. Nevertheless, the lack of this explanation does not hinder or prohibit the JSC from using the indicators it deems necessary or consulting experts in the qualifying process.

532 ***Deterring.*** The control of market abuse practices requires the implementation of proper deterring measures that hinder or contain the negative effects of the practice. These measures generally exercised and laid down externally by the competent authority. The deterring measure consists of imposing administrative measures and sanctioning[1552]. Administrative measures exist without any prejudice to criminal sanctions existing nationally. The measures include requesting the market participant to cease the abusive conduct, redressing the harm by disgorging the gained profits from such conduct, withdrawing or suspending the license, suspension of the registration of the persons discharging managerial responsibilities, public warning and declaration of the infringing person and the type of infringement. These measures form part of the discretionary power of the competent authority as explained in the preceding title. The competent authority imposes pecuniary administrative sanctions over the infringing person.

533 ***Pecuniary sanctions.*** The authority fines the person with two forms of fines. A general fine for the infringement of securities rules does not exceed one hundred thousand JOD[1553] in addition to another fine that is the equivalent to twice the profit gained or the losses avoided yet

[1548] Previously addressed in part I
[1549] Article 23.2 MAR
[1550] Article 25 MAR ; this cooperation and exchange finds an example in the MMOU signed between Israel Securities Authority and *AMF* as mentioned in *AMF* Sanctioning Commission decision of 18 December 2017, n° SAN-2017-12
[1551] Annex 1 MAR
[1552] Article 30 MAR; Article 107 JSL of 2017
[1553] The corresponding value in euros April 2018 is one hundred and fifteen thousand and seven hundred Euros

does not exceed five times either the gain or the loss[1554]. The administrative pecuniary sanction under the MAR was limited to the second form of fines. Those relating to the profit gained or losses avoided if they are determinable. The amount of the fine should be at least three times the profit or the loss without having a maximum multiplication. The fines under the MAR differ depending on the type of infringement and the market abuse practice further the amount differs between natural and legal infringer[1555]. Both rules have their advantages and disadvantages. Not having a cap for the maximum administrative fine can have negative effect on the financial situation of the listed company and eventually on its shareholders. Even if shareholders are benefiting from the sanctioning. Having two forms of fines can be financially excessive and exhaustive on the part of the infringing party for the same previous reasoning. Nonetheless, the huge amounts of fines that can be imposed on infringers is a means to deter the concerned person from any repetitive behavior and provides a lesson for other market participants or components. The intensity of administrative pecuniary sanction under French and EU rules finds its reasoning in the scope of the effect market abuse practice may have not only nationally in the MS but also on the entirety of the single market. The amounts imposed by the Jordanian legislature are satisfying for a market with the size of the Jordanian one.

534 ***Imprisonment.*** In addition to the administrative sanction the securities rules impose an imprisonment sanction on the infringing party differing in the period from one market abuse practice to the other. The criminal sanctioning is possible alongside the administrative one. An approach aiming to strengthening the repressive measures to securities violation and market abuse. This may lead to having two sentencing proceedings for the same matter under two different systems judicial and administrative leading in some cases to arbitrary sanctioning. This issue was specifically witnessed in France. Therefore, French rules provide a system of double

[1554] Article 107.a JSL of 2017

[1555] Article 30.2 MAR; infringements involving market abuse practice have pecuniary sanction with a minimum amount of five million euros for a natural person and fifteen million euros for a legal person. Infringements relating to preventive and detective measures and the public disclosure of inside information have pecuniary sanction with a minimum amount of one million euros for natural person and twenty five million euros for a legal person. As for infringements relating to maintaining an insider list and disclosing manager's transactions they have a pecuniary sanction with a minimum amount of five hundred thousand euros for a natural person and one million euros for a legal person. The French rules provide a pecuniary sanction of ten million euros for the entirety of the mentioned infringements or tenfold the profit gained with the ten million as a minimum reference amount (C. mon. fin., art. L. 465-1)

jeopardy applicable to the infringements committed under the securities rules such as market abuse practices. This procedure is known as the '*aiguillage*'.

535 ***Aiguillage.*** French solution of *aiguillage* procedure came into existence post a *QPC* that was filled with the *Conseil Constitutionnel*. The *Conseil Constitutionnel* affirmed the unconstitutionality of the possibility to accumulate administrative and criminal sanctions and proceedings in matters of market abuse for the same person and infringement[1556]. The basis of this decision concerning cumulative sanctions is traced back to the principles of necessity and proportionality[1557]. The necessity allows for matters and behaviors conducted by the same person to be subject to different forms of sanctioning as long as different rules are applied before their proper jurisdiction. The proportionality when a cumulative sanctioning is in question limits the imposed sanction to the maximum amount provided by either forms of sanctions administrative or criminal. Other principles come into mind when explaining this approach, *Non-bis in idem*, the power of judged things, the right of defense, presumption of innocence and the separation of powers[1558]. The decision of the *Conseil Constitutionnel* do not refer to the principle of *non-bis in idem*. Meaning to the possibility of instituting a legal action twice for the same cause of action[1559]. Further, the decision took into consideration the fact that administrative sanctions are in fact criminal-law matter due to holding a criminal character despite the jurisdiction imposing them[1560].

536 ***Aiguillage mechanism.*** The solution addresses two case scenarios. The case of having a legal proceeding already in place and the other is the case of the intention to commence a legal proceeding[1561]. If either the public prosecutor for financial matters or the *AMF* have already commenced their legal proceedings, the other is prohibited from commencing a parallel proceeding for the same matter. The defining proceeding is the public action to implement the

[1556] Cons. cons., déc. n° 2014-453/454 QPC, 18 mars 2015; Cons. cons., déc. n° 2015-513/514/526 QPC, 14 janvier 2016

[1557] C. Ginestet, 'Cumul de peines et de Sanctions Administrative', Cons. Cons., n° 2015-513/514/526, *Dalloz Recueil*, 2016, p. 2428

[1558] C. Ginestet, 'Sanctions', Cons. Cons., n° 2014-453/454, *Dalloz Recueil*, 2015, p. 2468

[1559] Olivier Décima, 'Le Fantôme de *ne bis in idem*' (2015) 15 Recueil Dalloz 874

[1560] Article 6 ECHR; *Grande Stevens and others v Italy* (2015) App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 04 march 2014); C. Ginestet 2015, n (1558) page 2468

[1561] C. mon. fin., art. L. 465-3-6

sanctions stated in the financial and monetary code by the prosecutor or an official complaint was already filed by the *AMF*[1562]. In the other case scenario, either the prosecutor[1563] or the *AMF*[1564] has the intention to launch a legal proceeding. In this case, each of the two should notify the other of this intention. Both have a period of two months to decide if they instead want to go through with the legal proceeding or they will leave it to the initiator. This case scenario grants the initiator a final saying in the whole process of exchange of intentions and hinder duplication of sanctions. The fact that the *AMF* notifies the prosecutor of its intention to file the official complaint instead of the latter or vice versa, the prosecutor notifies the *AMF* of his intention to proceed with the action is limited to a final decision made by the initiator within a period of fifteen days. Otherwise, the proceeding is transferred from one system to the other. The *AMF* remains in a stronger position to employ its administrative proceedings over the infringements involving market abuse. This position is justified by the fact that the prosecutor is conditioned in its proceedings to the authorization granted by the general prosecutor of the appeal court of Paris[1565]. Further to the rapidity, administrative sanctioning enjoys *vis-à-vis* lengthy criminal proceedings[1566]. The general prosecutor after hearing the observations of both the prosecutor of financial matters and the *AMF* issues an authorization or a refusal to authorize the prosecutor to go ahead with the public action. The refusal grants the *AMF* the jurisdiction to proceed with administrative sanctioning. As for the civil proceedings filed by a third party in relation to an infringement forming a market abuse practice and is being processed either administratively or criminally is allowed solely in the case where the sanctioning proceedings are held criminally[1567].

537 ***Jordanian approach.*** The Jordanian rules do not address a similar procedure. Nonetheless, the general legal theory states that private derogates public. The JSL is a private law that derogates yet does not prejudice the criminal law. The sanctions and proceedings mentioned in the JSL are applicable and fall under the jurisdiction of the competent court

[1562] C. mon. fin., art. L. 465-3-6 al. I
[1563] C. mon. fin., art. L. 465-3-6 al. II
[1564] C. mon. fin., art. L. 465-3-6 al. III
[1565] C. mon. fin., art. L. 465-3-6 al. IV
[1566] Katrin Deckert, 'Le choix d'Aiguillage, un Bon Choix?' in *La Réforme du Contentieux Boursier : Répression des Abus de Marché en France et Solution Etrangères* (2016) 11 Bull. Joly Bourse 468
[1567] C. mon. fin., art. L. 465-3-6 al. VII

designated in the JSL. The Amman court of first instance is competent in the proceedings involving the violation of the securities rules or the decisions issued by the JSC[1568], including market abuse practices. A conclusion implicitly deducted from the statement mentioned in the article imposing both forms of sanctioning pecuniary and imprisonment.

538 ***Transition.*** In the course of addressing indirect control safeguarding shareholders interest in IC, the mere transparency is not enough. Transparency is guaranteed through a level of accountability for the breach of disclosure obligations in addition to the infringements negatively influencing the well-functioning of the company and consequently shareholders. The following section B addresses in details this accountability through an illustration of the accountable persons and the legally introduced forms of accountability.

Section B: Accountability for Actions

539 ***Definition.*** Accountability is seen as the obligation of a natural or moral person to account for its activities. A given situation where a natural or moral person is responsible for their actions or lack thereof and must be able to justify or give a satisfactory reason[1569]. Further, it is the acceptance of the responsibility for one's activities and disclosing the results in a transparent manner. The most obvious synonyms for accountability include answerability, liability and responsibility.

540 ***Scope of application.*** Accountability has a limited scope of application. Throughout the performance of the activities of the IC, not all the involved persons are accountable for harmful actions. The question rising in this regard is the following: who is the accountable person? Within the sphere of IC, the accountable person is any person discharging a responsibility. Particularly the accountable person includes members of management and auditors. Specifically, members of management and auditors who have been effectively appointed through a valid decision of appointing. A valid appointing means appointing in accordance with the applicable company law rules and relevant provisions of the AOA. Therefore having what is called a *de jure* management. The accountability extends to *de facto* or shadow management.

[1568] Article 107.c JSL of 2017
[1569] Cambridge Advanced Learner's Dictionary (3rd edn, 2008)

Meaning the case involving a person who no attempt was made to formally appoint him as director nevertheless he acts as if he was validly appointed. The accountability extends especially vis-à-vis third party.

541 ***Dirigeant de fait.*** The notion of shadow management or what is called *dirigeant de fait* under French jurisprudence; includes also the person who freely and independently carries out management activities on a regular and continuous basis while having a void, an expired or non-existing appointment deed[1570].

542 ***Importance.*** What is the origin of the accountability? The accountability results from the breach or infringement of a responsibility, obligation or duty that creates a liable action as a main outcome on the part of the accountable person.The importance of the accountability as a legal notion is found in its character. It is a form of an indirect control over the performance of the IC. Having strict legal rules that state the liability of management and auditors for their accountable actions. It is directly linked to the direct control (later addressed in chapter 2). It provides shareholders and the company with legal grounds for the enforcement action. This indirect control is explained through considering the accountability as a complementary action to a pre-existing responsibility or obligation. A character if implemented safeguards shareholders' interest and ensures the proper functioning of the company. Accountability is a method to manage risk exposure. Particularly operational risks. Further to managing situations entailing conflicts of interest. The importance of the accountability is translated into the identification of the misconduct of the management (sub-section 1) further designating whether this misconduct mounts to a liable action. If it does what is the nature of this liability (sub-section 2).

Sub-section 1: Misconduct by Person Discharging Responsibility

543 ***Expectation.*** When performing their duties and obligations, the persons discharging a responsibility (particularly management) are expected to present proper and lawful conduct

[1570] Jean-Pierre Casimir et Michel Germain, *Dirigeant de Sociétés : Juridique, Fiscal, Social* (3rd edn, Groupe Revue Fiduciaire 2010) ; Cass. Com., 10 oct. 1995, n° 93-15.553; close to the concept of work of virtue under Jordanian general civil law rules (Article 301 Jo. Civil Code) ; Xavier Delpech, 'Dirigeant de fait' (2018) 571 Juris Associations 50

throughout the course of their term. They should act when there is a duty or obligation in question. Therefore, non-compliance with the behavioral expectation results into holding the responsible persons accountable for the breach of responsibility or the omission. The management has a set list of duties and obligations that they should comply with and perform on a personal or collective basis. Nonetheless, the law allows the delegation of powers and responsibility. The question rising in this regard is the following: does the delegation include the transfer of liability? If the delegation was proven, the principal responsible person may be exempted from the liability. The following paragraphs introduce a list of the actions or omissions considered as misconduct and resulting in holding the person liable for the outcome (paragraph 1). Further to introducing the possible limitation of liability. Meaning exempting the responsible person from the liable action due to the existence of specific circumstances (paragraph 2).

§1: *Standing to Liability*

544 ***Source of liability.*** Directors, managing directors, executive officer, supervisory board and the executive board of listed companies are subject to a number of statutory controls. The control exemplified in various misconducts and infringements that mount to cases of liable actions. Generally, the liability relates to an action owed to shareholders, the company or third party (whether public or stakeholders). The accountability in the sphere of listed companies covers the company in addition to the persons discharging a responsibility. In this paragraph, we address examples of the liable actions addressed in the different governing rules (company law and securities law). We deal with these actions in two different categories depending on the liable person meaning, company's and management liability.

545 ***Company's liability.*** The statement that considers the company as having separate liable action than that of its management is statutory debatable. The management acts on behalf of the company, operates and represents it. Nonetheless, the management may seek personal gains that holds them liable for their misconduct without holding the company liable as is except derivatively for their misconducts against third party. For example the Jordanian law considers the IC liable before third party (acting in good faith) for the performance of its board and

management[1571]. In this category of liable actions, the law considers the company as personally liable for violating company[1572] or securities rules. A form of separate violation not necessarily resulting out of a misconduct or a conduct of the management practically difficult to envisage. These liable actions particularly include any conduct of the company abstaining from keeping the records and accounts as required by law, preventing the regular or on the spot audit of records[1573], and disposing inexact or false records[1574]. In addition to issuing or trading in securities ahead of ratifying the AOA or the effective incorporation of the company or performing fictitious underwritings[1575]. Exercising any deception or using misleading means in relation to the securities or any prohibited conduct[1576] and providing portfolio investment services without a prior licensing[1577]. The Jordanian securities rules address the licensee (including the IC) separately from its management. Therefore, they state liable actions applicable to both the management and the company, yet the liability of the company does not entail a presumption of liability of the management[1578]. May be understood as means to transfer the burden of proof rather than addressing a separate liability of the company. This lack of presumption replaced the former existing presumption under the former temporary JSL of 2002 is seen as an attempt of the legislature to provide the management with a larger margin to be innovative, take risks and be active in their decisions. These actions include abuse or misuse of company's assets, exercising deception, prohibited activities and misleading, negatively influencing the competition in terms of price manipulation or negatively influencing the capital market[1579], further to including incorrect or misleading information in the documents submitted with the securities authority[1580].

546 ***Management liability.*** The management is the representative of the company. The actual decision-maker. They include members of management, meaning board members and the

[1571] Article 156.a JCC
[1572] Article 279.a JCC
[1573] Article 279 JCC
[1574] C. mon. fin., art. L. 232-1 (issuer's liability)
[1575] Article 278.a JCC
[1576] Article 105.d JSL of 2017
[1577] Article 47 JSL of 2017
[1578] Article 107.h JSL of 2017
[1579] Article 56 JSL of 2017
[1580] Liable action imposed on both the company and the management under the Jordanian rules (Article 105..a JSL); personal liability presumed by the IC under the French rules (*AMF*, régl. gén., art. 422-65)

general manager. Generally, they are expected to act loyally, with care and diligence to fulfill the objectives of the company and act in the best interest of shareholders. The powers, duties and functions of the management put them in a place of accountability. Operating the company is not random. It is a process bestowed with care and loyalty due to all the concerned parts company, shareholders and third party. Therefore, the management is held liable for misconducts, faults[1581] and omissions it commits throughout the operation of the company. The main liability in connection with the management of IC is that relating to the exercise of portfolio investments. The infringement of the licensing requirements by members of the board, general manager or an administrative responsible in the company results in the suspension of the license[1582]. The liability for providing investment services without a prior authorization as set in the governing securities rules[1583]. The liability stands also in relation to capital market infringements. The management is liable for market abuse practices. Including liability for unlawful disclosure of inside information[1584], insider dealing[1585] and influencing the competiveness in the market[1586].

547 ***Examples of misconduct.*** The management in exercising its activities and operating the company should comply with the governing legal rules in addition to company's statute. They are held liable for the violation of the law (general liability include non-complying with their obligations such as the case of not preparing a management report or not addressing a performance inventory[1587], further to the case of failure to disclose the annual and management reports to the GA[1588] and failing to publish annual reports[1589]). The breach of the AOA and incorporation rules[1590]. The management is liable for its misconducts. They are liable for the abuse of power[1591], the misuse of assets[1592], negligence and poor management[1593], deception,

[1581] CA Paris, 10 août 2017, n° 15/17109; Jean-Brice Tap, 'La Faute de gestion dans ses états', CA Paris , n°15/17109, *Revue des Sociétés*, 2018, p. 241
[1582] Article 58 JSL of 2017
[1583] C. mon. fin., art. L. 573-1
[1584] Article 158 JCC; C. mon. fin., art. L. 465-3
[1585] Article 166 JCC; C. mon. Fin., art. L. 465-1
[1586] Article 56 JSL of 2017; C. mon. fin., art. L. 465-3-1
[1587] C. com., art. L. 242-8
[1588] C. com., art. L. 242-10; C. mon. fin., art. L. 573-3
[1589] C. mon. fin., art. L. 573-5
[1590] Article 137 JCC; C. com., art. L. 225-251
[1591] C. com., art. L. 242-6 al. 4; Article168 JCC
[1592] C. com., art. L. 242-6 al. 3; Article 56 JSL of 2017

misleading and prohibited activities[1594]. The misuse of assets and abuse of power under the French rules limited to those performed in bad faith. The bad faith is not presumed the burden of proof is left to the claimant on a case-by-case basis (in the criminal liability it is called the proof of the intentional or moral element[1595]). In practice, it is easy to prove bad faith through simple presumption related to the position held by the member of management. Abuse of confidence is an example of this bad faith such as guarding the rents due to the clients or the company[1596]. Misuse of assets is made contrary to company's interest such as laying down excessive remuneration (for purposes of the criminal liability considered as the material element[1597]). The abuse of power under the Jordanian rules is not conditional to bad faith performance. Yet it is limited to the abuse to achieve personal gains and interest or favoring the interest or gain of others. This performance should be performed in an unlawful manner and results in placing the company in a severe administrative and financial situation or incurring significant loss[1598].

548 ***Acting and omission.*** The actual misconduct of misuse of assets and abuse of powers is put on equal footing with the abstention and omission of actions required by law[1599]. The liability of the management includes conducts entailing embezzlement[1600], forgery[1601], fraud[1602], and abuse of credit. The management is also liable for fictitious distribution of dividends[1603] and false underwritings. In performing the disclosure obligation, the management is liable for incorrect or inexact information included in management reports[1604], omitting information and explanations required by law from shareholders that hide the actual situation of the

[1593] Article 159 JCC
[1594] Article 56 JSL of 2017
[1595] Cass. crim., 2 mars 1983 non publié au bulletin
[1596] Cass. crim., 7 sept. 2003, n° 05-80163
[1597] Cass. crim., 22 oct. 2014, n° 13-81743
[1598] Article 168 JCC; the role of the company controller emerges in this case. As a preventive immediate measure, the company controller dismisses the management of the company and appoints a replacement committee to take its place. This power under the new rule transferring the powers of the company controller to the JSC is transferred to the JSC therefore leaving the Jordanian rules on equal footing with the French ones as they attribute such a power to the *AMF*
[1599] Cass. crim., 13 mars 1972, n° 71-91378; Article 168 JCC
[1600] Limited under the Jordanian rules to public employees (Article 174 Jordanian Criminal Code)
[1601] c. pén., art. 441-1
[1602] When trading in securities (Article 63.c JSL of 2017); c. pén., art. 313-1
[1603] Article 278.a (5) JCC; C. com., art. L. 242-6 (using fraudulent means or lacking an inventory)
[1604] C. com., art. L. 242-6 : this infringement is separate from the publication of misleading information. It consists of a separate infringement (Cass. crim., 31 oct. 2000, n° 2000-007197)

company[1605]. The management should allow all shareholders and auditors to attend GAMs. They are liable for any conduct preventing a shareholder[1606] or the auditors[1607] from doing so. The management should not be interfering in the performance of auditors' duties. They should allow them to exercise their duties without restrictions. Any action preventing the auditor from exercising its duties holds the management liable[1608]. The management should respect the incorporation process of the company therefore; they are liable for the trading or issuing of shares ahead of the full incorporation of the company or the ratification of its statute[1609]. This liability is similar to that of founding shareholders[1610].

549 ***Scope of liability.*** The liability of the management covers the different forms of management the IC may undertake[1611]. In addition to the mentioned liable actions, members of the supervisory board under, French rules, hold a personal liability for the faults they commit during their term. Further, they may be held liable for the misconducts of members of the executive board only if they knew of and did not disclose it to the GA[1612]. The management has a liability regarding abnormal management actions '*acte anormal de gestion*'. This form of actions is defined as that action putting an expense or a loss on the company's part without being acted in the commercial interest of the company or without being justifiable by the commercial exploitation[1613]. An example of this form of actions is granting an advantage to a third party and not a preference over other counterparties. Further to selling an asset with a price that is inferior to its real value. The main purpose of this form of action is minimizing the taxable results or tax evasion. The management in this regard holds the burden of proof to justify that its action was performed in the interest of the company and in the course of commercial exploitation[1614]. Liable actions introduced in this paragraph interconnect further they can be limited. The limitation in terms of acquiring approvals or waivers. Alternatively, a

[1605] Article 278.a (4) JCC; C. mon, fin., art. L. 465-3-2
[1606] C. com., art. L. 242-9
[1607] C. mon. fin., art. L. 573-4 (for example not calling the auditors to attend the meeting)
[1608] C. mon. fin., art. L. 573-4 ; Article 279.c JCC (intentional action)
[1609] C. com., art. L. 242-1; Article 278.a (1) JCC
[1610] Their liability is limited to the incorporation stage of the company. Throughout this stage, they should ensure the compliance with the entirety of requirements stated by the governing legal rules (company and securities rules); C. com., art. L. 210-8
[1611] C. com., art. L. 242-30
[1612] C. com., art. L. 225-257
[1613] CE, 5 janv. 1965, n° 62099
[1614] CE, 22 Juin 2011, n° 320746

limitation in terms of the scope of liability. The following paragraph addresses the different forms of limitations.

§2: Limitation of Liability

550 ***Authorization of GA.*** The liability of the management stands once an infringement or non-compliance is activated in terms of an obligation imposed by the governing legal rules or the statute of the company. The management may seek an authorization, ratification or waiver from the GA to limit the liable action. Company rules differ in treating this form of limitation. The French and Jordanian rules do not accord this form of exoneration to the management. The French rules prohibit any clause in the AOA that requires prior opinion or authorization of the GA for the decisions made by the management or that including a waiver *a priori*[1615]. Further, they do not take into consideration the decisions of the GA in eliminating or suspending the liability for the fault[1616]. The Jordanian rules consider the possibility of the exoneration and waiver of the liability by the GA. Nevertheless, this decision does not exempt from the legal prosecution of the board[1617]. Therefore, the liability stands. The waiver made by the GA is limited to the issues the GA was informed of. Hence a similar restriction to the French one. No waiver is made *a priori*. Arguing the liability by the board and using the waiver of the GA, as means to eliminate the liability is not possible ahead of the publication of annual and auditor reports[1618].

551 ***Delegation of powers.*** Another form of limitation of liability is by proving the delegation of activity or power. In this case, members of the management do not directly perform the misconduct therefore; they should not be accountable for it[1619]. This is specifically related to the notion of presumption of liability. If the governing legal rules presume the management as liable for the misconducts and the infringements happening within the company then the burden of proof is left to the management to prove otherwise. Therefore, the management may use the delegation as a counter argument for the presumption. The limitation in this case is of the

[1615] C. com., art. L. 225-253 al. 1
[1616] C. com., art. L. 225-253 al. 2; Cass. com., 8 mars 2016, n° 2016-012510
[1617] Article 157.a JCC
[1618] Article 161.a JCC
[1619] Fabrice François and others, *Dirigeant de Société : Statuts Juridique, Social et Fiscal* (3rd edn, DALLOZ 2015)

criminal personal liability of the member of management. The liability stems out of the general principle considering the manager liable for the non-compliance with the legal rules and for the entirety of infringements occurring within its company regardless if he was behind the infringement. The limitation is in having a manager delegating its powers and the lack of the direct connection between him and the infringement. Therefore, in this case it is not possible to prove the material element of the criminal liability due to the lack of actual personal act. The delegation of powers differs if there is a legal person involved in the delegation. The liability cannot be transferred if a legal person is involved. The representative is performing in the name and for the benefit of the legal person. Proving the delegation requires the manager to prove first the delegation of power related to the committed infringement and the non-participation in committing the infringement[1620].

552 ***Possibility to delegate.*** The question rising in this regard is the following: is the delegation legally possible? Going through company rules, we find no text directly addressing the delegation of management powers. The mere delegation addressed under the Jordanian company rules is that of the chairman for the representation before competent authorities[1621]. The regulatory silence does not mean that it is prohibited to delegate the powers. The necessity to delegation rises in cases where the management cannot solely cover the entirety of the activities due to the size or structure of the company or the diversity of its products. The management in this case decides to delegate partially its powers instead of ending up being liable for conducts it took that put the company in danger or at significant risk due to ineffective decisions. A perfect example is given in this case is the outsourcing of activities made by the IC to a MC, yet in jurisprudence the delegation made to third party is very restricted in being considered as a transfer of liability. The delegation may be restricted or prohibited in the AOA.

553 ***Exonerating delegation conditions.*** The exonerating delegation is conditioned. The conditions are set by jurisprudence. The delegation should be made to a subordinate individual in the company or the group of companies that holds the required competence (professional competence and knowledge in the applicable regulation[1622]), authority (holding an authoritative

[1620] Cass. crim., 19 sept. 2007, n° 06-85.003
[1621] Article 152.a JCC
[1622] Cass. crim., 8 dec. 2009, n° 09-82.183

position in order to insure the compliance of its subordinates[1623]) and means[1624] (notably financial means to execute orders)[1625]. The delegation for the same activity made to a sole person and not spread among different ones[1626]. This condition finds its reasoning in the difficulty this diversified delegation imposes on the proof of the initiative of one of the delegates. The delegation is not limited to specific form or category of activities. Nonetheless, it should be a total delegation of the entirety of powers. The jurisprudence provided a general scope of application for this limitation as long as the governing legal rules do not prohibit such delegation[1627]. Further to having a precise content of the delegation of a specific form of intervention[1628]. French company rules address one special case of delegation of powers consists of that authorization provided by the board to the general manager in terms of providing surety and guarantees in the name of the company[1629]. The manager has the full discretion to delegate this power to another person within the limits and conditions stated for the initial authorization. The delegation limits only the criminal liability as for the civil liability it stands before the company for the misconducts in terms of the choice of the delegated person, the performed delegation, the attributions or the fact that the manager did not supervise the action[1630].

554 ***Limited recourse action.*** The liability stands for a limited period of time. It is not eternal. This period set by company rules differs from one country to the other and differs from one liable person to the other. Prosecuting and challenging the liability of the management is limited to the period of three years following the damaging action or its discovery if it was hidden[1631]. As for the case of qualifying the conduct as a crime, the time limit for the legal action is twenty years[1632]. French jurisprudence considers the publication as the triggering factor and not the actual discovery of the fraudulent act[1633]. The Jordanian rules provides an intermediate period for the time limit of the legal proceeding. The liability expires at the end of five years following

[1623] Cass. crim., 13 mai 1996, n° 95-83.057
[1624] Cass. crim., 11 dec. 1996, n° 95-85.341
[1625] Cass. crim., 26 mai 1994, n° 93-83.180
[1626] Cass. crim., 23 nov. 2004, n° 04-81.601
[1627] Cass. crim., 11 mars 1993, n°s 90-84.931, 91-83.655, 92-80.773
[1628] Cass. com., 3 juin 1997, n° 94-12.450
[1629] C. com., art. R. 225-28
[1630] Cass. com., 6 fevr. 1962, *Bull. civ.* IV, n° 80
[1631] C. com., art. L. 225-254
[1632] CPP, art. 7; six years for minor offences (CPP, art. 8)
[1633] Cass. crim., 9 juill. 1996, n° 1996-003580; Cass. crim., 20 fevr. 1997, n° 96-81.613

the GAM that ratified the annual budget and the final accounts and statements of the company[1634]. The question rising in this regard is the following: which GAM is the law addressing? The meeting addressed in this rule is that following the decision, action or omission leading to the liability. The rule do not provide such a precision yet it can be indirectly deduced as the triggering factor for the liability. The rule provides a calculation based on a GAM and not related to the damage incurred by the actions of the management. GAM triggers the factor of knowledge. The time limit falls outside the general rule of time lapse of contractual liability and that of the tort.

555 ***Transition.*** This sub-section introduced case examples for the liable action and the possible means to limit the liability. To fully benefit from the regulatory imposed accountability shareholders, company and third party should understand the basis for the rise of such liability. Therefore, an explanation of the structure of the liability. In terms of the behavioral requirement, that triggers it in addition to the nature of this liability in order to go through with challenging and private enforcement process. The following sub-section addresses thoroughly these points.

Sub-section 2: Structure of Liability of Accountable Person

556 ***General rule.*** The IC, the management and its different organs should comply with the best conduct of business practices. Including acting in due devotion and loyalty, with the necessary professionalism and independence in the exclusive interest of the company and its shareholders. Acting in a manner maximizing their interest and achieving their investment objectives on an equal basis, without incurring them any additional excessive costs or while guaranteeing personal gains or promising them of such gains in favoring one over the others or using manipulative or deceptive means[1635]. Further providing a concrete proof that guarantees their technical and financial organization and means. In addition to guaranteeing the experience and care of the management[1636]. In other words, the management owes a duty of care and loyalty. A question rises in this regard. To whom the entirety of management duties are owed?

[1634] Article 157.b JCC
[1635] Article 57 JSL of 2017
[1636] C. mon. fin., art. L. 214-9

Is it exclusively owed to the company and shareholders, or does the liability extend to cover third party?

557 ***Destination of duty.*** Exists a general undisputed principle states that persons discharging a responsibility and particularly the management owe their duties directly to the company. The duties of the management are also owed to shareholders direct or indirect differs from one legal system to the other. It is connected to the source of corporate power or their process of appointment, is it shareholders or statute? The company is conceptualized while considering the roles of both the management and shareholders in two different ways. First seeing shareholders as the source of corporate power and the director as agents who receive the authority to make decisions on behalf of the company by way of delegation from shareholders. Alternatively, qualifying directors as *sui generis* actors or fiduciaries who act for the benefit of shareholders and, depending on how the interests of the company are defined, the benefit of other stakeholders, but whose powers are derived directly from a statutory act of authorization[1637]. In the sphere of the IC, the management is qualified as those actors acting in the best interests of shareholders. Management of IC owe their duty to the company while acting in the best interest of shareholders (collective interest and not individual). This statement falls under the second conception of the source of corporate power meaning the statute. They owe a direct liability to both the company and shareholders. Owing the liability differs from owing a duty. Nonetheless, when considering the above-mentioned general rule for management conduct we note that they owe a direct duty to shareholders by acting in their best interest. Therefore exists a duty of care.

558 ***Duty towards third party.*** The debate is in terms of owing a direct duty of care towards third party. The general principle states that the liability of the management is engaged directly towards the company and not third party. Reasoned in the autonomy in the legal personality of the company and that the management is the mere representative of the company. Company rules nonetheless, state a direct personal liability of management towards third party for their fault, misconduct and negligence in operating the company[1638]. This liability holds an exceptional character to the general principle[1639]. The view of the management as a simple

[1637] P. Paech 2013, n (965) page 63
[1638] C. com., art. L. 225-251; Article 157 JCC
[1639] Cass. soc., 10 mai 1973, n° 71-12.690

representative changed with time. Once the management is attributed the entire operation of the company they are the principle decision makers. Their execution and conduct may negatively affect or harm third party. Therefore, the law sees them as liable for the indemnification for the damage and prejudice they cause. The direct liability envisaged under company rules is limited to the fault resulting from the exercise of the management activity and does not include the fault separable from the management function[1640]. As for the personal liability of the management towards third party, it concerns the detachable misconduct from the management function. The French jurisprudence presented a definition for this form of misconduct resulting in a personal civil liability. It is defined as the case of a fault of a particular gravity incompatible with the normal exercise of the social functions of the management[1641]. The Jordanian rules address this form of liability merely to adjust the rule of redress from the actual damage to include the lost profit[1642].

559 ***Liability in IC***. Shareholders participate in laying down the statute governing the performance of the company. This participation is performed in the incorporation level of the company. As at later stages, the management derives its duties and functions from the already set statutes or those set by law. Therefore, the founding shareholders may be seen as the actual shareholders who were the original source of power and duties of management and the corporate. The later joining shareholders merely agreed to the existing rules and method of governance. Nonetheless, the IC holds an autonomous legal personality that provides its statute with binding nature and presents it as the source of power. Shareholders perform mere modifications to the AOA at later stages while following the process stated by company rules. This does not in any way, undermine the role and the control shareholders have and exercise in GAMs especially in appointing members of management. As previously mentioned the source of liability and corporate power is the statute of the company and legal rules. Shareholders in general cannot tell the management what to do. Law and the AOA state their duties and responsibilities. On the other hand, shareholders and the company have expectations from the different behaviors of the management. They are expected to act in due care and diligence. Any

[1640] CA Versailles, 17 janv. 2002, n° 00-7792
[1641] Cass. com., 10 fevr. 2009, n° 07-20.445
[1642] Jo. cass. civ., 31 jan. 2000, n° 1056/1999; an explanation provided by the explanatory notice of the Jo. civil code for Article 363 of the same code

misconduct or fault result in triggering the liability clause. The following paragraphs 1 and 2 address respectively the expectation and the nature of the liability.

§1: *Behavioral Expectations of Liable Person*

560 ***Duty of care.*** The expected care and diligence of the management in their practices relate to a thorough analysis and understanding of the functions they are obliged to perform, and the knowledge, competence and skill they are expected to have. In the sphere of the IC, the management is expected to hold the necessary knowledge, experience and skill in financial and economic matters covering the decisions they are expected to make throughout their term. Further, under corporate governance principles the management is expected to provide effective and efficient portfolio management. Meaning laying down a risk management policy and employing cost friendly mechanisms. Previously in this work, we addressed functions, knowledge, competence and skills of management. The function relates to an expectation of the performance set by law in the form of a care and diligence and imposing liability when they are missed. Further to the expectation of the company and its shareholders of promised outcome. The skill, knowledge and competence of the management form important factors in the qualification of misconduct. They influence the standard of care legally required by the management and the proof of its existence in a said decision or conduct. The duty of care addresses one of the main aspects of the agency problem existing between shareholders and the company. It aims at ensuring that directors devote sufficient time, care, and diligence to managing the company, act only on an informed basis, possess the necessary skills and experience to make sound business decisions, and consider the likely outcome of their decisions carefully. The behavioral expectation related to the duty of care considers three main elements constituting the duty. The duty to monitor, inquire and care in decision-making[1643]. The duty to monitor and oversee the conduct of the business entails laying down operation policy of the company such as that prepared by the board, in addition to the continuous reporting of company's activities (business activity report prepared by the board). The duty to inquire meaning following up on the acquired information despite their source and raising cause for concern when necessary. This duty is closely linked to the oversight of the management. Duty

[1643] Melvin A. Eisenberg, 'The Duty of Corporate Directors' and Officers' [1989] 51 U. Pitt. L. Rev. 945

of care in decision-making in the sense of making informed decision (procedural element) while meeting the substantive element (business judgement rule may be used as a standard of care).

561 ***Standard of care.*** Acting in care and diligence requires the management to act in a specific manner that does not arise the question of liability for misconducts. This manner is known as the standard of care. Meeting this standard eliminates the liability of the management. The standard differs from one legislation to the other. There are three approaches used to define the nationally required standard of care subjective/objective standard, objective standard, and a reduced standard[1644]. A distinction made based on the level of strictness of the standard.

562 ***Subjective/objective standard.*** The objective/subjective standard establishes an objective lower benchmark that has to be satisfied by all directors, notwithstanding their individual skill, expertise, or experience. The benchmark is defined with reference to the care exercised by a prudent businessman with the knowledge and expertise that can reasonably be expected of a person in a comparable situation. However, the required standard is heightened if the director in question possesses particular knowledge or experience. In this case, the law expects the director to deploy his or her abilities to the advantage of the company.

563 ***Objective standard.*** The objective standard refers to the prudent businessman, similar to the objective/subjective standard, but does not explicitly provide for increased expectations in light of the individual skills of the concerned director.

564 ***Reduced standard.*** The reduced standard usually starts from an objective formulation of the care and diligence that directors are expected to employ. Contrary to the other two standards, it allows exceptions that lead to a relaxation of the objective benchmark, such as the case of a director lacking the knowledge or experience of an average businessman or does not occupy a full-time position on the board.

565 ***Nationally adopted standards.*** The French system adopted the first conception of the standard of care objective/subjective. The company rules do not provide an explicit definition to the standard of care. The definition and the requirements are found in the jurisprudence. A

[1644] P. Paech 2013, n (965) page 10

reasonably careful and diligent director. An objective definition, can be raised if the defendant has specific knowledge and experience differs depending on the position of the director and size of the company. For example, the care required from the director of a listed company is higher than that of the director of a small family-owned business. Directors have been found liable for lack of monitoring. Such as the case of the supervision exercised by the board over the general manager[1645]. The standard of care provided under the French rules considers employing the necessary efforts to achieve the set objective (*obligation de moyens*) contrary to the obligation of result. Triggering the liability of the management for not achieving a result is not automatic. The law imposes a burden of proof on the claimant to prove that the director did not employ the care set by law to achieve the expected result. This standard means that the management does not guarantee the result yet employs the efforts and means to achieve it[1646].

566 ***Jordanian standard.*** As for the Jordanian rules, they provide as a standard of care the prudent businessman in addition to a more strict care envisaged in the care provided for personal affairs[1647]. Both standards are applicable depending on the concept of remuneration of the agents[1648]. Considering the management as paid agents applies the prudent businessman standard. On the other hand, if the management is considered as non-paid agents then the level of care is elevated to that care provided for personal affairs. If the relationship between the management and the company is qualified as, a simple contract of management, (closer to the concept provided under French rules) the applicable standard of care is that of the average person without being obliged to achieve a specific result[1649]. Several questions rise in this regard: who decides if the standard is met or not? What does the failure to meet the standard mean for the management? Does the company or its shareholders have a role in triggering the qualification of the standard? Answering these questions requires addressing the possible existence of a presumption of liability in the governing legal rules. Further to the impact of the presumption on the internal control.

[1645] Cass. com., 3 Janv. 1995, n° 91-18.109
[1646] CA Versailles, 11 juin 1998, n° 1998-055284
[1647] Article 841 Jo. Civil Code
[1648] Jo. cass. Civ., 16 aug. 2005, n° 1292/2005; Jo. Cass. civ., 7 sept. 2009, n° 897/2009
[1649] Article 358 Jo. Civil Code

567 ***Presumptions.*** The available texts and jurisprudence are uncertain in affirming the presumption of the misconduct. The presumption transfers the burden of proof from the claimant to the respondent. Therefore, proving that the standard of care was not met hence the duty is violated. French law considers that the misconduct and fault should be proven. This statement puts the burden of proof on the claimant. The claimant proves the existence of this fault using the authorized means of proof such as expertise. On the other hand, there is a difference between the violations of legal or statutory provisions and other forms of infringements. The mere existence of the statutory or legal infringements might be enough to presume the fault or misconduct if the management is considered as corporate officer in the sense that bestows the agency relationship over the circumstances. Therefore transferring the burden of proof to respondent to prove the contrary meaning that he provided the expected care. A rebuttable presumption exists under French law that is the presumption of the liability of the director for the participation in wrongful decision of the board. The liability stands unless the directors proves that he behaved as a cautious and careful director notably by opposing this decision[1650].

568 ***Business judgement rule.*** In this regard, the US courts invented a rule 'business judgement rule' that serves as the standard of care and presumes that the director acted within the required care[1651]. This rule provides a higher level of protection and introduces the US standard of care as reduced and less restrictive. Interpreted as *a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company*[1652]. This rule lays the burden of proof on the claimant to prove that the directors violated the conditions of this rule. The rule requires a decision that has been made, the director did not have a financial interest in the decision, satisfying the procedural element in issuing an informed decision, and standard of review for the decision is the rationality. Therefore, the US courts will respect the

[1650] Individual personal presumption of liability (Cass. com., 30 mars 2010, n° 08-17841)
[1651] Percy v. Millaudon
[1652] Aronson v. Lewis

directors' business judgment, unless it cannot be "attributed to any rational business purpose[1653]".

569 ***Presumption in Jordan.*** Under the Jordanian law, the presumption may be understood implicitly from the legal text addressing the liability of the management. The law states that the collective liability of the management includes the entirety of board members unless the board members establish otherwise by proving his opposition in the boards minutes of meeting[1654]. Contrary to this statement, the JSL provides the management of the company with a safe harbor in terms of the liability for the infringements of securities rules. The law requires the proof of knowledge of the management to arise the liability[1655]. This statement transfers the burden of proof to the claimant in terms of the infringements of securities rules and not those committed in violation of company rules. The lack of an explicit presumption under company rules leads to the application of the general rule of evidence stating that the burden of proof is that of the claimants[1656].

570 ***Duty of loyalty***. The management is expected to act with care and diligence in addition to acting with loyalty towards the company and its shareholders. The duty of loyalty is a moral conception imposed on listed companies in the aim to restore and safeguard shareholders' interest in the management. This duty is imposed for the benefit of both the company[1657] and its shareholders[1658]. The French jurisprudence affirmed this duty[1659]. How is this duty interpreted and translated in practice? Three main obligations achieve the duty of loyalty averting from the abuse of assets and managing the company in the social interest, not competing with the company in any manner including incorporating a company with similar objectives or acting in a competitive manner against the company[1660]. Further, to the transparency and disclosure of

[1653] Walt Disney co. Derivative Litigation
[1654] Article 157.b JCC
[1655] Article 107.h JSL of 2017
[1656] Article 77 Jo. Civil Code
[1657] Cass. com., 24 fevr. 1998, n° 96-12638; Cass. com., 18 dec 2012, n° 11-24305
[1658] Cass. com., 27 fevr. 1996, n° 94-11.241
[1659] Ibid
[1660] Article 148.b JCC; see : Philippe Conte, 'L'Abus de Confiance Commis au sein d'une Personne Morale Echappant à la Qualification d'Abus de bien Sociaux' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015) page 231

self-dealing and any agreement entered in a manner arising conflicts of interest[1661]. This duty qualifies the relationship between shareholders and management as an agency relation. Contrary to this statement, the French rules do not qualify the said relationship as such. Therefore, under tort law clauses in French legal tradition many texts may be particularly suitable for establishing such a direct legal relationship. Given that these rules provide for the liability for any damages caused intentionally[1662] or by negligent or imprudent conduct[1663]. This duty is closely connected to conflicts of interest. The most important conflicts addressed by the duty of loyalty are related party transactions (self-dealing) meaning the transactions between the company and its directors weather directly or indirectly. In addition to corporate opportunities meaning exploiting inside information in a competitive manner. In the sphere of the IC, the management is expected to act in the best interest of the company that includes non-disclosure of confidential information and non-competition with the company.

571 ***Related party transactions***. Under the national rules exists the general rule of hindering conflicts of interest and not having direct or indirect interests in the transactions performed on behalf of the company. Further, the rules address three forms of transactions prohibited transactions, transactions entered into outside the normal course of business and transaction entered into within the normal course of business. This distinction is particularly provided in French rules. Prohibited agreements include loans or guarantees by the company to the director[1664]. The second form of transaction are those entered into not through an ordinary course of business directly or indirectly by the management known in France as regulated agreements. They are not prohibited yet they require the authorization of the board[1665]. For example, these transactions include the bids or offers of contracting published by the company in addition, the management participates in the offers on an equal footing with other contractors[1666]. Another example is signing a guarantee or credit agreements by the general manager. The fact that such form of agreements are entered into without priory obtaining the authorization of the board does not hold the general manager personally responsible before third

[1661] Article 148.c JCC
[1662] C. civ., art. 1240 (general rule)
[1663] C. civ., art. 1241; C. civ., art. 1850
[1664] C. com., art. L. 225-43
[1665] C. com., art. L. 225-38
[1666] Article 148.d JCC

party suffering a damage as a result of this agreement. The French jurisprudence considers that engaging the company without being authorized does not categorize the action as *faute separable*[1667]. As for the remaining form of transactions, those entered into at arm's length and in the ordinary course of business, they are permitted and they do not require further authorization[1668], such as the agreements entered into on a group level.

572 ***Transition***. The liability stands when a liable action is committed. The question rising in this regard is the following: what is next? The following step is qualifying the liability in terms of its nature, origin and character. This qualification provides the basis for the direct control exercised by shareholders, company and third party. The qualification of the liability further explained in the following paragraph 2.

§2: *Nature of Liability*

573 ***Classification.*** Holding the management liable in its simplicity as a general concept of control is a statement that embeds various questions. What is the legal basis for this liability? Under which rules is it reviewed? Does the liability entail a form of redress for the claimant? The qualification of the liability should be clear and complete. To qualify the form of the liability in question the law provides three main categories. A qualification based on the nature of the liability leaving the claimant with a civil or criminal liability. Another based on the origin of the liability leaving the claimant with joint, several or solider liability. Lastly a qualification based on the character of the liability, which introduces two forms of liability direct and indirect. The difference in the chosen qualification has major impact on the financial motive behind the action.

574 ***Civil vs. criminal liability.*** The liability is the obligation to answer to one's actions. In the sphere of private law, the liability takes two main forms civil and criminal. They are distinct from one another yet they are cumulative and they intertwine. The same person may be liable

[1667] Cass. com., 20 oct. 1998, n° 96-15.418; Cass. com., 8 nov. 2017, n° 16-10.626; Caroline Coupet, 'Garantie non Autorisé par le Conseil d'Administration: Quelle Responsabilité pour le Dirigeant Social?' (2018) 3 Revue Droit des Sociétés 29

[1668] C. com., art. L. 225-39

under both civil and criminal texts[1669]. Each of the two forms have its set rules that govern the consequential procedures following its occurrence. Civil liability has a larger scope of application than the criminal one. In practice, it extends to include several domains of the law. It has an exclusive general objective that is repairing damages. The civil liability stands without the need for an actual legal text that addresses the damage resulting from this liability. On the contrary, the criminal liability requires the existence of an incriminating legal text to stand.

575 ***Forms of civil liability.*** Civil liability of the management depends on company rules governing it. In its composition, it is similar to the civil liability addressed in the general rules of law. The general rule provides two forms of civil liability depending on the qualification of the relationship connecting the concerned parties. A contractual civil liability and a tortuous one. Which of the two forms of civil liability does the management report to? Answering this question differs depending on the reviewed legislation. Both liabilities are similar in terms of the composition the difference lies in the complementary consequences[1670]. Both liabilities compose of the damage[1671]or prejudice (material, physical or moral), fault[1672] (intentional or unintentional) and the causality link between the damage and the fault (French rules) or the damage and the prejudice (Jordanian rules).

576 ***Qualifying based on appointing.*** Under the Jordanian rules there is no explicit text qualifying the civil liability of the management as either contractual or tortuous. Therefore, when reviewing the legal rules that address this liability we note two different viewpoints. One possible qualification of the liability based on the process of appointing the management. Therefore, the liability is qualified as contractual based on the agency contract. Another qualifies the liability based on the source of management power regardless of the appointing procedure. Therefore, the liability is qualified as both contractual and tortuous depending on the

[1669] The general manager is held liable under civil liability for *faute separable* if he/she was condemned criminally for such an action (Cass. 1er civ., 14 dec. 1999, n° 97-15.756); Patrice Jourdain, 'Autorité de la Chose Jugée au Pénal et Responsabilité Civile du Dirigeant Social : la Condamnation Pénale du Dirigeant suffit-elle à Caractériser une Faute Civile Personnelle Détachable de ses Fonctions ?' (2000) 2 RTD civ. 342

[1670] Philippe Le Tourneau, *Droit de Responsabilité et des contrats Régimes d'Indemnisation* (11th edn, DALLOZ 2017) page 481

[1671] Article 256 Jo. Civil Code

[1672] The notion used in French law, the Jordanian law is distinct in its approach as it considers merely the damaging conduct; damage is suffered prejudice is repaired

claimant and the liable responsible person. These viewpoints introduce different possibilities for the qualification. Considering members of the board as the agents and the company as principle. Further to taking into consideration, that members of the board are appointed directly by shareholders bestows the contractual nature on the civil liability based on the agency contract. As for the general manager, he is considered agent of the agent consequently the relationship is characterized as agency hence the liability is contractual.

577 ***Qualifying based on source of power.*** In the second viewpoint, the basis of qualification is the source of corporate power. It considers the statute and the legal rules as the source of management power, further to considering the management as owning direct duty to the company as they act as its legal representatives. This consideration qualifies the relationship between the company and the management as contractual this includes both members of the board and the general manager. As for the relationship of the general manager with shareholders, it is qualified as tortuous as he does not in fact owe a direct duty to them. He acts in the social interest of the company to achieve its objectives. The legal rule addressing the liability of the management does not cover the general manager. The relationship between the board and the shareholders is debatable due to the control shareholders exercise over the appointing and in laying off the board. Considered as contractual reasoned with the control shareholders exercise and the fact that they choose them. Tortuous if reasoned based on the statement that considers shareholders as owners of their contribution in the company and not the company as a whole.

578 ***French qualification.*** Under French rules, the liability of the directors is subject to the special texts addressing this form of liability under company rules and not the general rules of civil liability. The liability differs in terms of a standing company or a company suffering from a financial difficulty**.** The civil liability of the management in France is neither contractual nor tortuous. A distinctive approach of the French doctrine to address a mere civil liability without entering into a more detailed qualification. The non-contractual liability of the board is based on a long-standing consideration that the board is a social organ that has no legal personality[1673]. Further to considering the source of power of the manager and members of board as legal texts

[1673] CA Nancy, 19 juill. 1946, D. 1947, p. 525, note A.C

and not the contract or the performed delegation. Reasoned by the fact that the company is an institution and not only a contract. A moral person that has a legal personality, rights and powers but cannot in practice express its will and interest. Therefore, law attributes the power to the management. As for members of the board and the general manager, they have a legal personality that makes them subject to liability. This liability is civil and personal. This liability is presumed by jurisprudence for the individual member for the participation in a faulty decision unless he/she proves that he/she acted as a diligent and prudent manager[1674].

579 ***Company's liability.*** The company is also liable. It is liable towards third party acting in good faith for the actions of its members of management[1675]. Generally considered as tortuous liability for the fault, damage and prejudice incurred by third party. Nonetheless, it is further contractual in cases where a contract was entered into with the concerned third party.

580 ***Criminal liability.*** Criminal liability entails an infringement, action or omission prohibited by law. It is limited in its scope of application to a legal incriminating text. Its main objective is repression. It is not strictly connected to the civil liability they co-exist further to existing separately. The criminal liability requires its main elements to stand. Starting point is the legal element having a legal incriminating text[1676]. The criminal liability has two other elements material and moral. The material element requires a conduct of the person in question. It is not related to the result of the action (committing an action prohibited by law) or omission (abstaining from performing an action required by law)[1677]. The moral element considers the will of the conductor. This element addresses the intentional infringement[1678]. The lack of this element does not stand a criminal liability. The actor of the crime and the one held liable is that who fulfills the elements of the crime material and moral[1679].

[1674] Cass. com., 30 mars 2010, n° 08-17841; Sophie Schiller, 'Les Fautes des dirigeants Sociaux' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015) page 753

[1675] Article 156.a JCC; C.com., art. L. 225-35

[1676] C. pen., art. 111-3 ; Article 3 Jo. Criminal Code

[1677] C. pen., art. 121-3; Article 73 Jo. Criminal Code

[1678] Articles 63 & 64 Jo. Criminal Code

[1679] Jo. cass. crim., 23 oct. 2017, n° 2149/2017; Article 75 Jo. Criminal Code

581 ***Standing to criminal liability.*** The criminal liability stands for both the company and it members of management. Even though the moral element traditionally requires a natural person to commit it. The company is held criminally liable for its actions and those of its representatives and subordinates[1680]. Whether the actions of the representatives or subordinates is performed intentional or unintentionally[1681]. When the criminal liability of the company was first introduced into legal texts it stood if it was explicitly expressed in the governing legal text. The rule was that companies cannot be held liable under the text criminalizing all persons unless the text explicitly extend to cover moral person[1682]. Currently the criminal liability of the legal person stands without the need for a specifically incriminating text[1683]. The criminal liability of the company is connected to an infringement resulting from a representative or a subordinate. This rule covers members of management of the company. The criminal liability of the member of management is engaged alongside that of the company for the same infringement as long as the member committed the fault for the account of the company[1684]. For example, the criminal liability of members of management stands for actions involving fraud, embezzlement, abuse of assets, deception and others[1685]. The criminally liable actions are mentioned under the general rules of criminal law and company rules.

582 ***Joint, solider and several liability.*** Another category of liability is the one based on the origin constitutes of several, joint and solider forms of liability. These forms apply solely to members of management and not the company. This category addresses the enforceability against members of management. It is important for shareholders, company and third party to know against whom the liability is enforced. These proposed forms of liability are personal even if the indemnification is performed collectively. The several liability is a personal liability limited in its framework to the degree of contribution. It is proportional, every member of management answers for its liability. Unlike the joint liability that introduces a collective form of liability. The enforceability for defaults is then made against the entirety of the members or

[1680] Article 74.2 Jo. Criminal Code; C. pen., art. 121-2
[1681] Cass. crim., 28 avr. 2009, n° 08-83.843
[1682] Cass. crim., 18 avr. 2000, n° 99-85.183; Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité
[1683] C. pén., art. 121-2
[1684] Cass. crim., 29 juin 2016, n° 15-85.523
[1685] See: Coralie Ambroise-Castérot, *Droit Pénal Spécial et des Affaires* (5th edn, Gualino 2016)

by choosing one of the members that answers for his proportion. Another form of collective liability provided in civil law is the solidarity. This form of liability presents every liable person as answerable for the total amount of damages on behalf of the remaining involved persons. French company rules holds members of the management liable severally and solidary for their violation of the legal rules, the AOA in addition to their misconducts in the management of the company[1686]. As for the Jordanian rules they hold members of the management liable severally, jointly and solidary towards the company, shareholders[1687] and third party[1688].

583 ***Direct and indirect liability.*** The character of the liability is of importance. The character is related to the possible answerability for the actions. Previously mentioned the main principle is that the management owes its duties to the company. They are liable for their misconducts and omissions towards the company. This liability is the most obvious form of management liability and it is direct. As for the liability towards shareholders and third party it is not necessarily obvious neither it is always direct. A direct liability owed by law for shareholders does not exist under French company rules. This does not undermine the right of shareholders of IC to initiate a legal proceeding collectively or individually against members of the management[1689]. Contrary to this rule, Jordanian rules address a direct liability of management's negligence and failure in performing its functions towards shareholders separate from the general liability of members of management that also covers shareholders alongside the company and third party. As for the liability towards third party, it is indirect despite the statement of the liability mentioned under both French and Jordanian company rules. Generally, there is no direct link between members of management and third party. Nonetheless management's actions may negatively influence third party (stakeholders or not). The liability towards third party is that of the company for the actions of its members of management[1690]. The personal liability of members of management stands directly before third party only in the limits of a misconduct separate from their functions and management activities, if two conditions are met; the fault was intentional and of particular gravity incompatible with the

[1686] C. com., art. L. 225-251
[1687] A liability strictly given to shareholders for negligence and failure (Article 159 JCC)
[1688] Article 157 JCC
[1689] C. com., art. L. 225-252
[1690] C. com., art. L. 225-35; Article 156 JCC

normal course of exercise[1691]. An approach introduced by the French jurisprudence[1692]. No such statement is addressed under Jordanian company rules. Nonetheless, the liability of the management outside its functions may stand towards third party according to the general rules of tort law if a damage occurs[1693].

584 ***Transition.*** Notwithstanding the importance of regulatory addressing the liability and obligations of members of management; shareholders of IC look beyond the mere statements of the legal rules incriminating or questioning the conducts and actions of members of management. Shareholders want to exercise a degree of direct control that permits them to prevent damaging decisions and actions further to repairing the possible occurring damage. The exercise of the direct control is dependent and complementary to management performance of the duties and obligation stated by law. The question rising in this regard is the following: how is the direct control performed? Is it exclusive to shareholders? The following chapter 2 answers thoroughly these questions.

[1691] Cass. com., 20 may 2003, n° 99-17.092; Cass. com., 10 fevr. 2009, n° 07-20.445 ; Cass. Com., 20 dec. 2017, n° 16-16.015; Thibault de Raval d'Esclapon, 'Responsabilité du dirigeant à l'égard des tiers : le cas particulier d'un comité de surveillance d'une SAS', Cass. Com., n° 16-16.015, *Revue des Sociétés*, 2018, p. 319

[1692] See : Deen Gibirila, *Responsabilité Civile des Dirigeants de Société* (Francis Lefebvre 2016)

[1693] Article 256 Jo. Civil Code

Chapter 2: Direct Control

585 ***Focus of direct control.*** Who should make decisions for a corporation? Moreover, how should decisions about who makes decisions be made? These fundamental governance questions motivate much of corporate law, as regulators seek to strike a sensible balance of power between managers, shareholders, and other players in the corporate system. The obstacle for shareholders' governance and control is coordination, communication and gathering. The role of an activist shareholder rises in this regard. Activist shareholder may seek to gather shareholders in order to lobby and make a change in the operation of the company. In practice if this activist shareholder does not own a significant share capital then the likelihood of him succeeding is minimal unless this shareholder is ready to bear the total bill for the change. What shareholders generally seek is to file a request to include an item on the meeting agenda. They employ their voting rights in the interest of all the members of the company and promote their own[1694]. *"*For every action there is an equal and opposite reaction*"* Newton third law. This famous scientific rule is similar in its essence to the legal rule applied in cases of violation and breach by management. Management owes a duty to shareholders, company and third party. Particularly shareholders rely on the statements of management. Management statements may entail breaches of their duties and obligations[1695]. They may result in losses on the part of the company, shareholders or third party. In legislation, directors are responsible for losses they cause voluntarily or byway of negligence or omissions. Shareholders should have the right to claim the redress for damages resulting from this violation whether they incurred the prejudice directly or derivatively, collectively or individually[1696]. A redress outside of financial collateral arrangements in cases of insolvency and liquidation[1697]. This arises the question of burden of proof of the negligence or intention. In most cases it is the claimant's responsibility to prove the loss, its extent and that, it resulted out of a management behavior[1698]. Direct control focuses globally on all the components of the company. It is not limited to the limits of shareholders'

[1694] M. Andenas n (71) 296
[1695] Dermot Cahill, *Corporate Finance Law* (Round Hall Sweet and Maxwell 2000)
[1696] Rebecca Money-Kyrle and Christopher Hodges, 'European Collective Action: Towards Coherence' (2002) 19 (4) Maastricht Journal of European and Comparative Law 477; Duncan Fairgrieve & Geraint Howells, 'Collective Redress Procedures: European Debate' (2009) 58 (2) International and Comparative Law Quarterly 379
[1697] Gulenay Russen, 'Financial Collateral Arrangements' (2007) 2 (4) Journal of international Commercial Law and Technology 250
[1698] Franz Reichenbach, 'The Obligations and Liabilities of Directors and officers of Companies and their Protection by Insurance' (1981) International Business Lawyer 9 (1) 5

rights and control. It addresses private enforcement exercised by shareholders as its key element. Nonetheless, it extends to the autonomous control the company exercises over its proper functions. The following sections address respectively these two elements.

Section A: Private Enforcement

586 ***Definition.*** Enforcement is the act insuring the obedience or observance to something[1699]. Shareholders' private enforcement is a form of intervention in the decision-making process and its post legal consequences. Meaning permitting them to exercise direct control over the functioning of the company. Enforcing shareholders right in the sense that allows them to initiate and make use of the rights attributed by law. The enforcement generally relates to the opportunity to initiate a legal proceeding once a right has been violated.

587 ***Strengthening enforcement***. Investors' confidence that company's managers, members of board, or even controlling shareholders will protect the capital they provide from misuse and misappropriation is an important factor in the capital market. Members of management and controlling shareholders may have the opportunity to engage in activities favoring their own interest over that of the remaining shareholders. In the process of investor protection and safeguarding shareholders' interests, a distinction is made between ex-ante and ex-post shareholders' rights[1700].

588 ***Place of shareholders' control.*** Between shareholders and members of management, much of the struggle is played in three main dimensions: vote, lawsuit and sale. Shareholders appoint board members who then appoint a general director that share with them the operation of the company. The decision-making on daily basis is vested with this organ. If shareholders' are not satisfied with the board, they remove them in the following election cycle. Shareholders' who cannot remove may seek to file a lawsuit claiming a harm for the violation of securities rules or duties set in company rules. Shareholders who see no chance for a lawsuit or find it long and costly decide to sell or redeem their shares. The main dimensions covering the relationship gathering the management and shareholders are based on rights attributed by law or

[1699] Collins Thesaurus 2008 n (1281)
[1700] OECD 2015, n (875) page 19

by statute to shareholders allowing shareholders to enjoy and employ their attributed rights is the main concern of private enforcement. In legal texts in the process of protecting investors of the capital market an investor protection association or fund is put in place. The aim of this association or fund is to ensure that investors are effectively and justly reimbursed for the damages they incur. By providing defense services such as the investor defense association addressed under French securities rules. This association has as an explicit statutory objective defending investors of financial products including shareholders' associations formed under company law rules[1701]. Alternatively, reimbursement plans such as the investor protection fund established under the JSC. It provides investor protection against bankruptcy or liquidation of the intermediary[1702]. This protection explicitly excludes shareholders of the involved company[1703].

589 ***Transition.*** The question rising in this regard is the following: how do shareholders enforce their rights? Shareholders employ their rights on different levels. In this section, enforcement is linked to both levels of exercise of shareholders' power the enforcement on an ex-ante (sub-section 1) and ex-post (sub-section 2).

Sub-section 1: Ex-Ante Governance Tactics

590 ***Advantages***. Ex ante is a Latin term means 'before the event' refers to future events, such as future returns or prospects of a company. It is a forward looking. It asks questions such as; what effect will this rule have in the future? It is associated with welfare and policy[1704]. When connected to the rights and exercises of shareholders refers to rights and powers shareholders' possess as means to control the decision-making process a priori particularly, in cases where no violation to the attributed rights took place. They are rights that strengthen the enforcement power of shareholders ahead of a violation. In one way or another considered as preventive and preemptive to infringements and an approach to strike the balance between management and shareholders. The question rising in this regard is the following: where are ex ante rights found?

[1701] C. mon. fin., art. L. 452-1 ; they may file class actions

[1702] Article 33 JSL of 2017; Article 5 Investor Protection Fund Regulation of 2007

[1703] Article 15.b Investor Protection Fund Regulation of 2007

[1704] Legal Theory Lexicon 001: Ex-ante and Ex-post (Legal Theory Blog, 14 September 2003) < http://lsolum.typepad.com/legal_theory_lexicon/2003/09/legal_theory_le_2.html > accessed 18 December 2017

Set internally by shareholders or management in statute or internal policies or regulatory imposed in the governing legal rules. Addressing these rights is an attempt to achieve good corporate governance in a manner providing equitable treatment of all shareholders. In this regard, ex-ante rights are crucial to protect minority shareholders especially, in cases of takeovers, merger and related party transactions.

591 ***Disadvantage***. Ex-ante rights are not always considered as effective good corporate governance mechanisms. A main down side to ex-ante governance is the case where key players (mainly controlling shareholders or members of management) strive to enact structural rules that may tilt the resolution of future disputes in their favor. Such as shareholders enacting limitations and restrictions in the statute of the company, or board members laying down policies that allow them to minimize litigation fees or permits forum shopping[1705].

592 ***Transition***. Ex-ante rights consists mainly of preemptive rights that lay down measures taken a priori by shareholders throughout the operation of the company (paragraph 1). In addition to, a right granted particularly to shareholders of the OEIC. Open for employment at all times not necessarily used on an ex-ante basis yet mostly used this way. It is the right to request share redemption (paragraph 2).

§1: *Preemptive Rights and Measures*

593 ***Focus of rights.*** In order to provide shareholders and investors with an atmosphere where they easily practice their rights; the legal rules and the AOA provide preemptive rights and measures that shareholders engage in to be closer to the operation of the company and have a closer eye on the performance of the management. These rights exemplified in GA powers further to those powers with the possibility to be individually exercised.

594 ***Collective direct control.*** Shareholders forming the GA exercise collectively a set of rights through GAMs. The exercise is on an ex-ante basis with forward looking[1706]. We noted that the most essential right of shareholders is voting. They are enabled to exercise this right

[1705] George S. Geis, 'Ex-Ante Corporate Governance' (2016) Virginia Law and Economics Research Paper Series 11/2016, 41 (3) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2833953 > accessed 15 December2017

[1706] Previously addressed in Part I the powers and role of the GA

through the participation in GAMs. Shareholders' participation in GAM is achieved through facilitating the participation. Corporate governance principles suggest casting votes in GAM by way of proxy, telecommunication (video calls), or correspondences (postal or email). The actual influence and control shareholders exercise is made directly through the decisions taken in GAM. Those decisions that affect the composition of the board, question or supervise their performance. The question rising in this regard is the following: how can shareholders control GAM?

595 ***Controlling GAM.*** The key power of shareholders is in their communication and gathering. Their participation in GAM should be concrete and effective in the sense that present them as decision-makers and having binding power not mere advisory body who happens to collectively, own the business. Previously addressed in part I that convening a GAM is a power granted to the board on general terms and exceptionally can be convened by shareholders. This exceptional power feeds the control of shareholders as it grants them similar power as that of the board. Better practice of control requires small-qualified share ownerships to make such a request. Shareholders' control is exercised through dynamic participation in GAM meaning, enabling shareholders to have a say on the content of the meeting's agenda. In the sense that allow them to ask questions, being communicated the relevant financial information beforehand, in addition to being able to add a point on the agenda. As previously mentioned the agenda and the financial documents are prepared and communicated respectively by the board. This control of the form and process of the meeting is closely linked to the right to decide and make influential decisions. Therefore, shareholders vote during GAM on priory made or initiated management decisions and policies. Further, they vote on the election and removal of board members. The most important factor of the voting on decisions and policies is that entailing a say-on-pay and related party transactions.

596 ***Say-on-pay***. The say-on-pay differs from one legislation to the other. It may be a mere advisory role of preset policies by the board or binding in terms of actual vote over the attributed amounts. The two approaches are addressed in the new European shareholders' rights

directive[1707]. They address the direct control of shareholders on management remuneration through approved policies in GAM. Further opting to less restricted measure in allowing the company to apply remuneration policies previously rejected by the GA under a condition to provide a revised version in the following GAM[1708]. An approach to encourage long-term shareholder engagement. Management remuneration plays a key role in aligning the interests of shareholders and management and ensures that members of management act in the best interest of the company[1709]. The French legislature ahead of implementing the new amendments suggested by EU directive on shareholders' rights took a stand to counter excessive and unexplainable remuneration umbrellas that directors of listed companies enjoyed in the past years. The legislature decided to implement a strict regime of say-on-pay[1710]. Close enough to the suggested European regime yet stricter. The French regime provides two forms of voting on management remuneration ex-ante and ex-post vote[1711].

597 ***Ex-ante vote*****.** An ex-ante vote forward looking over the policies of remuneration therefore, a binding positive vote over the principles and criteria of the entirety of elements constituting the remuneration including fixed, variable, exceptional, and all the advantages[1712] of all natures transferred or attributed within the scope of management functions. This vote includes the totality of the members meaning the general manager, president and assistant director (*Directeur Général Délégué*)[1713], chairman and members of the supervisory board[1714].

598 ***Ex-post vote***. An ex-post vote backward looking over the transfers of the previously performed functions and the modification of the existing collectively approved policy. This vote

[1707] Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132/1; to be adopted by MS within the twenty four months following its entering into force previewed for 2019
[1708] Article 9a Dir. 2017/828
[1709] EU Commission Memo 17/592 on Shareholders rights Directive Q&A of 14 march 2017 < http://europa.eu/rapid/press-release_MEMO-17-592_en.htm > accessed 19 November 2017
[1710] Loi Sapin 2, Loi n° 2016-1691 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique; Caroline Coupet, 'Loi Sapin II : Consécration Légale du Say on Pay' (2017) 2 Droit des Sociétés; Philippe Portier, 'L'Encadrement des Rémunération des Dirigeants de Sociétés Cotées dans la Loi Sapin 2' in Didier Poracchia, 'Le Droit des Sociétés dans la Loi Sapin 2' (2017) 2 Bull. Joly Sociétés p.p 64/81
[1711] ANSA, Votes sur la Rémunération des Dirigeants des Sociétés Cotées : Questions Diverses sur le Vote ex Ante (Comité Juridique, n° 07-017 [2017])
[1712] List of advantages C. com., art. R. 225-29-1
[1713] C. com., art. L. 225-37-2
[1714] C. com., art. L. 225-82-2

is limited to variable and exceptional elements transferred to members of management conditioned to a vote in an OGAM[1715]. This ex-post vote excludes the attributions made to the management such as stock options.

599 ***Qualifying national approaches***. The French approach is seen as pre-emptive implementation of the European directive, a manner transforming the say-on-pay into a real decide-on-pay[1716]. Jordanian company rules do not address a similar form of direct shareholder control on the remuneration policy. The say-on-pay in Jordan as previously established is limited to consulting the prepared policy and the attributed amounts without having an actual binding vote over the amounts or principles of attribution neither ex-ante nor ex-post. A detailed statement of the remuneration prepared by the board and provided to shareholders for review ahead of the GAM[1717]. The proposed amending bill of the Jordanian company rules does not address the remuneration of the management and particularly the control shareholders may have over this issue. On the other hand corporate governance regulation[1718] and the JSL[1719] address the necessity to appoint a nomination and remuneration committee that lays down remuneration and financial attribution policies. The committee consists of non-executive board members, allows for a level of internal control yet granted to the management and not directly to shareholders. It is a drawback to good corporate governance on the Jordanian level as the existence of such a control provides shareholders with a pressuring mechanism to orient management performance in company's interest.

600 ***Exercising voting right***. The voting right of shareholders provides them with a level of control over major decisions taken by the company. Exemplified in requiring qualified majorities usually in EGAM. The perfect example is decisions involving merger and acquisition[1720], takeover, selling of shares and related party transactions[1721]. Further to pre-

[1715] C. com., art. L. 225-100

[1716] Alain Pietrancosta, 'Say on Pay: The New French Legal Regime in Light of Shareholders' Rights Directive II' (Oxford Business Law Blog, 30 November 2017) < https://www.law.ox.ac.uk/business-law-blog/blog/2017/11/say-pay-new-french-legal-regime-light-shareholders-rights-directive > accessed 18 December 2017

[1717] Article 143 JCC

[1718] Article 8.b Jordanian Corporate Governance Regulation of 2017

[1719] Article 46 JSL of 2017

[1720] French doctrine and jurisprudence addresses the issue of whether merger is considered as a transformation of the company from one form to the other and therefore should the general rule of unanimous vote be applied in terms of merger (C. civ., art. 1836). Considering the merger as increasing the engagement of shareholders. This

emptive rights in relation to shares. Meaning having new issues, increase or decrease of capital, major changes in percentages of ownership. These actions affect the rights of shareholders particularly their percentage of ownership, voting rights and possibility of share dilution due to new issues. Provided in the aim of protecting minority shareholders against abusive controlling shareholders[1722]. Shareholders control the sale of shares due to the fear of takeovers, they seek this control rather than controlling the new issues as the disclosure obligation provides a degree of protection and a form of indirect control.

601 ***Data accessibility.*** A main question rises in this regard: do shareholders of IC have the right to access and review the records and documents of the company? Moreover, if it is possible to access the information, can they access the data whenever they deem necessary or a prior request directly or a court order is required. The accessibility of company's data granted as a right therefore forming a level of direct control. French rules grants the entirety of shareholders the right to be communicated the data of the company. This data includes the annual report, list of board members, management and auditors reports to be submitted with the GA, texts and proposed decisions, inquiries concerning board candidates, global certified amount of highly paid persons[1723]. The list, deprived shareholders from the right to be communicated the inventory and the list of current acceptable transactions (those that do not require a prior authorization). Shareholders under French rules also have a permanent communication right. In terms of being enabled to request the mentioned documents, minutes of GAMs and the presence sheet for the past three exercises[1724]. As for the list of shareholders, a separate right is provided for its review. The right is granted to shareholders to access the list and request its access. It is limited to fifteen days ahead of the GAM[1725]. It is a right open to all

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statement was affirmed by the French *cour de cassation* nonetheless not in terms of the *SA* (Cass. com., 19 dec 2006, n° 05-17802). Form mere legal terms merger differs from transformation. Merger involves two or more companies while the transformation involves a unique company that holds its legal personality throughout the transformation. Hence merger of a Plc. in France requires the decision of an EoGAM; AbdelKarim Osman, 'L'Opération de Fusion est-elle Considéré Comme Transformation de la Société Absorbée' (Village de la Justice, 22 Fevrier 2016) < https://www.village-justice.com/articles/operation-fusion-est-elle,21517.html > Accessed 21 December 2017

[1721] Article 175.a JCC; C. com., art. L. 225-96

[1722] IOSCO Technical Committee, 'Protection of Minority Shareholders in Listed Issuers' June 2009 page 5

[1723] C. com., art. L. 225-115; the right of shareholders does not cover the individually paid amounts and advantages to the persons included in this article

[1724] C. com., art. L. 225-117; *AMF*, régl. gén., art. 411-39

[1725] C. com., art. L. 225-116

forms of GAMs. The list may be made available at the headquarters of the company, or the place of intended assembly meeting, electronic medium such as having a screen showing the list[1726] while making it possible for shareholders to produce copies if they deem so.

602 ***Jordanian approach to accessing data.*** The Jordanian rules provide a similar right with slightly different conditions and prerequisites. The access rights is open to the public and shareholders yet on different terms. Accessing the publically made information including that submitted with the company controller is open for review by both shareholders and the public[1727]. The difference lies in granting shareholders the right to produce copies of the submitted documents freely without a prior court order as the public does. As for unpublished data, it is accessible for shareholders following a court order[1728]. Shareholders' list is treated differently under the Jordanian rules. Despite being submitted with the company controller, they are not accessible by shareholders of the OEIC. They are prohibited from reviewing the list as a rule of law unless stated otherwise in the AOA[1729]. Shareholders of OEIC have a special right that allows them to leave the company any time they wish without having to pass by the stock exchange to exchange their shares for cash. This right to redeem shares is employed directly with the company (further illustrated in paragraph 2).

§ 2: *Share Redemption*

603 ***Definition.*** Redemption is repurchase as of something sold[1730]. In the sphere of the IC, it is the act of the issuing company repurchasing its stocks at the net asset value per share[1731]. Share redemption is a request made by shareholders of OEICs in an attempt to cash themselves out of the company. It is a right exercised at any time as long as the company's liquidity permits such repurchase and the scope of application is met. Share redemption is neither a strict ex-ante nor ex-post right. It is a right that may be included under either forms of shareholders' rights. It provides shareholders with a direct control, as it is continuous and not limited to specific time limit. They decide when to redeem the shares and there is no hierarchal requirements or

[1726] C. com., art. R. 225-90
[1727] Article 274.b JCC
[1728] Article 274.a JCC
[1729] Article 209.b (6) JCC
[1730] Collins Dictionary 2014 n (1250)
[1731] Farlex Dictionary n (1522)

authorizations needed to exercise this right. Shareholders invest in the company and once they see they reached their peak financial return or they no longer see a benefit or interest in remaining shareholders they redeem their shares in exchange for cash.

604 ***Buyback vs. redemption.*** Share redemption differs from share buyback. Despite consisting of a process of repurchase by the company of its previously issued shares, the origin of this repurchase and its basis differs from one case to the other. Buyback is the repurchase of the company of its own shares[1732]. Buybacks reduce the number of outstanding shares. Redemption is an exchange for cash upon the request of shareholders. Redemption is not performed to increase the holdings of the company unlike buybacks that allow the company to regain a majority status. Buybacks require the company to comply with the process set in securities rules including repurchasing at market value unlike share redemption the conditions are set by the company and repurchase is based on NAV. Share redemption may be abusive to the company as it may risk undervaluation of the shares as for buyback, undervaluation, maybe the motive. In buybacks repurchase is performed at the lowest prices possible in order to reissue the purchased shares at a higher price later on when the market is corrected. The major difference is having a repurchase performed directly by the company and for its own interest and another performed by the company upon a request and for the benefit of the concerned shareholder.

605 ***Scope of application.*** The redemption request is not random. The company should meet the set legal conditions in performing this request. This right is limited in its scope of application to two main categories of conditions. The first limitation is in terms of the form of company the shareholder forms part of. The second limitation is procedural. Only shareholders of OEIC have the right to redeem their shares at any time without needing to go through stock exchanges[1733]. Unlike those holding shares in closed-end investment companies where no such

[1732] Theo Vermaelen, *Share Repurchases* (Now publishers 2005) page 7
[1733] C. mon. fin., art. L. 214-7; Article 209.b (4) JCC

right exists[1734]. This right is a bonus for shareholders of OEIC. The procedural limitation is connected to several aspects that leads to one key point 'liquidity'.

606 ***Liquidity.*** Share redemption expects the company to have enough liquidity to be able to repurchase the shares. If the liquidity of the company cannot handle this redemption then the repurchase is suspended. Shareholders when making such a request should choose a good timing where the company is in hold of a sufficient amount of liquid assets. The liquidity's importance in terms of the OEIC relates to its capital nature. OEIC has a variable fluctuating capital. Therefore, requesting a redemption requires having enough cash to repurchase the shares in addition to being able to evaluate and calculate the repurchase price. The governing securities rules require the IC to have a minimum liquidity or a minimum amount of capital in order to maintain the redemption right acceptable at all times. If the amount of liquidity or capital becomes inferior to that set by law, force of law suspends the repurchase of shares automatically[1735]. The minimum capital requirement for French IC is three hundred thousand euros. As for the Jordanian IC, required to maintain a minimum liquidity that allows it to execute redemption requests the commission's council lays down regulations that illustrate the calculation of the percentage of the required liquidity[1736].

607 ***Suspending redemption.*** The company may suspend share redemption autonomously. Members of management of the IC may decide to suspend share redemption when exceptional circumstances exists and the interest of shareholders and the public requires such suspension[1737]. An example of these circumstances is the risk of reaching an amount of capital inferior to the minimum required by law if a redemption request is executed. Further, having a significant number of redemption requests, or losing share value on the market if share redemption is performed. Another example is the risk of threatening market integrity, or the company being an owner of a large percentage of its shares. For similar circumstances, the company may choose to lay down a cap for share redemption[1738]. This limitation of the scope of application of share

[1734] John Morley, 'Collective Branding and the Origins of Investment Fund Regulations' (2012) 6 (3) Virginia Law and Business Review 341
[1735] *AMF*, régl. gén., art. 411-21
[1736] Article 47 Collective Investment Regulation of 1999
[1737] C. mon. fin., art. L. 214-7-4
[1738] *AMF*, régl. gén., art. 411-20-1

redemption right is temporary and cannot be considered as prerequisite in company's statute. The cap limitation should be disclosed in accordance with disclosure rules stated by law. The disclosure is made with the securities authority and the public. Share redemption is connected to professional obligations requested in securities rules such as risk management and hindering conflicts of interests. In the sense that share redemption may result in favoring one shareholder over the other or puts the company at higher level of risk exposure due to redemption execution[1739]. The *AMF* sanctioning commission affirmed this connection[1740].

608 ***Calculation of NAV.*** The repurchase is executed based on the net asset value per share[1741]. A question rises in this regard: what is NAV? It is the value of entity's assets minus the value of its liabilities. Assets include total market value of the company. This value consists of the investments prices at the closing price of the day the NAV is calculated, cash and cash equivalents and any accrued income. The liabilities consist of total expenses, short and long-term liabilities of the company. They further include management and operational expenses, auditing expenses, staff salaries, and marketing expenses. The NAV per share is calculated by dividing the NAV over the outstanding shares of the IC. This basis of calculation differs than that used in ordinary transactions. International accounting standards require companies to calculate the value of their shares that disclosed in the financial statements based on the fair value[1742].

609 **Fair value vs. NAV**. Fair value is the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date[1743]. Why would fair value be replaced by NAV? In specific cases, NAV is used instead of fair value where it is difficult to determine a fair value for an asset, if there is no active market for trading the asset. Therefore, NAV is used as a practical expedient. As for CIS, NAV is their fair value. It is the equivalent to the fair value recommended by international accounting standards. Reasoned by the obligation imposed by securities rules over IC to calculate this value

[1739] Isabelle Riassetto, 'Rachat des Parts d'un OPC par un autre OPC et Respect des Obligations Professionnelles des Société de Gestion de Portefeuille' (2015) 2 Bull. Joly Bourse 90
[1740] *AMF* Sanction Commission decision of 30 october 2014, n° SAN-2014-21
[1741] *AMF*, régl. gén., art. 411-123; Article 209.b (4) JCC
[1742] IFRS 13; IAS 1
[1743] IFRS 13

on a daily basis in addition to disclosing it to the public and not merely communicate it to concerned investors[1744]. To guarantee daily and consistent calculation of the NAV, securities rules impose an obligation on the part of the IC to lay down internal policies and procedures to perform the calculation[1745], to evaluate the securities it holds in accordance with the NAV on a daily basis while confirming with the conditions set in the prospectus[1746]. The IC is further obliged to publish the NAV of its issued securities on a daily basis particularly for the IC that admits its shares for negotiation on regulated markets[1747]. If not then the publication is made at least two times per month. The calculation of the NAV is closely related to the information stated in the prospectus. As it identifies the reference calendar in addition to the conditions and periodicity of calculation[1748].

610 ***Transition.*** Ex-ante rights are not sufficient on their own. No matter how much national rules try to strengthen them to avoid ex-post measures. Ex-post measures are fruitful once a liability stands. Their exercise and employment has prerequisites and conditions that should be met. To some extent, they are stricter in their scope of application than ex-ante rights. Following sub-section illustrates ex-post rights attributed to shareholders of IC.

Sub-section 2: Ex-post Rights

611 ***Focus.*** What does an ex-post right consist of? An ex-post right is backward looking. It is usually associated with fairness. It asks questions including who acted wrongfully and who acted well? Whose rights were violated? Ex-post right, allows redress once a right has been violated[1749]. It depends on the strength of enforcement available in national regulatory frameworks. It is the key component of private enforcement. The focus of ex-post rights are violation and liability. The equation resulting into the activation of ex-post right consists of the right owed to shareholders, company or third party, the duty of members of management and

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[1744] National Professional Services Group, 'A Look at Current Financial Reporting Issues' (PWC, 29 June 2015) < https://www.pwc.com/us/en/cfodirect/assets/pdf/in-depth/us2015-11-investments-using-nav-removed-from-fv-hierarchy.pdf > Accessed 27 December 2017

[1745] *AMF*, régl. gén., art. 411-24

[1746] *AMF*, régl. gén., art. 411-25; JSC issues a regulation identifying the calculation and its related requirements

[1747] *AMF*, régl. gén., art. 411-124

[1748] *AMF*, régl. gén., art. 411-123

[1749] Reinier Kraakman & Hyun Park & Steven Shavell, 'When are Shareholders Suits in Shareholder interests' (1994) 82 (5) George Town Law Review 1733

the violation of both. The ex-post right is employed once the liability of members of management stands. It allows stakeholders to put a cause of action and claim redress. The question rising in this regard is the following: where do stakeholders seek their redress? To answer this question the following paragraphs address two forms of claiming redress. First form urges seeking courts to compensate the incurred damages (paragraph 1), and the second provides an alternative dispute resolution process (paragraph 2).

§1: *Cause of Action*

612 ***Reason for enforcement.*** Shareholders and stakeholders should have the opportunity to obtain effective redress for the violation of their rights and interests. The concerned legal system opens the door for stakeholders including third party to seek redress yet in limited terms. Opening, the redress largely may result in excessive litigation. Therefore comes the approach of legislations to strengthen ex-ante rights in order to hinder litigation risks. In addition to the standards and rules that transfer the burden of proof to claimants in a manner protecting members of management against abusive proceedings. The questions this paragraph aims to answer are the following: who, how and where.

613 ***Who, how, where.*** Who initiates the action? How is the action initiated? Where is it filed? The governing legal rules generally address three forms of stakeholders. Shareholders, company and third party[1750]. The liability of members of management stands towards the three of them, consequently they are permitted to initiate a litigation with the competent court. The action may be held collectively or individually, criminally or civilly. The focus of this paragraph and the provided forms of actions are shareholders of IC.

[1750] C. com., art. L. 225-251; C. com., art. L. 225-252; Articles 157 & 160 JCC; the Jordanian company rules grants the company controller the right to file a liability action in the same context as the company and shareholders (Article 160 JCC). The reasoning behind such a right is not clear. The closest explanation for such a right is granting the company controller a direct control over the company in terms of legal pursuit for violations of company law rules. The question rising in this regard is the following: Is this right transferred alongside other functions of the company controller to the JSC confirming with article 111 JSL of 2017. Initiating a liability action does not in legal terms fall within the scope of supervisory and organizational functions. It is a public enforcement action therefore; we believe that such right does not transfer to the JSC. JSC remains in position of its right to initiate a legal action for the violations of the JSL

614 ***Collective vs. individual action.*** The difference between the exercises of either form of action lies in the number of claimants and the claimed prejudice. Collective action embeds the concept of collectivity meaning multiple or single claimant seeking a collective prejudice. In the sense that destines the action to the repair of damages incurred by the company and not that personally incurred by the claimant. The personal prejudice is claimed in a separate individual action. The collective action even if exercised '*ut singuli*'[1751], is a derivative indirect action initiated by shareholders in the aim of obtaining a redress for damages incurred by the company. Under French rules, this form of action is limited to claims related to management functions and filed against members of management and not third party contractors[1752]. The reasoning finds its place in the in-existing direct interest of shareholders in third party contracts with the company. The damage resulting from this form of contracts or third party misconducts is incurred directly by the company[1753]. There is no direct relation between shareholders and third party. Nonetheless, shareholders may seek to repair personal prejudice in a different form of action according to civil law rules. Therefore, the redressing action against third party is filed directly by the company.

615 ***Conditions of liability action.*** The liability action shareholders' file is conditioned. Two main conditions one addresses the prejudice subject of the claim and the other relates to the character of the claimant. The collective civil action requires the pre-existence of interest in the form of a character. Meaning being a shareholder when initiating the action. The right to initiate a liability action claiming the entirety of the damages incurred by the company ceases once the total shares are sold or redeemed[1754]. Unlike members of management where they may be prosecuted and held responsible even after the end of their term[1755]. The general rule designates the right to file this action to shareholders. Nonetheless, in the sphere of Plc. where the law

[1751] In the sense that every shareholder has the right to request the entirety of the prejudice and damage incurred by the company in its initiated civil liability action against members of management; Bruno Dondero, 'Exercice Ut Singuli de l'Action Sociale et Astreinte' (2010) 2 Bull. Joly Sociétés 122; Cass. com., 8 mars 2016, n° 14-16.621; Cass. com., 21 juin 2016, n° 14-26.370 ; Didier Poracchia, 'Action Sociale ut-singuli', cass. Com., n°s 14-16.621 14-26.370, *Revue Droit et Patrimoine*, 2017, p. 66

[1752] C. com., art. L. 225-252

[1753] Cass. com., 19 mars 2013, n° 12-14.213

[1754] Cass. com., 26 janv. 1970, n° 67-14787

[1755] Cass. com., 15 nov. 1983, n° 82-14.719

permits the creation of associations and groupings of shareholders[1756], this grouping may file the lawsuit on behalf of its members. The second condition is claiming the redress of company damages resulting from a fault committed in the sphere of management activities[1757]. If a shareholder initiates a liability action based on the violation of criminal law rules governing fraud or deception the action then falls outside the scope of the social collective action and is considered an individual action[1758]. Nonetheless, the action *ut singuli* may be filed before repressive jurisdiction meaning criminal courts for infringements or fault committed by members of management during the exercise of their mandate[1759].

616 ***Distinction shareholder and third party actions.*** The collective action even if filed individually is strictly granted to shareholders of IC. Third party stakeholders cannot file such a direct action to request such a redress. Their direct liability action is limited to faults separate from the functions of management. The *CA* of Versailles addressed in one of its decisions this distinction while applying the jurisprudence of the *Cour de cassation* in limiting the direct liability of members of management towards third party to the separable fault[1760]. The collective action addressed in this paragraph focuses on financially stable companies and does not include those in financial difficulty meaning those undergoing a liquidation process. For the latter exists another form of collective procedure taken against members of management for insufficient capital[1761].

617 ***Direct or derivative action in Jordan.*** The Jordanian rules do not address a collective or individual action in their detailed composition as provided in the French rules. The Jordanian rules grant the right to file a lawsuit to any shareholder. They choose if they file the legal proceeding collectively or individually. The Jordanian rules are silent in terms of the requested damages. Do they request the redress of personally incurred damages or those incurred by the company? Meaning do they file a direct legal action or a derivative one? When referring to the relevant legal text we note that members of board and the chairman are responsible for

[1756] C. com., art. L. 225-120
[1757] CA Paris, 31 mars 2000, RJDA 2001, n° 43
[1758] Cass. crim., 10 oct. 1963, n° 61-94.203
[1759] Cass. crim., 19 oct. 1979, n° 77-92.742
[1760] CA Versailles, 17 janv. 2002, n° 2000-7792
[1761] C. com., art. L. 651-2, 3; Article 159 JCC

redressing the damages resulting from their misconducts and violation of the governing rules[1762]. The statement is general the damages may be incurred personally by the shareholder or the company. As for the liability for the lack of care and diligence in managing the company, by either the board or the general manager, it is strictly owed to shareholders[1763]. Then the resulting damage is limited to that of shareholders unless the company goes under liquidation. Following this explanation, a direct action is filed for the lack of care and diligence and mostly derivative for the violation of the rules or misconduct in managing the company. Nonetheless, the Jordanian jurisprudence introduces the legal action for repairing the damages as a strict right for the company despite the explicit content of the legal text that grants the right to shareholders[1764]. The jurisprudence in a recent decision affirmed that the action filed by shareholders is derivative therefore considering the requested redress is that for the damages incurred by the company and not that personally incurred by the concerned shareholder[1765].

618 ***Direct individual action.*** Shareholders may individually seek their personally incurred prejudice as a result of management misconduct. This misconduct or the fault does not have to be separable to the functions as the case of third party. Further, it is not limited to significant, intentional and particular gravity form of exercise that is incompatible with the normal functioning of the management[1766]. As an example for personally incurred damage is the inaccurate accounts and information provided by the management that were the basis for maintaining shares or the investment decision in newly issued shares[1767]. Therefore, shareholders suffer a loss of a chance to invest in another portfolio more retainable. Another example is the increase or decrease of capital changing the value of held shares (share dilution) further to, damages incurred by investors for the sale of securities (including shares)[1768].

[1762] Article 157 JCC
[1763] Article 159 JCC
[1764] Jo. cass. civ., 18 feb, 1987, n° 125/1987
[1765] Jo. cass. civ., 13 jan. 2011, n° 3663/2010
[1766] Cass. com., 9 mars 2010, n°ˢ 08-21547 08-21793
[1767] Right given under the Jordanian securities rules to any investor without limiting the scope of application of the term investor (article 108.b JSL of 2017)
[1768] Article 108.a JSL of 2017

619 ***Company initiator.*** The collective action does not prohibit the company from initiating the civil action directly[1769]. If such decision is taken then shareholders right to initiate the action ceases as long as we consider the action filed by shareholders as derivative. Further, the company is the legally permitted claimant in actions concerning third party damages. Third party actions are held against the company, as it is responsible for the actions of its members of management towards third party acting in good faith[1770]; except for those liabilities relating to the fault separable from management functions under French rules. Such civil action is held individually and directly against the concerned member of management.

620 ***Criminal action.*** The criminal action is a public action for the application of sanctions[1771]. The criminal action may be related to a civil action in terms of the damages caused by the committed infringement or crime. The criminal action is initiated by the state (namely prosecutor or its delegated judicial officers). Nonetheless, the victim of the committed criminal infringement may initiate the criminal action. Therefore, company or shareholders may file this form of action before criminal courts. The criminal action held for the infringement of company law rules, securities or general criminal law rules[1772].

621 ***Transition.*** Ahead of seeking courts, shareholders and investors may decide to settle the disputes outside of courts through alternative dispute resolutions. In terms of listed companies the competent securities authority handles the dispute that arise with investors and shareholders. The authority provides an internal dispute settlement in the form of a prior-litigation dispute settlement plan exemplified mainly in a complaint handling process. The following paragraph 2 addresses this settlement plan.

§2: *Alternative Investor Dispute Settlement*

622 ***Complaint handling.*** Corporate governance requirements stresses on the necessity to access to justice how it should be made cheaper and shorter. A long discussion on an EU level took place to address and endorse the necessity to harmonize an extra-judicial dispute resolution

[1769] Article 160 JCC
[1770] Article 156 JCC
[1771] CPP, art. 1
[1772] Philippe Bonfils & Eudoxie Gallardo, *Droit Pénal des Affaires* (2nd edn, LGDJ 2016)

channels in order to boost consumers' confidence in the market[1773]. The aim of alternative dispute resolution is to provide consumers and investors with effective, inexpensive, simple and swift extra-judicial dispute resolution methods[1774]. Shareholders of IC require an efficient and effective complaint handling and redress procedures. The legal systems provide different approaches to prior-courts problem settling. The French rules followed the recommendation of the OECD and implemented EU law by creating an ombudsman office at the *AMF*[1775]. The office provides amicable dispute settlement for those disputes arising between investors (retail or professional) and issuers or intermediaries. The JSC on the other hand put in place a complaint handling committee[1776]. It reviews the submitted complaints and issues recommendations in order to control the violation to capital market regulation. The two approaches differ in their conclusion. Nonetheless, they both aim to support investor protection and provide a free of charge and confidential problem settling procedure. They both introduce an independent and impartial body in charge of the resolution. The difference lies in the decisions or opinions issued by either of them. The ombudsman provides non-binding rapid recommendations through a process executed in accordance with law and equity[1777]. The ombudsman provides a mediation process therefore requiring the consent of both parties[1778]. The main advantage of this mediation is suspending the limitation period for legal actions[1779]. The recommendation of the ombudsman is not subject to legal recourse before administrative courts[1780]. The complaints committee under the JSC reviews the complaint and refers its recommendation to the council of the JSC in order to undertake the necessary measures and

[1773] Commission, 'Recommendation on the Principles Applicable to the Bodies Responsible for Out-Of-Court Settlement of Consumer Disputes' (Recommendation) COM (1998) 257 final OJ L 115/31; Commission, 'Recommendation on the Principles for Out-Of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes' (Recommendation) COM (2001) 1016 OJ L 109/0056; Commission, 'Communication on Widening Consumer Access to Alternative Dispute Resolution' COM (2001) 0161 final

[1774] Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L164/63

[1775] C. mon. fin., art. L. 621-19 ; the ombudsman of the *AMF* considered an ADR entity according to article 4.1 (h) Consumer ADR Dir.

[1776] Foundations for complaints handling under its updated version of 2012

[1777] Generally three months following complete submissions of both parties

[1778] Some specialists do not consider the dispute settlement process provided by the ombudsman as a form of mediation. This view is due to reasons relating to the proposals the ombudsman issues at the end of the process. Generally, in mediation no such proposals are provided

[1779] C. mon. fin., art. L. 621-19 al. 4

[1780] CE, 18 oct. 2006, n° 27-7597

impose proper sanctions. The approach differs in its core content. The recommendation of the committee is binding once approved by the council forms part of the supervisory competence the JSC enjoys over its subjects. Unlike the ombudsman where the process seems more privately oriented and a means to cheaper access to justice despite being non-binding.

623 ***Settlement prerequisites.*** Both approaches state prerequisites that should be met by the complainant. They both require the preparation of a detailed and clearly written complaint endorsed with supporting documents submitted in accordance with the form provided by the authority. In this regard, the ombudsman requires from the investor to state its targeted settlement be it cancellation, execution or compensation in which case an estimation of the incurred damages should be provided. Ahead of filing this complaint, the ombudsman expects and stresses on the necessity of a prior action to be taken against the listed company, to have contacted the listed company before hand with the problem and a negative or unsatisfying response was issued or no response at all was received within two months following the communication[1781]. Both the ombudsman and the committee request the response or comments with supporting documents of the company mentioned in the complaint to be communicated to them within a period not exceeding two weeks for the committee and obligatory response for the ombudsman (consent of both parties is obligatory otherwise the amicable settlement is suspended). Both the ombudsman and the committee look into complaints that entail issues falling within the scope of jurisdiction of the related authority, meaning in matters involving disputes in securities and relating to securities markets and not those relating to insurance or banking matters[1782]. The committee in JSC stresses on complaining of a transaction that was executed or not, not more than a year ago[1783]. Both further require that no legal proceeding is put in place regarding the same complained issue. Both approaches provide the investor with a complementary problem solving. The investor and the company retain their right in initiating a legal action at any time. They respect the confidentiality of the procedure[1784]. The submitted documents with the ombudsman cannot be referred to before courts unless both parties consent to their use.

[1781] AMF website < http://www.amf-france.org/en_US/Le-mediateur-de-l-AMF/Le-mediateur-mode-d-emploi/Procedure? >

[1782] *AMF*, 'Rapport de Médiateur de l'*AMF* 2017' (12 Avril 2017) page 39

[1783] JSC website < http://www.jsc.gov.jo/News/Nws_NewsDetails.aspx?Type=P&lang=1&Site_ID=2&NewsID=489 >

[1784] *AMF* rapport médiateur, n (1782) page 37

624 ***Civil liability insurance.*** In a different alternative approach guaranteeing a priori the redress of the damages incurred by the company and consequently those of shareholders, is a civil liability insurance. It is legally acceptable and normal under French rules that members of management when exercising their professional activities in the name and for the benefit of the company to be covered with a civil liability insurance. The question rising in this regard is the following: who covers the costs of this insurance? Logically, the company takes care of the cost of insurance. The paid amount does not enter into the annual report; it is strictly connected to the exercise of functions and is not connected to the personality of the manager[1785]. It is a right for the member of management and a duty on the part of the company[1786]. Another question arises: why is it a duty and a right? Based on the theory of representation, members of management exercise their functions in the name, and for the benefit of the company, and not for their own personal gain. When the liability is put in question, the search focuses on the functioning of their duties and not their personal exercise. The insurance in this case covers merely their professional exercise as representatives and not the personal one. Therefore, the liability this insurance covers stands towards third party for the activities exercised in the name of the company[1787]. This insurance is not considered as part of the advantages granted to management; it is seen as a necessity rather than an advantage[1788]. No such right or duty is addressed explicitly under the Jordanian rules[1789]. General civil law rules allow the civil liability insurance[1790]. Adopting such approach, may impose further operational costs on the part of the company. Nonetheless, on a long-term basis it provides a source of redress for the damages incurred by the company as a result of the misconduct of the management.

625 ***Transition.*** This section addressed direct control exercised mainly by shareholders of the IC. The direct control is further exercised directly by the company over its proper activities and practices. This control takes the form of an internal review of transactions and conformity with

[1785] ANSA, 'Questions Relatives aux Rémunérations, Avantages et Indemnités de Départ Destines aux Mandataires Sociaux et Dirigeants Apres La Loi du 26 Juillet 2005' (Comité Juridique, n° 05-060 [2005])
[1786] Comité Juridique du 1er octobre 2003, communication n° 04-005
[1787] Alexis Constantin, 'De Quelques Aspects de l'Assurance de Responsabilité Civile des Dirigeants Sociaux ' (2003) 7 RJDA 595
[1788] ANSA report 05-060, n (1785) 13
[1789] Obligatory for auditors (Article 26 Law Regulating the Practice of the Auditing Profession of 2003)
[1790] Article 922 Jo. Civil Code

the governing legal rules. The following section B addresses thoroughly this internal auto control.

Section B: Internal Auto Control

626 ***Origin.*** Traditionally in corporate history, a function of internal control was assigned to the AOA. It specifies the objective of the company and the purposes for which the company was established. Any action that went beyond the AOA was considered unenforceable. Today in modern corporate conceptions, purposes and restrictions of powers and the value of the AOA have changed. Companies exercises go beyond the limited statements of its AOA. The modern approach of corporations is more lucid. Companies function within their main objectives framework yet they adapt to changes and requirements of the market in which they operate. Therefore, a contemporary notion of internal control came into the light to replace the previously existing conceptions.

627 ***Importance.*** To guarantee shareholder and investor protection, it is necessary to guarantee the internal overview of the IC[1791]. Particularly, by laying down adequate internal control mechanisms. Internal control is that exercised directly by the company over its proper functions through legal control bodies that review the financial situation of the company in addition to controlling its compliance with the applicable legal rules. The internal control is of great importance as it provides shareholders and investors with an overview of company's situation and the risks it is subject to. The importance of the internal self-control finds its setting in ensuring that financial reports and other related information disseminated by the company are accurate and present a complete picture of the position of the company. The dissemination is regulated as previously addressed in this title. Ensuring an effective monitoring procedure is put in place to control the dissemination; the applicable legal rules oblige companies to appoint an external auditor in order to control its accounts and the course of its activities. Most corporate governance codes extend the concern of the effectiveness of internal control to impose an obligation to create an audit committee that plays an intermediate role between auditors and members of management. The committee is considered a support body that helps the board

[1791] Recital 10 UCITS Dir. 2009/65; *AMF,* règl. Gén. art. 313-58

fulfil their duties (further addressed in sub-section 1)[1792]. Providing a strong and efficient investment atmosphere in which investors have confidence and are willing to seek, companies should comply with the applicable laws and regulations within the jurisdiction in which they conduct their business. Therefore, they organize and structure a compliance function in order to confirm with national legal requirements (further illustrated in sub-section 2).

Sub-section 1: Auditing Function

628 ***Legal audit.*** Shareholders interest and investor protection requires greater level of transparency, objectivity and independence of the persons performing statutory auditing[1793]. Therefore, the question of auditors' oversight arises alongside increasing the minimum level of convergence with respect to auditing standards. Enhancing investor protection requires strengthening the powers attributed to competent authorities carrying out the public oversight. Hence, conferring adequate powers such as investigatory and sanctioning powers. Further enforcing shareholders' powers regarding the direct control they may exercise over the functioning of auditors. Such as employing their voting rights in the nomination and removal of auditors. Most importantly is laying down deterring and preventive measures that control infringements of applicable rules. Audit is closely connected to management functions. Mainly conducted over the decisions of the management that eventually have a financial aspect to them and are pointed out in the financial statements and the accounts the company keeps. The role of auditors is a following step to an efficient and well-organized board. Meaning presenting the board with sufficient number of independent non-executive members that may undertake key role in essential areas such as hindering conflicts of interests and participating in supportive committees such as nomination, remuneration and audit ones. These committees provide recommendation to the board ahead of making their decisions. They play the role of a fresh third eye. This sub-section addresses the structure of the audit body in terms of its composition, role and functions (paragraph 1). Further, it addresses the oversight over the practices of

[1792] Commission, 'Recommendation on the Role of Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board' (Recommendation) COM (2005) 162 OJ L 52/51

[1793] Means an audit of annual financial statements required by national law or requested voluntarily by the company (article 2 as amended by Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts [2014] OJ L 158/196)

auditors including their accountability before shareholders and the company and their positioning in the pyramid of audit structure (paragraph 2).

§1: *Structure and Duty of Auditing Body*

629 ***Composition.*** The auditing body composes of two main sub-categories internal and external bodies. Internal including the persons appointed directly by the company as employees (internal accountant) or a supporting body to the management (audit committee). External body referring to an independent body appointed directly by the GA (external auditor) or an independent supervisory authority (national council for auditors' oversight). These bodies interconnect through control exercised from one body over the other. The external auditor reviews the accounts of the company and supervises the activity of the internal accountant. The auditing committee has an essential role in the nomination of the external auditor and course of activity. The national council controls the practices of the external auditor and interconnects with the audit committee. The detailed composition of each one of these bodies lies at the heart of their distinction. The applicable legal rules discuss this composition except for that of the internal accountant; left internally to the discretion of the company.

630 ***External auditor.*** The external auditor is the person responsible for executing statutory audit[1794], takes the form of an individual auditor[1795] or an audit firm[1796]. GA appoints the external auditor[1797], through an OGAM[1798]. The audit committee has a vital role in the nomination process of the external auditor. The committee submits a recommendation to the board or supervisory board in two-tier management, for the appointment of the external auditor containing at least two choices of auditors while justifying its preferred one[1799]. The committee ensures that the candidates hold the required qualifications, independence and meet the

[1794] C. mon. fin., art. L. 621-22
[1795] C. com., art. L. 822-1-1; article 22 Law Regulating the Practice of the Auditing Profession of 2003
[1796] C. com., art. L. 822-1-2
[1797] Article 192 JCC; C. com., art. L. 823-1
[1798] Article 171 JCC; C. com., art. L. 225-228, Article 34 Collective Investment Regulation of 1999 with limitation on the nomination for companies that has a public interest and trade their shares on regulated markets. The nomination may be made by the board
[1799] Article 7 Jordanian Corporate Governance Regulation of Listed Companies of 2017; Article 16 Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC [2014] OJ L 158/77

conditions set by law for the practice of the audit profession. External auditors are considered agents of shareholders in the eye of the Jordanian company rules[1800]. Under French rules, their main connection with shareholders is them ensuring that shareholders are treated equally throughout the practices of the company[1801].

631 ***Conditions of auditors.*** The main condition for the nomination as external auditor is holding the necessary qualification[1802]. In the sense of holding the necessary technical and professional knowledge in auditing. This requirement is guaranteed by the national council when approving the registration of the auditors on the list of licensed auditors[1803]. The second most important condition and continuous obligation is being independent. Independent in the sense of not being a shareholder of the company he is about to audit, not being a founding shareholder of the audited company, further to not having a relation (partnership or employment) with members of management of the company[1804]. In addition to not being a member of the board, not having exercised an administrative, financial or consulting position in the audited company[1805], not holding an interest in the audited company[1806] in addition to the prohibition to trade in the shares of the audited company[1807]. In other word, the external auditor should hinder situations entailing conflicts of interest. To ensure this independence the securities authority impose disclosure obligations on the external auditor[1808]. The auditor is bound by strict rules of confidentiality and professional secrecy for the information and documents they come across throughout the exercise of their activities[1809].

[1800] Article 199 JCC
[1801] C. com., art. L. 823-11
[1802] Article 17 Disclosure Regulation of 2004
[1803] C. com., art. L. 822-1; Article 5.e Law Regulating the Practice of the Auditing Profession of 2003
[1804] C. com., art. L. 822-10; Article 197 JCC
[1805] C. com., art. L. 822-13 where the auditor was a former employee or a director at the audited company, he/she cannot be an external auditor before five years following the end of its terms with the audited company; C. com., art. L. 822-12 for reversal situation where an external auditor wishes to take on a position at the audited company it is permitted three years following the end of their term as auditors
[1806] C. com., art. L. 822-11 III; Article 197 JCC
[1807] Article 203 JCC
[1808] C. mon. fin., art. L. 621-22 ; Article 200 JCC ; Recitals 80 & 82 UCITS Dir. 2009/65 ; Article 106.1 UCITS Dir. 2009/65; Article 14 Reg. 2014/537
[1809] Article 102.1 UCITS Dir. 2009/65; C. com., art. L. 822-15; Article 202 JCC

632 ***Role of auditor.*** The main role of external auditors is exercising control over the activities of the company[1810]. Meaning reviewing and controlling its financial statements and accounts, its internal financial and administrative control systems, verifying its assets, reviewing the decisions of the GA and the management in addition to exercising any other activities or functions that the proper practice of their profession permits[1811]. Auditors follow the internationally accepted auditing standards in their practice[1812]. To effectively execute their role the external auditor certifies the financial statement of the company[1813] further he/she issues a report[1814]. The report is addressed to the GA[1815] certifies that the auditor had access to all the necessary information and documents that allows him to produce his/her opinion and recommendation[1816]. Further, that the company keeps its records and accounts regular in conformity with the applicable legal rules, most importantly certifying the exactitude of the financial statements and accounts of the company and includes his/her observations[1817].

633 ***Audit committee.*** The audit committee is a special committee created at the heart of listed companies to perform a supporting role to members of management and guarantee the internal control[1818]. Audit committee has a decisive role to play in contributing to high quality statutory audit through reinforcing the independence and technical competence of members of this committee by imposing qualification and professionalism requirements over the majority of its members. The committee is created by the board of the company and falls under its control and responsibility. The audit committee exclusively composes of non-executive or supervisory directors. At least a majority of its members should be independent. Independence is an essential necessity for effective internal control. Jordanian corporate governance regulation

[1810] C. com., art. L. 225-218; *AMF*, règl. Gén., art. 212-15
[1811] Article 193 JCC; C. com., art. L. 823-10
[1812] C. com., art. L. 821-13; Article 193.b JCC
[1813] C. com., art. L. 823-9; Article 73 UCITS Dir. 2009/65
[1814] C. com., art. L. 225-235; Article 193.z JCC; Article 10 Reg. 2014/537 ; Article 28 Audit Dir. 2006/43; *AMF*, règl. Gén., art. 411-37
[1815] Additional reports are addressed under EU rules. They include an additional report submitted with the audit committee and another submitted with the supervisors of the audited company (limited to companies with public interests); Article 11 & 12 Reg. 2014/537
[1816] The opinion of the external auditor in the report includes one of the following recommendations: certifying the accounts, certifying with preservations or non-certification and returning the accounts to the board while including a reasoning for the refusal (Article 195.b JCC); Article 19 Disclosure Regulation of 2004
[1817] Article 195.a JCC; C. com., art. L. 225-235; *AMF*, règl. Gén., art. 411-36
[1818] Article 6 Jordanian Corporate Governance Regulation of 2017; C. com., art. L. 823-19; Article 46 JSL of 2017; Article 15 Disclosure Regulation of 2004

limited the minimum number of members to three. As for the French rules they do not precise an exact minimum number nonetheless from the context of the legal text addressing this committee we note that the minimum number is two. Members of the audit committee should have relevant background and experience in finance and accounting for listed companies appropriate to company's activities[1819]. Further, they should bound with rules of confidentiality[1820].

634 ***Functions of audit committee.*** The main function of the audit committee is ensuring the effectiveness of the internal and external audit function[1821], in particular by making recommendations on the selection, appointment, reappointment and removal of the auditors and internal control positions. Further, it monitors the responsiveness of management to its findings and recommendations. The audit committee reviews the reports issued by both forms of auditors, especially in terms of the application and following of proper auditing standards and measures in a manner respecting the size and activities of the company.

635 ***Exemption from audit committee.*** In terms of the IC, the EU legislation sees that CIU should be exempted from the obligation to have an audit committee[1822]. The reasoning behind this exception is taking into account the objective of the IC. It functions merely for the purpose of pooling assets. The appointment of an audit committee is seen inappropriate. UCITS in the view of the EU legislation operates in a strictly defined regulatory environment and are subject to specific governance mechanisms such as the depository control. The depositary may replace the functions of the audit committee. Its main role is safe-keeping the assets of the UCITS in addition to ensuring that the transactions of the UCITS are carried out in accordance with law and the incorporation of the undertaking[1823]. French company rules exempted the IC from the obligation of the special committee[1824]. The Jordanian rules do not provide for such an exemption. The IC is obliged such as other Plc. to put in place this committee. The applicability is understandable, as the depository under the Jordanian securities rules does not function in the

[1819] C. com., art. L. 823-19 II; Article 6 Jordanian Corporate Governance Regulation of 2017
[1820] C. com., art. L. 823-21
[1821] C. com., art. L. 823-19 II; Article 7 Jordanian Corporate Governance Regulation of 2017
[1822] Recital 25 Audit Dir. 2006/43
[1823] Article 32 UCITS Dir. 2009/65
[1824] C. com., art. L. 823-20 3°

same sense as the one addressed in French rules. Further, the IC under the Jordanian rules does not enjoy a complete, strict and effective regulatory framework due to being subject to the same rules as Plc. with minimal exceptions.

636 ***National council.*** Another important composition of the auditing structure is the nationally designated competent authority or body, in charge of the regulation and oversight of external auditors and audit firms. Under French rules, the designated competent authority is the *Haut Conseil du Commissariat aux Comptes* (*H3C*)[1825]. The Jordanian rules designate the Higher Commission for Auditors' Profession[1826]. The difference between the two designated authorities is the legal personality. The *H3C* is an independent public authority meaning holding a legal personality and financial and administrative independence[1827]. As for the higher commission, no such character is attributed. The two authorities differ in their composition. In terms of the number of their participating members. The *H3C* constitutes of fourteen members in addition to a president[1828]. The members include four judges (including a member of the *cour de cassation* as president), president of the *AMF*, president of the *ACPR*, general director of the public treasury, university professor qualified and specialized in legal, economic and financial issues, four qualified individuals in financial and economic matters in addition to two auditors[1829]. The auditors should have ceased their practice three years preceding their nomination for this position[1830]. The ministry of justice appoints a government commissioner for consultative vote[1831]. The higher commission composes of twelve members and the minister of industry and trade as president. The members include the minister of finance, president of the JSC, governor of the central bank, president of the Jordanian insurance commission, president of the Jordanian audit bureau, company controller, president of the auditors' association, a

[1825] C. com., art. L. 821-1; ANSA & others, 'Guide sur la réforme de l'Audit Légal' (2016) < https://www.middlenext.com/IMG/pdf/Guide_reforme_de_l_audit_juillet_2016_vf.pdf > Accessed 3 January 2018
[1826] Article 4 Law Regulating the Practice of the Auditing Profession of 2003
[1827] C. com., art. L. 821-1
[1828] Appointed for a term of six years
[1829] C. com., art. L.821-2
[1830] C. com., art. L. 821-3
[1831] C, com., art. L. 821-4

professional in auditing or accounting appointed by the president, a faculty member specialized in accounting and three legal accountants appointed by the board of the auditors' association[1832].

637 ***Role of national council.*** Members of the national competent authority should bound with rules of professional secrecy for the information and documents they come across throughout their term[1833]. The main mission of the national authorities is approving the registration or licensing of legal auditors and accountants[1834]. The authority adopts deontology norms for the practice of the profession and quality of internal control[1835]. The authority defines the main framework and orientation of the control therefore it puts in place regulatory and organizational texts[1836]. It follows the evaluation of the market in terms of adopting auditing and accountant standards[1837]. Further in the process of globalizing investor protection and guaranteeing best auditing practice the authority cooperates with its counterparts[1838]. To ensure the level of technical competence of the auditors the national authority puts in place the necessary actions to provide continuous professional education plans[1839].

638 ***Auditing association.*** The last composition of the auditing structure of the IC. A nationally created association for auditors. It holds the entirety of the registered auditors as its members. It looks after the interest of its members and protects the traditions and morals of the profession[1840]. The association is delegated partially the functions of the competent authority[1841]. It enjoys a legal personality and financial and administrative independence[1842].

639 ***Importance to shareholders.*** Since auditors are agents of shareholders of the IC, in Jordanian law, their function is of great importance to shareholders. Through their reports, shareholders deduce a general overview of the financial standing of the company. Further, they

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[1832] Article 4 Law Regulating the Practice of the Auditing Profession of 2003
[1833] C. com., art. L. 821-3-3
[1834] Higher Commission creates a licensing committee (Article 5.b Law Regulating the Practice of the Auditing Profession of 2003)
[1835] C. com., art. L. 822-16
[1836] Article 5.o Law Regulating the Practice of the Auditing Profession of 2003; C. com., art. L. 821-1 5°
[1837] Article 5.a Law Regulating the Practice of the Auditing Profession of 2003; Article 27 Reg. 2014/537
[1838] C. com., art. L. 821-1 9°
[1839] Article 5.h Law Regulating the Practice of the Auditing Profession of 2003; C. com., art. L. 822-4
[1840] Article 8 Law Regulating the Practice of the Auditing Profession of 2003; C. com., art. L. 821-6
[1841] C. com., art. L. 821-1 al. II
[1842] Article 7 Law Regulating the Practice of the Auditing Profession of 2003; C. com., art. L. 821-6

become informed of the misconducts and infringements conducted within the company. The fact that the report of the auditor presents a negative recommendation grants shareholders the chance to request the board to rectify the situation or referring the matter to the company controller in order to appoint an expertise to settle the problem[1843]. It is a form of indirect control exercised by shareholders. Shareholders' and the company require greater level of protection as auditors may be dishonest and seek to hide certain transactions or infringements to benefit members of the management, themselves or third party. The practices of auditors should be controlled. Therefore, the applicable legal rules introduce two levels of oversight over the exercises of auditors, internal and external control further illustrated in the following paragraph 2.

§2: *Auditors' Oversight*

640 ***Internal control of auditors.*** Oversight exercised by internal organs of the audited company, includes the audit committee (if the IC is not exempted), shareholders and the company. The audit committee makes recommendations to the board in relation to the selection, appointment, reappointment and removal of the external auditor. The committee monitors external auditor's independence and objectivity. In particular, the level of fees paid by the company, and other related regulatory requirements. Keeps the nature and extent of non-audit services under review, based inter alia on disclosure by the external auditor of all fees paid by the company. Further preventing any material conflicts of interest from arising. The committee should set and apply a formal policy specifying, the types of non-audit services which are excluded, permissible after review by the committee, and permissible without referral to the committee. Shareholders and the company exercise the control in terms of the liability auditors' hold towards them, in addition to the right to request the audit by shareholders and board members[1844].

641 ***Auditors' liability***. The statutory control covers auditors of the company. Company rules state a list of proper conduct and misconducts resulting from the performance of auditors' activities. Members of the audit body are subject to specific liability rules and a standard of care

[1843] Article 196 JCC
[1844] Article 275 JCC; C. com., art. L. 225-231; Cass. com., 14 fevr. 2006, n° 05-11822

(obligation of means and results, a reduced standard) in light of their position and/or expertise in addition to that of the board of directors for approving the related transaction or the misreported accounts[1845]. Auditors share with the manager and the board of the company the liability for financial difficulties of the company if negligence or failure of proper performance is proven[1846]. Auditors under the Jordanian rules considered as agents of shareholders[1847]. The GA directly elects them[1848]. Auditors are held liable for misconducts resulting out of performing their functions including the faults or failure to properly perform[1849]. Further, the auditor is held liable for issuing or ratifying inaccurate or incorrect financial statements[1850], in addition he is liable for ratifying or issuing of financial statements not confirming with the accepted auditing standards[1851]. The information that the auditor comes across throughout its performance may hold confidential information. The auditor is prohibited from disclosing this information to shareholders or third party. Any unlawful disclosure made by the auditor in this regard holds him liable for the occurring damage[1852]. Auditors should avert from situations involving conflicts of interest[1853]. They are prohibited from dealing directly or indirectly with the shares of companies' they audit. They are held liable for the incurred damage if such dealing is performed[1854]. Auditors, under French rules, are held liable before the company, shareholders and third party for damages resulting from their fault or negligence in performing their functions[1855]. This liability is limited to the information and disclosures made within their term. Their liability is personal. Meaning they are not responsible for the actions of the management unless they knew of such, conduct and they failed to report this misconduct either to the competent authority[1856] or in their report for the GA[1857]. Auditors are liable for fraudulent excessive estimations of share value[1858].

[1845] Article 280 JCC; Didier Poracchia, 'Commissaire aux Comptes' (Dalloz 2017) parag. 424
[1846] Article 159 JCC
[1847] Article 199.a JCC
[1848] Article 192.a JCC
[1849] Article 201 JCC
[1850] Article 278.a (4) JCC; Article 44 Law Regulating the Practice of the Auditing Profession of 2003; C. com., art. L. 820-7
[1851] Article 105.c JSL of 2017
[1852] Article 202 JCC
[1853] C. com., art. L. 822-11
[1854] Article 203 JCC
[1855] C. com., art. L. 822-17
[1856] Article 200 JCC

642 ***Sharing liability with management***. Auditors may be considered as accomplice in the misconducts and violations of the management[1859]. For example in the case of abuse or misuse of company's assets if the auditor hides, while being informed, the misuse and reports to the GA the legitimacy of the operations[1860]. They may face secondary action by members of the board in order to share a larger portion of the damages by arguing that the auditors are more liable. Auditors' liability also stands for the same time limits provided for management[1861]. The difference between the two lies in the starting point for the calculation of the period. Being responsible for the control of the reports and financial statements of the company the calculation of the mentioned period begins with the publication of the accounts. The French jurisprudence considers the publication as the triggering factor and not the actual discovery of the fraudulent act[1862].

643 ***Auditors' civil liability.*** Auditors' liability is qualified as contractual under Jordanian company rules by explicitly stating that they are agents of shareholders within the limits of their functions[1863]. Their liability towards the company may be qualified as either tortuous or contractual. Contractual in considering the relation connecting them with the company as contractual close enough to employment contract. Tortuous when considering two main legal texts first the text explicitly considering them as agents of shareholders and not the company, second is the text addressing their liability towards the company as it provides as basis for damage compensation, two concepts that belong to tortuous liability under general civil law rules redressing the actual incurred damage and the missed profit[1864]. The contractual liability accepts the actual damage as basis for redress[1865]. Again, under French rules the rules do not address a specific form of civil liability. The auditors are responsible for the fault and negligence towards both the company and third party[1866]. The form of civil liability of auditors was addressed by French jurisprudence. Some court decisions referred to the general rules of

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[1857] C. com., art. L. 822-17 al. III
[1858] General liable action applicable to auditors (C. com., art. L. 242-2); Cass. Crim., 12 avr. 1976, n° 1976-096115
[1859] Article 278.b JCC
[1860] Cass. Crim., 19 mai 1999, n° 98-83.587
[1861] C. com., art. L. 822-18
[1862] Cass. crim., 9 juill. 1996, n° 1996-003580; Cass. crim., 20 fevr. 1997, n° 96-81.613
[1863] Article 199 JCC
[1864] Article 201 JCC
[1865] Jo. cass. civ., 29 mar. 1983, n° 768/1982; Jo. cass. civ., 10 may 2001, n° 332/2001; Article 363 Jo. Civil Code
[1866] C. com., art. L. 822-17

tort[1867] and others referred to the liability as contractual[1868]. When considering the actual terminology used in the governing legal text we find that it addresses a civil professional liability. A liability for damages and negligence in the sphere of the profession and for the exercise of functions. Therefore, this stipulation departs from the classical view of the liability as tortuous or contractual to a larger concept of a civil liability connected to a profession[1869]. Auditors' liability is limited to the several and joint forms[1870]. Criminal liability stands also for auditors[1871].

644 ***Independence and control.*** The management should not be interfering in the performance of auditors' duties. They should allow them to exercise their duties without restrictions. Any action preventing the auditor from exercising its duties holds the management liable[1872]. As for shareholders' control over auditors extends to removal and replacement of the external auditor upon their request. The request is conditional. The two requests differ in their reasoning. Revocation of auditors is made for a fault committed by the concerned auditor. It is not limited in time to a specific period[1873]. As for the *récusation* or replacing it is limited in its scope of application to newly appointed auditors, where a suspicion arises concerning their independence such as the case of conflicts of interest, or other characteristic without requiring a prior fault or violation. Shareholders holding not less than five percent of the share capital have the right to request to courts for "*récusation*" of one or more of the auditors' in term[1874]. Further shareholders may request the termination of the term of the auditor for fault or impediment[1875]. Replacing an auditor generally is not permitted in Jordan before the end of the term. Exceptionally the replacement is permitted yet conditioned; to be performed after the end of the

[1867] Cass. com., 6 oct. 1992, n° 90-21.011; cass. com., 18 mai 2010, n° 09-14281
[1868] CA Paris, 30 juin 1994, n° 93/8424 et n° 93/13113
[1869] Jean-François Barbiéri, *Responsabilité Civile des Commissaires aux Comptes* (Francis Lefebvre 2017) page 9
[1870] Article 201 JCC
[1871] Article 280 JCC; C. com., art. L. 820-5; C. com., art. L. 820-7; Augustin Robert, *Responsabilité des Commissaires aux Comptes et des Experts Comptables* (Dalloz 2011) page 165
[1872] C. mon. fin., art. L. 573-4 ; Article 279.c JCC (intentional action)
[1873] C. com., art. L. 823-7
[1874] C. com., art. L. 823-6
[1875] C. com., art. L. 823-7

financial year unless the auditor is incapable to perform its activities for any reason then the replacement during the course of the financial year is permissible[1876].

645 ***External control of auditors.*** An external body to the company that provides an audit quality assurance reviews exercises external control of auditors[1877]. It ensures that the external auditor is practicing the profession in an adequate quality framework[1878]. The *H3C* exercises such a control over the auditors of companies with public interest such as the IC[1879]. As for other companies, national auditors' association performs this control[1880]. The participants in the audit quality assurance should hinder any situations entailing conflicts of interest[1881]. Quality assurance should be independent in accordance with a system laid down by the competent authority. This external control is granted to the minister of industry and trade under Jordanian company rules following a request made by the company controller[1882]. No such control is granted to the higher commission. Neither does the auditing profession law grant such a right of controlling the audit quality of external auditors to auditors' association. The control of the *H3C* extends to investigatory[1883] and disciplinary powers (pronouncing disciplinary sanctions)[1884] and appellate review for the decisions taken by regional disciplinary commissions[1885]. The higher commission for auditors' profession takes the role of a first stage appellate body for the challenges of the decisions issued by the board of auditors' association[1886]. The sanctioning committee[1887] created within the structure of the auditors' association imposes disciplinary sanctions[1888]. The higher commission does not pronounce sanctions. It merely approves the decision of the disciplinary committee previously approved by the board of the association and

[1876] Article 32 Law Regulating the Practice of the Auditing Profession of 2003
[1877] Article 26 Reg. 2014/537
[1878] The JSC has the power when it deems necessary to appoint another than that appointed by the company on company's expense, in order to perform particular audits (article 83 Licensing Regulation of 2005; article 23 Licensing Bylaw of 2018)
[1879] C. com., art. L. 821-9 al. I
[1880] C. com., art. L. 821-9 al. II
[1881] C. com., art. L. 821-10
[1882] Article 276 JCC; this right does not transfer to the JSC in accordance with the rule transferring the organizational and administrative duties of the company controller to the JSC (Article 111.a JSL of 2017)
[1883] C. com., art. L. 821-3-1
[1884] C. com., art. L. 821-1 7°; C. com., art. L. 824-1,2; disciplinary sanctions are challenged before the *CE* (C. com., art. L. 824-14)
[1885] C. com., art. L. 821-1 8°; C. com., art. L. 824-9
[1886] Article 5.d Law Regulating the Practice of the Auditing Profession of 2003
[1887] Article 34 Law Regulating the Practice of the Auditing Profession of 2003
[1888] Article 36 Law Regulating the Practice of the Auditing Profession of 2003

solely for decisions involving annulment of the license or the permanent removal of the registration of an auditor[1889].

646 ***Transition.*** The first level of guarantee to shareholders is having an effective and efficient statutory audit. The following level of protection is having a properly functioning company that complies with the applicable legal rules and its professional obligations. In the sense, that hinders any violations and infringements that incur the company and its shareholders material and immaterial costs and damages. The following sub-section 2 introduces the compliance function as a form of internal direct control of company's activities and function.

Sub-section 2: Compliance Function

647 ***Focus of compliance***. Collective investment industry has different actions and functions that need to be adhered to by ICs. They should ensure that their functioning is performed in accordance with the mandates and consistently interpret the relevant legislations[1890]. Operating a business that is based on risk management and in most cases invests lifetime savings of individuals requires the apprehension of misconducts such as insider trading. Rules were created to ensure the compliance with professional obligations and the imposed internal monitoring on the operation process. Compliance is a form of internalized law enforcement[1891] that provides better shareholder protection. If functioning effectively replaces other forms of enforcement activities especially those exercised by the state. It is an essential internal control activity that coexists next to its cousins risk management and governance. IC establishes and maintains a compliance function in addition to effective operational measures that guarantee continuous compliance with the applicable legal and industrial rules. Compliance function is a form of internal control exists alongside the audit function and does not replace it. The two functions belong to the same category of control yet they are independent and separate from one another.

[1889] Article 37 Law Regulating the Practice of the Auditing Profession of 2003; decisions involving sanctioning (article 37) or relating to licensing (article 23) are challenged before administrative court; Jo. co. admin., 14 march 2016, n° 543/2015; Jo. co. admin., 20 dec. 2015, n° 383/2015

[1890] 'Collective Investment Managers' < http://www.asisa.co.za/_docs/Chapter%202.pdf > accessed 6 August 2014

[1891] Geoffrey P. Miller, 'The Compliance Function: An Overview' [2014] NYU Law & Economics Working Papers 393/2014 < http://lsr.nellco.org/cgi/viewcontent.cgi?article=1397&context=nyu_lewp > Accessed 13 January 2018

They should be separate to ensure that the compliance function is subject to independent review[1892].

648 ***Role of compliance***. Compliance function has as its main role reasonably ensuring that the company complies with the applicable regulations. If integrated into the business culture, it empowers the responsible for compliance to fulfil their missions. As for audit, it is uniquely independent and objective due to its reporting structure. It monitors and evaluates company's internal control environment in terms of adequacy, efficacy and effectivity. Despite their separation, they coordinate effectively, through leveraging a common language of risks and control. For example in Jordan, particularly internal audit and compliance function are not separate. In the sense that corporate governance regulation grants the audit committee both functions internal audit and compliance[1893]. The rule does not limit the compliance to the regulations governing the audit profession; it extends to include the entirety of applicable rules. They both represent control components of a company's structure. If an effective program emphasizes their function then a reduction of incidence of abuse is achieved. In the preceding sub-section, we addressed the audit function. The following paragraphs address the composition and structure of the compliance function in terms of its basic structure and source of obligation (paragraph 1) and its responsible individuals (paragraph 2).

§1: *Common Structural Framework of Compliance*

649 ***Compliance theory.*** The goal of compliance is to incentivize or force a control system inside the company that has practical effect of reducing wrongdoing that otherwise have a positive expected value[1894]. Compliance is a tradeoff of costs and benefits. In the sense that if the company complies with its regulatory obligations and requirements while achieving the lowest operational cost possible and fulfilling the benefit of the regulation then it reduces its legal risk and therefore offers a stable investment environment for current and future investors. The theory of compliance addresses companies' legal risk. Meaning the risk resulting from non-

[1892] Angela Gillis, 'Internal Audit vs. Compliance' (30 May 2013) < https://www.schneiderdowns.com/our-thoughts-on/risk-advisory-Internal/internal-audit-vs-compliance > Accessed 13 January 2018
[1893] Article 7.d (4) Jordanian Corporate Governance Regulation of 2017
[1894] Donald Langevoort, 'Cultures of Compliance' (2017) 54 (4) American Criminal Law Review 933 < http://heinonline.org/HOL/PL?key=EIFVk > Accessed 13 January 2018

compliance or irregularities with regulatory requirements. Legal risk opens the door for litigation based on liability and redress of damages and losses. A stage companies wish to avoid to save their reputation and maintain a stable financial standing in the market. The basic theory states that if law imposes the right mix of detection and sanctions, then companies are likely for this sole reason have an incentive to take a step to reduce their legal risk. Companies play by the book but not when playing by the rules is performed in an overly legalistic regulation where compliance is too costly and the regulation is too complex to know and understand. Particularly this relates to the current state of the art in companies' liability system. Companies are responsible for the actions of their agents and members of management. Liability incentivizes companies to employ compliance measures in order to avoid unnecessary payments and operational risks. The balance between the compliance obligation and the liability is found in the individual forms of liability addressed under securities and company rules. They put the company in a more beneficial position. As they can place adequate (in the eyes of the law) compliance policy and procedures that may exempt them from liabilities relating to inefficient compliance function and transfer the liability to the concerned person.

650 ***Compliance system design.*** Compliance is a system of policies and controls adopted to deter violations of the law and to show competent authorities that such a preventive step is taken[1895]. General compliance systems address the overall conduct of the business and includes all forms of misconducts. They operate by increasing the overall enforcement resources in a manner, ensuring the apprehension either prior or post the violation. Compliance organization begins at the authorization or licensing stage of the company[1896]. Companies choose a system design and structural framework to their compliance function. There are two general national systems of compliance[1897]. A system focused on a command approach; appointing a compliance officer to perform quality control of each designated level at the operational stage. In addition to

[1895] Miriam Hechler Baer, 'Governing Corporate Compliance' (2009) 50 Boston College Law Review 949 < https://www.bc.edu/content/dam/files/schools/law/bclawreview/pdf/50_4/02_baer.pdf > Accessed 13 January 2018

[1896] Article 8-1 *AMF* Instruction Programme d'Activité, Obligations des Prestataires de Services d'Investissement et Notification de Passeport DOC-2014-01 ; Article 7.a (bis) Licensing Regulation of 2005 ; article 5.a/bis Licensing Bylaw of 2018

[1897] Wong Teck Kow, 'Compliance Function in Financial Institutions' [2006] IFAST Financial < http://www.ifastnetwork.com/ifastverve/home/articles/iFAST-Compliance_Function.pdf > Accessed 13 January 2018

a system focused on a values approach or called norm-based compliance. In this system, the general concept is generating ethical norms within the company. In the sense that empowers the persons of the company with the ability to tell their responsibility to comply with the regulations related to their field. Meaning increasing the deterrence if the company is permitted to discipline its employees for violations that do not mount to legal ones yet they violate the generated social norm. The question rising in this regard which of the two systems yields greater benefits to the company?

651 ***Beneficial system.*** The first proposed system might be costly and less beneficial on the long term as no compliance culture is generated. Further this system faces problems of incentive especially for outsider officer. As for the second system, it is seen as yielding greater benefit on the long term. The concept behind this system is in training the employees for compliance ethics. They are relied upon to do their job while conforming to regulatory obligations and requirements. In this system, employees take complete responsibility to comply with rules. It becomes a part of their daily functioning such as fulfilling any other regulatory requirement. To function properly, this system requires financial and promotional motives and incentives. Therefore promoting compliance culture.

652 ***Compliance culture.*** Compliance culture has made its way into common legal discourse as describing a goal and a maker[1898]. This culture sees departmentalization as not the answer to compliance. It sees the solution in a globally spread culture across the company. The state of the art for nationally adopted compliance system leans towards the first proposed system as the compliance culture is difficult to achieve. Regulations address the obligation to set up a compliance function while providing a general framework for its missions and duties. The detailed component and structure is left to the discretion of the company. Nonetheless, national rules address trainings of compliance procedures. It is the beginning of compliance culture. Education through effective communication with different components of the company to ensure their understanding of their compliance commitment[1899]. Further, the rules address the necessity to comply with the regulatory requirements for the main organs of the company such

[1898] D. Langevoort 2017, n (1894) page 937

[1899] Donald Langevoort, 'Monitoring: The Behavioral Economics of Corporate Compliance with Law' (2002) 2002 (1) Columbia Business Law Review 71 < http://heinonline.org/HOL/PL?key=DJJAo > Accessed 13 January 2018

as members of management and auditors. The rules hold them liable for the lack of compliance. This approach is an attempt to develop a compliance culture on the long run. For the moment, national systems seek to profoundly establish the compliance as a necessity and an inseparable part of the internal organization of the company. Compliance in this approach is embodied in management duties including the responsibility to safeguard the company from illegal activities.

653 ***Compliance and disclosure.*** There is a historical link between the development of compliance and the growth of financial reporting and internal control mechanisms. Company law extends the compliance beyond the duty of management by including codes of best practices, regulatory statutes and other norms. The regulatory requirements translate into internal codes of conduct that advice employees to comply with legal rules and assists them to seek the competent organ in the company if they are unsure of the rule or they fear a violation occurred. The aim of these codes is to minimize company's civil and criminal liability using an ethical norm instead of a legal deterring method therefore, using a direct monitoring strategy in terms of having a standard hierarchal review of behaviors and performance. In securities systems the compliance function is sometimes attributed to the responsible for economic productivity supervision and evaluation. In some systems, board members may be allowed to exercise the role of the compliance officer or participate in the compliance process. This mix generates conflicts of interest especially if the participant is driven by financial motives rather than the greater good of the company.

654 ***Compliance function obligation.*** Complying with applicable rules by market participants is guaranteed through deterring texts imposing liability for their violation, in addition to obliging companies to comply with applicable legal rules. The obligation requests the company to establish and maintain operational adequate policies, procedures and measures to detect risk of non-compliance with professional obligations; while taking into consideration nature, importance, complexity and diversity of the activities provided by the company[1900]. This obligation does not stop at merely placing a policy and procedures. The obligation extends to establishing and maintaining a compliance function at the heart of the organizational structure

[1900] *AMF,* règl. Gén. art. 313-1; it is the board's mission to lay down the general policy of the company including taking the necessary measures that guarantee compliance with applicable rules and regulations in addition to adopting a compliance guide (Article 66 Licensing Regulation of 2005)

of the company[1901]. The function should be exercised independently to fulfil two main missions. The first mission addresses regular control and evaluation of the adequacy and efficacy of the implemented policies, procedures and measures, further to evaluating and controlling ongoing redress actions for the violations of the company and its concerned persons[1902] of their professional obligations. The second mission is providing advice and assistance to the concerned person in charge of the investment services to comply with his professional obligations[1903].

655 ***Compliance Function conditions.*** In order to have an efficient and adequate compliance function the company should meet the conditions set by law. The function should enjoy authority, resources, expertise and access to all necessary information[1904]. In addition to, designating a compliance officer responsible for the operation of the function and issuing compliance reports[1905]. If a concerned person (including members of management) participates in the compliance function, he/she should not be attributed the control over services and activities he/she controls (guaranteeing the necessary level of independence). Most importantly, the remuneration granted to concerned persons participating in the compliance should not compromise their objectivity. Companies may derogate from the mentioned conditions of independence and remuneration if they prove that nature, importance, complexity and diversity of company's activities present these conditions as excessive and if the compliance function in place remains efficient despite the derogation[1906]. Worth to be mentioned that the Jordanian rules do not address the actual term 'compliance function' the rules explain a compliance procedure (envisaged in the compliance guide), and the compliance officer responsible for the compliance of the company and its staff. Not mentioning the actual term does not undermine the attempt of the legislature to insist on the importance of compliance. Nonetheless, the fact that such function does not explicitly exist as is, leaves the compliance process in the hand of an

[1901] *AMF,* règl. Gén. art. 313-2
[1902] Includes the MC (*AMF,* règl. Gén. art. 313-2 al. II). This statement is of importance in cases of delegation of functions where the company does not transfer its liability but merely its functions
[1903] *AMF,* règl. Gén. art. 313-2 2°; duty of the compliance officer under the Jordanian rules (Article 68.c (4) Licensing Regulation of 2005); appointing compliance officer with no explanation of his/her duties in article 18 Licensing Bylaw of 2018
[1904] This condition is fulfilled for the benefit of the compliance officer under Jordanian rules (article 68.h Licensing Regulation of 2005)
[1905] *AMF*, règl. Gén., art. 313-7
[1906] *AMF,* règl. Gén. art. 313-3 al. II

individual and not a team. Therefore, this arises operational risk and possible failure of performance due to the limited language of the text. The risk is related to the size, complexity and diversity of the provided activities. The internal organization of the company is left to the discretion of the board. This loose attribution may be the solution for the gap in the compliance obligation text. The company may decide to set up internally a compliance function or a department within its organization, in addition to the role of the audit committee in the compliance process. The question rising in this regard is the following: who are the key players in a compliance function?

§2: *Key Players in Compliance Function*

656 ***Nomination obligation.*** In order to permit the compliance function to perform its missions in an appropriate manner and with the necessary independence, the IC fulfills a list of conditions including nominating a compliance officer[1907]. This officer is assigned and is in charge of ensuring that, the company complies with its regulatory requirements and internal policies. In other words making sure that the company plays by the rules. Several questions rise in this regard: who is this officer? Who is responsible for its appointment? What is he responsible for?

657 ***Qualifications of compliance officer.*** National legal rules provide a list of conditions the compliance officer should comply with ahead of receiving his official post. Due to the importance of compliance function within the life of the financial company, the person holding the position of a compliance officer is expected to hold certain level of technical knowledge and experience. Compliance officers deal with different industries depending on the objective and activities of the company. Regarding the IC compliance officers, they should hold the necessary professionalism to deal with financial and investment regulations and services. In order to ensure this qualification, national securities authorities require the candidates for the post of compliance officer to undertake a qualification exam organized and managed by the

[1907] *AMF,* règl. Gén. art. 313-3 2°; Article 68.a Licensing Regulation of 2005; article 18 Licensing Bylaw of 2018 the article does not refer to the form of registration required to the compliance officer as it no longer distinguishes between administrative and technical registration

authority[1908]. This exam forms part of the greater obligation of acquiring a professional status[1909] from the securities authority ahead of commencing the attributed missions[1910]. The national authority verifies that the candidate meets the remaining conditions alongside the qualifying exam. The conditions include knowledge of professional obligations the company is subject to, a university qualification (under Jordanian registration rules) and the honorability of the concerned person[1911]. The authority further verifies that the company making the request for the professional status of its compliance officer meets its compliance function conditions. The professional card issued by the *AMF* for the benefit of the compliance officer of an IC includes two main parts; compliance and internal control (type *RCCI*[1912]). Most importantly, compliance officer should hinder any possible situations entailing conflicts of interest between its functions as compliance officer and other missions attributed to him[1913]. This is mostly seen in cases were a concerned person (example a member of management, agents of the company, an employee or an individual exercising an externalized function[1914]) is involved in the compliance process such as being a member of the compliance team.

658 ***Responsibilities of compliance officer.*** Compliance officer is responsible for three main missions in charge of the compliance function, permanent control and periodic control[1915]. Responsible of the compliance function meaning; ensuring that the company maintains and establishes operational procedures, policies and measures and an efficiently and independently exercised compliance function. The compliance function consists of permanent and regular control ensuring that the company, its different organs and employees confirm with professional

[1908] *AMF,* règl. Gén. art. 313-38; Article 45.b Licensing Regulation of 2005; article 20.a Licensing Bylaw of 2018; the exam organized by the *AMF* composes of interviews with a jury that refers its decision to the *AMF* (the exam's modality and organization is set in an *AMF* instruction DOC-2006-09). The jury states in its decision whether or not the candidate holds the required qualifications and fulfils the requested conditions (*AMF,* règl. Gén. art. 313-42 (for employees of the company), *AMF,* règl. Gén. art. 313-44 (for externalized compliance))
[1909] Professional card under *AMF* general regulation and technical registration under the licensing regulation of JSC
[1910] *AMF,* règl. Gén. art. 313-4; *AMF,* règl. Gén. art. 313-29; Article 68.a Licensing Regulation of 2005; article 18 Licensing Bylaw of 2018 a mere registration with no distinction if it is administrative or technical
[1911] Non conviction; *AMF,* règl. Gén. art. 313-39; Article 45.b Licensing Regulation of 2005; article 20.a Licensing Bylaw of 2018
[1912] Responsable de Conformité et du Contrôle Interne
[1913] Article 68.d Licensing Regulation of 2005
[1914] *AMF,* règl. Gén. art. 313-2 II
[1915] *AMF,* règl. Gén. art. 313-66

obligations and the applicable rules and regulations[1916]. The permanent regular control is divided into different duties[1917]. They include achieving clear understanding of company's staff and management of the financial services provided by the company, proposing compliance guide (confirming with internal control mechanisms, a Jordanian imposed duty), deliver compliance training, provide advice and recommendations on regulatory issues, and certify the supervision of registered individuals and investigating any possible violations[1918]. Further to, evaluating on a regular basis the adequacy and efficiency of the implemented compliance policies and procedures, the redress the company owes as a result of ongoing liability actions, assisting the concerned persons responsible for investment services in confirming with their professional obligations[1919], in addition to controlling and evaluating internal control mechanisms[1920], risk control and management[1921]. The Jordanian rules address the duties of the compliance officer as part of a main regular control. The rules do not refer to any possible periodic control in the framework presented by the *AMF* rules.

659 ***Periodic control.*** Periodic control is not obligatory for all forms of investment services providers. The company choses to establish and maintain a periodic control function[1922] distinct and independent form the permanent one. The creation of such a function relates to the appropriateness and proportionality regarding the nature, importance, complexity and diversity of activities provided by the company[1923]. The responsibilities included in the periodic control includes establishing and maintaining operational a periodic control program that examines and evaluates the adequacy and efficacy of systems and mechanisms of internal control. Further to, issuing recommendations following the performed examination, verifying that these recommendations are respected and submitting reports to the management. The periodic control is an internal control. It is not limited to the compliance with regulatory requirements. It

[1916] *AMF,* règl. Gén. art. 313-66; *AMF,* règl. Gén. art. 313-2 I; Article 68.b Licensing Regulation of 2005
[1917] *AMF,* règl. Gén. art. 313-64
[1918] Article 68.c Licensing Regulation of 2005; no explanation of the duties of the compliance officer are mentioned in the Licensing Bylaw of 2018
[1919] *AMF,* règl. Gén. art. 313-2
[1920] *AMF,* règl. Gén. art. 313-58
[1921] *AMF,* règl. Gén. art. 313-53-2; *AMF,* règl. Gén. art. 313-53-7
[1922] *AMF,* règl. Gén. art. 313-67
[1923] *AMF,* règl. Gén. art.313-62

concerns other internal control mechanisms implemented by the company[1924]. It concerns specifically a well and precisely modeled organizational structure. Including a clearly aligned hierarchal composition and the distribution of functions and responsibilities. This clearly defined organization ensures that relevant persons are informed with procedures they should follow in order to guarantee an efficient, effective and faultless exercise of responsibilities. Periodic control is prior step to the permanent. It concerns the incorporation period of the company in addition to newly hired persons. As mentioned the Jordanian rules do not explicitly address the two forms of control. The closest obligation of the compliance officer to the periodic control is that concerning the development and execution of trainings to the registered personnel of the company[1925]. This training aims to spread the knowledge of the applicable rules and regulations in addition to the measures of internal control. Another close link to the periodic control is a compliance guide the licensing rules address. The IC should provide it as part of the licensing application conditions. The regulation address this guide as the means through which the company guarantee an internal control over the licensed activities[1926]. Finally the obligation the licensing regulation imposes on the board of the company and not the compliance officer to lay down general internal policies of the company that designate the allocation of responsibilities in a manner achieving administrative and financial control[1927]. The compliance officer prepares compliance reports and submits them with the board[1928].

660 ***Outsourcing compliance.*** ICs may choose to outsource their compliance function[1929]. As we previously mentioned in part I, the IC may choose to outsource partially or entirely its functions to a MC. The same rule applies to compliance function. In an approach to guarantee the utmost independence of the compliance function or compliance team members. Alternatively, if the IC does not hold the qualified human or financial resources to comply with this obligation on its own and with the limits and conditions set by law.

[1924] *AMF,* règl. Gén. art. 313-54
[1925] Article 68.c (3) Licensing Regulation of 2005
[1926] Article 7.a (bis) Licensing Regulation of 2005; article 5.a/bis Licensing Bylaw of 2018
[1927] Article 66.a Licensing Regulation of 2005
[1928] *AMF,* règl. Gén. art. 313-7
[1929] *AMF,* règl. Gén. art. 313-44

661 ***Part II Conclusion.*** Every exercise or activity coming from the company impacts one-way or the other its shareholders. This exercise is not random. It is regulated internally and externally through regulatory requirements and obligations. To guarantee the proper functioning of the company a form of supervision is continuously exercised over its activities. The source of this supervisory environment is both internal and external. Internal in the sense that permits the components of the company to possess such a supervisory character. External in the form of public enforcement. These components exercise their authority separately yet they interconnect and cooperate on different organizational and operational levels. The connection addressed in this part is in terms of an IC legally incorporated and duly authorized or licensed to provide collective investment services in securities. An IC that exercises its proper functions and does not outsource them to a MC. Control activities eventually affect shareholders. The role of the competent authority in the performance of the IC is crucial. The competent authority plays a role of control over control. Competent authority ensures market integrity and restores investor confidence in the market.

662 The first step is the internalized enforcement of the company. A control that stems out of the company. Internally born and raised. In the form of compliance with regulatory requirements especially by members of management, yet globally affecting the staff and agents of the company. The compliance function may not be enough if standing alone. Compliance and risk management intertwine and depend on each other. Compliance and risk management are forms of internal control used pre and post executions. To some extent they form a preventive measure. Especially if compliance design is rather cultural than a costly measure based on a policy and a functional team. Post transactions and throughout the exercise avails the importance of the audit function. Ensuring the financial standing of the company and that equality and adequate treatment is provided to all shareholders. Internal control closely relates to the performance. Meaning a management that fulfils its function in an effective and faultless manner. A management that complies with its legal obligations and prevents misconducts and violations. The role of shareholders in this equation avails at two extreme stages. Early ex-ante stages in employing their voting rights or later ex-post stages particularly when a misconduct occurs. Their control relates also to performance. The most important argument that should be mentioned in this regard; is having a supervisory mechanism that is not excessively costly or

legalistic for companies. Neither should the mechanism provide competent authorities with excessive supervisory powers that suffocate the normal performance of companies. Therefore, regulatory assessment usually have a cost benefit analysis to them. Nonetheless, this thesis limited its scope to the legal assessment of the Jordanian rules and regulations applicable to IC.

General Conclusion

663 The main question this work tried to answer is the level of shareholders protection provided in OEICs. In answering this question the thesis studied the degree of existing provisions regulating the IC and those addressing shareholders' protection under the Jordanian rules. The IC is in fact regulated under the Jordanian rules. This form of company exists under Jordanian company rules. To which extent this regulation is considered sufficient, adequate and thorough is our main concern. Throughout the work we referred to the Jordanian governing rules mentioning more or less their existence and their level of adequacy to the requirements of portfolio management, market integrity and investor protection. While at the same time taking into consideration the reference French model. Therefore, this work performed a thorough assessment of the state of the world of the Jordanian OEIC regulatory framework in the light of shareholders' interests. The aim of this assessment is to decide whether the existing provisions are sufficient on their own or a legislative movement should be put in place. The existing legal rules governing the IC in Jordan cannot be defined as entirely specialized or general. IC governing rules have one main source: the rules governing public limited companies. The IC is seen as a separate company than the usual Plc. Nonetheless, its existence should be consistent and conforming with Plc. rules except for minimum exemptions mentioned in company and securities law, which aimed to respect the particularity of this form of company yet failed in providing a strong and thorough regulatory framework due to major dependence and reliance on Plc. rules. The legal assessment performed in this work is merely academic and text based analysis as in practice the IC is not common in Jordan. No actual record of a registered IC can be found with the Jordanian company controller. Therefore, the consistent application of the rules governing the IC could not be assessed.

664 The rules governing the IC lack the exclusivity that such company form generally requires. The generality of rules does not harm yet in terms of the IC, negatively affects investors' confidence in this form of company as an investment decision problem solving and a safe access to financial markets. The Jordanian rules are not mature enough to host an actively

managed IC. The essence of the rules lack a more concise legislation that thoroughly and exclusively address the regulatory framework of ICs following the footsteps of French and European legislatures. We see that a regulatory reform is due in this regard. This reform introduces a filling for the gaps general company and securities rules are suffering from, a solution for the challenges this form of company imposes and prospects, detection and preventive measures for future potential crises, conflicts and risk management.

665 As a conclusion for this thorough analysis, this work proposes a legislative intervention in the form of a bylaw to be issued in accordance with article 100 of JSL of 2017. This bylaw complements securities and company rules and follows the principle of consistency, respect and adequacy of the regulatory practice. The bylaw includes rules governing issuing, trade and redemption of IC shares, capital requirements, information included in the AOA, the content and form of the prospectus, management structure, composition and conditions, in addition to those rules that define the organization and control of IC's activities and performance. Complying with securities rules, preceding the official adoption, and entering into force of this bylaw, the draft should be disseminated to the public to permit them to provide their comments and opinion on its content and design in addition to study the impact it may have over their business or future investment decisions. The commission should take the feedback of stakeholders and public into consideration as the draft passes into the law-making process.

666 For reasons relating to the composition of the securities law and hierarchy of norms within the Jordanian legal system the following proposal draft excludes particular issues from its scope of reforming framework. They include the structure of the JSC. It was mentioned in this work that the JSC council composition is rather small when compared to other boards of securities commissions in other countries. This composition may be left as is yet preferably it should be restructured to be composed of a bigger number of members while guaranteeing effective representation from the central bank and the insurance commission. Therefore, the law should explicitly address the cooperation between the different competent authorities of financial segments. The proposed bylaw does not address the necessity to create an ombudsman within the JSC as was recommended by the OECD. The key role of the Ombudsman is in providing alternative dispute resolution and settlement process for securities related disputes for

those arising between investors and licensees of the commission. The newly implemented JSL of 2017, in article 111.a, transfers organizational and supervisory functions generally granted to the company controller and the minister of industry and trade as part of their supervisory power over incorporated companies, to JSC. The JSC council exercises the powers of the minister and the president of the council exercises the powers of the company controller. For purposes of the proposed bylaw, this matter was excluded for two main reasons; the bylaw regulates particularly the IC and does not entail any amendments or modifications to the JSC. Furthermore, this transfer addresses generally public limited companies and private limited companies that trade their shares on markets and not particularly the IC. Nonetheless, this issue is significant to the IC and the JSL should provide a clear definition to the scope of transfer and the scope of included functions. The proposed bylaw further excludes defining a competent court in matters relating to the decisions of the ASE that are not qualified as securities' related decisions such as membership issues.

667 The bylaw further excludes the matter of presumptions and burden of proof. The securities law transfers the burden of proof to the claimant in matters involving members of management and securities law infringements. The JCC on the other hand, needs to state an explicit presumption instead of having to apply the general rule of burden of proof provided by the law of civil procedures. The law should provide a presumption of members of management knowledge or engagement in the infringing action. The presumption induces efficient performance and provides a form of legal control and broader shareholder protection.

668 Issues relating to the prospectus are addressed in the proposed bylaw. A higher level of investor protection could be achieved if the JSL states clearly and explicitly the obligation to submit the prospectus with the commission and disseminating it to the public. An obligation of this form presents the failure to execute it as an infringement of securities rules.

669 Company law rules should explicitly state the nature of the relationship between shareholders and board, shareholders and general manager, shareholders and third party contractors of the company, shareholders and the company, the relationship between the company and the formers, and that between the company and auditors. Is it direct or indirect? The law should qualify the liability as contractual or tortuous.

670 A final proposal is governing risk management in securities law. Corporate governance regulation of 2017 is the sole legal text referring to risk management. The text is incomplete. The JSL should dedicate a part to explain risk management, the policy that should be put in place, the responsible person for its preparation, implementation and content, identifying the forms of risks listed companies are subject to, and introducing evaluation and methods of calculation of global risk exposure. The legal text should consider risk management and evaluation as an inseparable part of the prospectus, and company disclosures. Following this small recap, this thesis concludes with a draft proposal of the mentioned bylaw.

Appendix

Investment Company By-law for the Year 2018

Issued by virtue of article 100 of Securities Law no. 18 of 2017

Article 1: Scope of Application

A. This By-law shall be called "Investment Company By-law for the year 2018". It shall enter into force as of the date of publication in the official gazette.

B. This by-law shall be exclusively applicable to Open-end investment companies as for closed end investment companies they are not covered in the scope of application of this bylaw unless otherwise indicated in the text.

Article 2: Definitions

A. Whenever mentioned in this By-law the following terms shall have the meaning attributed to them hereunder, unless indicated otherwise in the relevant text:

1) Commission: Securities Commission

2) Council: Council of the Securities Commission

3) Regulated Market: Amman Stock Exchange or any other authorized multilateral system, which brings together or facilitates the bringing together of multiple third-party buying and selling interests in securities in a way that results in a contract.

4) Collective Investment Undertaking: the undertakings for collective investment in securities. They take two main forms fund whether open or closed end and company whether open end or closed end.

5) Investment Company: the public limited company with sole object of portfolio or collective investment of securities operating on the principle of risk spreading. It is the company whose shares upon the request of shareholders may be redeemed or repurchased.

6) Open-end Investment Company: a public limited company with a variable capital, established with a sole object of collective investment in securities, operates based on the principle of risk spreading, whose shares are redeemed at their net asset value anytime upon the request of shareholders.

7) Competent Authority: the body responsible for the enforcement and implementation of the rules stated in this by-law. This term includes the Commission, the Regulated Market, the depositary center and the company controller.

8) Statute: articles of incorporation of the company and its constitution. It constitutes of articles of association and memorandum of association.

9) Investment Adviser: means any person moral or natural who, for compensation, engages in the activity of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as part of a regular activity, issues or promulgates analyses or reports concerning securities.

B. Unless otherwise indicated in the text or when contradicting with the essence of this by-law the terms not defined in this bylaw and have their proper definition mentioned in Securities law, company law or any other related legislation retain the meaning assigned to them.

Article 3: Incorporation

A. The Investment Company is incorporated as a public limited company with the sole object of collective investment in securities with minimum seven founding shareholders. It takes two main forms regarding its capital structure: open and closed end. The Investment

Company is subject to the general rules governing public limited companies unless otherwise stated by law.

B. The Investment Company complies with the incorporation procedures set for public limited companies. Notwithstanding minimum capital requirement and threshold indicated in company law further to that mentioned in the licensing regulation and licensing bylaw the open-end investment company adheres to this requirement merely for the purposes of incorporation. This requirement ceases once the company commences the exercise of its activities. Nonetheless, the open-end investment company is expected to maintain at all times a minimum liquidity of three hundred thousand Dinars, in order to be able to execute shareholders' share redemption requests.

C. The Investment Company registers with the company controller following obtaining a preliminary approval from the Commission. The company controller establishes Investment Companies Registry for this purpose.

D. The Commission issues the preliminary approval within a period not exceeding thirty days following the submission of the complete registration application. The refusal of the Commission should be reasoned and it is contestable within sixty days before administrative courts. If the commission fails to issue a decision within the set timeframe, the applicant company has the right to contest the negative decision before administrative courts following a written request submitted with the Commission. The response of the commission to the written request should be issued within a period not exceeding fifteen days of its submission. The time lapse of this period without a positive answer permits the applicant company to contest this negative decision before administrative courts within the following thirty days.

E. When submitting the registration application with the company controller the Investment Company attaches its articles and memorandum of association, including but are not limited to the information mentioned in article 92 of company law no. 22 for the year 1997. The Statute of the company should indicate the name of a licensed or registered investment

advisor responsible for the management of company's investments. Further, the company submits the initial capital deposit certificate.

F. The Investment Company should fulfill the underwriting of its shares within a reasonable period in a manner that does not represent the company as inactive or hinders its financial licensing.

Article 4: Financial license

A. The Commission should license the Investment Company ahead of exercising its financial services yet following its registration with the company controller.

B. The Investment Company is licensed as an investment manager in accordance with the rules laid down in the licensing regulation of 2005 and that of the licensing bylaw of 2018.

C. The Investment Company fulfills the licensing conditions at the date of application in addition it is obliged to maintain these conditions valid at all times otherwise the license may be subject to annulment.

D. The conditions of the financial licensing include but are not limited to the following:

1) Submitting a licensing application with the Commission including but not limited to the information and documents mentioned in article 7 of the licensing regulation of 2005 and article 5 of the licensing bylaw of 2018.

2) Having a minimum incorporating capital of one million Dinars. If the Investment Company choses to include in its main object other financial services then the minimum accepted capital, should not be less than the accumulation of minimum capitals required for the involved services.

3) Justifying the existence of expertise and competence in the chosen members of management. This justification forms part of the professional registration and examination of senior staff and management conducted post licensing. Furthermore,

the applicant justifies acquiring technical competences and expertise in terms of software and communicational equipment.

4) Paying preliminary licensing and renewable license fees set by the Commission.

5) Providing an unconditional financial guarantee. The guarantee should not exceed the amount of two hundred and fifty thousand Dinars for investment management services.

6) Submitting a program of activity oriented to provide sufficient financial background on the applicant company and its components. The program constitutes of the form of management self or outsourced, the authorized securities within the scope of activity of the applicant and the targeted investors within its scope (retail or professionals). In addition to collective management strategies (asset allocation, stock picking, directional risks), compliance and internal control guide and investment process (including conflicts of interest policy). The program addresses instruments valuation, data retention and record-keeping organization, financial information (preliminary assumptions for companies under establishment, development assumptions) in addition to a forecast of financial statements. The applicant Company should provide as part of its activity program an Anti-Money Laundry and Terrorist Financing risk policy.

E. The commission reviews the application and issues its licensing decision sixty days following the submission of a complete application. This period becomes two weeks if the applicant Investment Company is comparable to another recently licensed reference company within the past eighteen months. The comparability is in terms of having the same management company for both applicant and reference companies, the reference company was not subject to major modification since its licensing and sharing similar investment strategy, functioning rules, and Statute and risk profile.

F. The silence of the Commission concerning the licensing application fifteen days following the submission of a written request inquiring on the result of the application at the end of the review stage is translated into an automatic licensing of the applicant company.

G. The Commission issues two forms of decisions relating to financial license approval or refusal. The decision should be communicated and notified to the applicant in a timely fashion by postal services in addition to an electronic copy. The notification includes a reasoned refusal or a restricted or non-restricted approval. The approval should contain the number of license, which should be indicated at all times in the correspondences of the Investment Company.

H. Commission licensing decisions whether negative or positive are subject to contestation before administrative courts.

I. The financial license expires annually on December 31. It is renewed annually upon the request of the licensee thirty days preceding the said date. The commission issues its decision of refusal or approval to renew the license maximum twenty-one days following the submission of a complete application, supported with a justification of payment of licensing fees. The silence of the Commission following the lapse of this period results in the automatic renew of the license.

J. The Commission enjoys supervisory, investigatory and disciplinary powers as indicated in the securities law no. 18 for the year 2017. Regarding the financial license the Commission may suspend, restrict or revoke it. The suspension of the license is temporary and used as preliminary preventive measure. The restriction is having a conditional license. The restriction ceases to exist once the condition is fulfilled. The revocation of the license takes several forms: withdrawal upon the request of the licensee, withdrawal due to not making use of the license within six months following the licensing without a justification or annulling the license due to incorrect information or infringement of securities rules.

Article 5: Exercise of activities

A. The Investment Company choses whether to personally exercise its activities or outsource them to a management company. The choice of outsourcing is limited in its scope of application to collective investment services, risk management and compliance function. The Investment Company cannot outsource the entirety of its activities. The same rules of incorporation and licensing apply to the management company. Nonetheless, the management company may be incorporated as a limited liability company. The management company is subject to the supervision of the Commission and the company controller. The management Company may externalize or delegate its activities to another body. This delegation and/or externalization does not transfer the responsibility of the management company before the Investment Company to the delegate.

B. The transfer of organizational and supervisory powers of the company controller to the Commission do not extend to management companies.

C. The management company should guarantee its independence and fair treatment further it should disclose any potential or existing interest with the delegated powers and activities.

D. The management company prepares a monthly report detailing its performance. A copy of this report should be submitted with the Commission.

E. Preceding the trade of shares on Regulated Markets Investment Company undergoes the following stages:

    1) Registration with the company controller following prior approval by the Commission according to article 98.a of Securities Law for the year 2017 and article 7.h of company law for the year 1997.

    2) Financial licensing following the rules set in licensing regulation of 2005 and licensing bylaw of 2018.

    3) Regulated Market membership according to Internal Bylaw of the Amman Stock Exchange of the year 2004.

4) Registration of shares with the Commission in accordance with article 3 of issuing regulation of 2005.

5) First issue of shares through initial public offering or private offering according to issuing regulation of 2005.

6) Membership in depositary center complying with article 80 of securities law of 2017 and securities deposit center membership internal bylaw of 2004.

7) Registration of issued shares with the depositary center according to article 79 of securities law of 2017.

8) Listing the issued shares on the Regulated Market according to listing regulation of 2016.

9) Trading shares on the market.

Article 6: Investor information

A. The issue of Open-end Investment Company shares is performed through a public offering. Potential future investors, shareholders and the public are communicated a prospectus in both electronic and hard copy forms. The prospectus should be submitted with the Commission and disseminated unless the Commission decides otherwise. The prospectus should be in Arabic. Exceptionally accepted in English as long as an Arabic translation is attached. For purposes of interpretation, the Arabic version is the officially recognized one. The language of the prospectus should be understandable and clear for retail and inexperienced investors in a manner that does not present the prospectus as overly technical.

B. The issuer company attaches a key investor information document that provides a summarized content of the prospectus prepared on an A4 page in a readable font and size. The paper should be printed in black ink with possible use of other colors for highlighting

as long as they do not exceed 15% of the size of the document, form a source of distraction or hinder the proper reading of the document. This document is considered a pre-contractual agreement. The content should be precise, complete and clear. It is communicated in a durable medium whether electronic or hard copy. It constitutes of key information that permit investors to reach an informed investment decision and be able to compare it across the market. Key information consist of five minimum requirements: objectives and investment policy, past performance, risk and reward profile, costs and charges, and practical information relating to the prospectus and additional information. The key investor information document follows the same language and publication requirements as the prospectus.

C. Both the prospectus and key investor information document should be provided free of charge and whenever requested by the investor or shareholder.

D. The Investment Company should comply with its ongoing and periodic disclosure obligation. Failure to disclose, inaccurate, misleading or ambiguous disclosure results in holding the company liable for the infringement of securities rules.

Article 7: Management composition

A. A board of director and a general manager manages the Investment Company. The board consists of not more than nine members. They appoint among them a chairman to be the president of the board. The general manager should be an independent individual and non-board member.

B. Shareholders elect board members as set in article 132-company law of 1997 and following the proposal of the election and remuneration committee. The board according to article 153 company law of 1997 appoints the general manager. Board members and the general manager may be reelected for equivalent terms.

C. The composition of the board should respect gender equality representation; age limits representation, independence, expertise and professionalism. Not more than third of the

board should compose of members over 70 years old. The minimum female representation in the board is third the members. The elected board members should be independent and respect the maximum number of board membership set in article 146-company law of 1997. Board members should not hold shares in the Investment Company unless otherwise stated in the Statute. Minimum two board members should not be shareholders at the moment of election. The fact that the company decides to grant the member a percentage of shares as a form of remuneration does not result in losing the membership. Nonetheless, the percentage should not be significant.

D. Members of the board, general manager, its delegates and senior administrative staff should undergo a professional registration process with the Commission. The process consists of an examination and evaluation of their expertise, knowledge and background in collective investment related issues. The examination is made in two different stages written exam and an interview. The Commission creates an internal examination committee composing of experts and professionals in financial, securities and economic fields. The committee decides on the content and frequency of the examination and composition of the examining jury.

E. Convening board meetings is performed in accordance with article 155 company law of 1997. The attendance and voting in board meetings is made personally, by way of representation, video, or conference call. Board members can mandate their vote to another member of the board with the limit of one mandate per member. The representation is limited to four times per financial year per member even if the mandated member changes during the financial year. Members of board who fail to attend board meetings for more than four times without a valid justification submitted maximum forty-eight hours following the meeting or without a valid mandate lose their membership and should be replaced immediately.

F. The general manager should participate in board meetings unless otherwise indicated in the Statute.

G. Complying with corporate governance regulation of 2017, the board establishes permanent support committees including but are not limited to risk management committee, audit committee, election and remuneration committee and corporate governance committee.

H. The board, if not otherwise delegated, creates a compliance function consisting of a compliance officer and supporting team. The function should be independent and cooperate with the audit committee in order to create a compliance culture within the company. The compliance function prepares trainings and compliance policy. Further, the function draws up non-compliance detective and deterring measures and legal risk management.

I. The board draws up conflicts of interest policy.

J. The board lays down a risk management policy.

K. The board prepares management and corporate governance reports including a risk exposure evaluation. They form part of periodic disclosure. They should be communicated to shareholders whether a general assembly meeting is due or not.

L. General Manager is responsible for the daily performance of the company. He/she should cooperate with the board in the decision-making process. The discretion of the general manager is indicated in its appointing deed.

M. The board, general manager and senior administrative staff are held liable for the attempt to engage and engaging in the infringement of securities and company law rules such as insider dealing, market manipulation, abuse of company's assets and unlawful disclosure of inside information.

N. For purposes of inside information, the proof of legitimate possession of inside information and that legitimate measures and procedures where used to obtain this information exonerates from insider dealing.

O. The Investment Company subscribes to a civil liability insurance for the professional performance of its general manager. The company undertakes the expenses of this insurance.

Article 8: Share redemption

A. Shareholders in Open-end Investment Company have the right to request to redeem their shares at their net asset value.

B. The Open-end Investment Company executes redemption requests without any delay.

C. The Open-end Investment Company calculates and discloses its net asset value on a daily basis. The net asset value per share is calculated by dividing the net asset value over the outstanding shares of the Investment Company.

D. For purposes of this Bylaw net asset value means the value of entity's assets minus the value of its liabilities. Assets include total market value of the company. This value consists of investments prices at the closing price of the day the net asset value is calculated, cash and cash equivalents and any accrued income. The liabilities consist of total expenses, short and long-term liabilities of the company. They further include management and operational expenses, auditing expenses, staff salaries, and marketing expenses.

E. The company may suspend share redemption if it justifies that it is at a risky level of liquidity. Meaning, if such request is executed the company risks having asset liquidity below or at the limit of the minimum required liquidity by law. Further, the company may decide to suspend share redemption if it justifies that the redemption may have a significant negative impact on its market value or if the execution of the redemption request results in having the company as majority shareholder.

F. The Commission for the same reasons provided for auto suspension may suspend share redemption. Further, the Commission may suspend share redemption if it suspects a negative impact on the transparency or integrity of the market.

Article 9: Shareholder protection

A. Notwithstanding the rules exempting the management of the Investment Company from convening general assembly meetings unless a board election is due and article 172 of company law of 1997, the board should convene at least one annual general assembly meeting. Shareholders directly or represented by their association, holding not less than 10% of share capital, have the right to file a request with the company controller to convene an extraordinary general assembly meeting. Shareholders holding not less than 20% of the share capital directly or represented by their association have the right to file a request with the board to convene an extraordinary general assembly meeting.

B. The exercise of voting rights in and attendance of general assembly meetings should be accepted by ways of proxy, postal vote and telecommunication.

C. Shareholders holding not less than 5% of the share capital present in general assembly meeting should have the right to add items on the meeting's agenda.

D. Shareholders have a say-on-pay regarding the remuneration of members of management. This control exemplified in an ex-post and ex-ante binding voting rights. It covers board members, chairman, senior administrative staff, general manager and its delegates. Shareholders vote on the remuneration policy laying down the remuneration framework. Further, shareholders vote on the remuneration report indicating the allocated remuneration to the aforementioned members of management and administrative staff.

E. Shareholders of the Investment Company should be allowed to be grouped in associations that represent them in general assembly meetings, before courts and the Competent Authority. The voting right the shareholder association exercises represent the accumulation of the shares represented in this association. The representation by the

association should be limited to three general assembly meetings per year. The association can file liability actions on behalf of its represented shareholders or petitions with the competent authority. On the other hand, the plaintiff in the liability action remains the group of member shareholders and not the association as it has no legal personality.

F. Shareholders enter into an agreement when creating the association whereas this agreement does not have any legal value before third party. It is binding before members of management and remaining shareholders. The agreement should not entail any rules violating the Statute of the company, the governing legal rules or providing member shareholders with any form of immunity or privileges. Shareholders provide the Commission and the company controller with a copy of this agreement where it is considered as part of the company's documents open for review solely to shareholders and in post members of management.

Article 10: Coordination between competent authorities

A. Competent Authorities responsible for the implementation of this bylaw should coordinate and communicate among them in order to safeguard shareholders' interest, provide the necessary level of investor protection and ensure market transparency and integrity.

B. The coordination and communication include but is not limited to: exchange of information, mutual representation in board meetings with consultative character and entering into a memorandum of understanding in order to regulate the flow of data and its sensitivity. The coordination guarantees that every authority effectively and efficiently exercises its powers and functions and provides a level of integration of external governmental oversight.

C. Competent Authorities should coordinate and communicate with other sectors of the financial system such as banking and insurance on a similar level to that requested between them.

Article 11: Transitional provisions

A. The collective investment regulation of 1999 no longer applies to Investment Companies.

B. The Council issues the necessary regulations to implement this bylaw.

Bibliography

Books:

Authored Books:

Books in English

- **Aameri M**, *Investment Portfolios Management* (1st edn, Ithraa Publishing and Distribution 2011)
- **Avadhani V,** *Securities Analysis and portfolio Management* (12th edn, Himalaya 2016)
- **Bailey R**, *The Economics of Financial Markets* (1st edn, Cambridge 2005)
- **Balachandran V** and Chandrasekaran V, *Corporate governance, ethics and social responsibility (*2nd edn, PHI learning 2011)
- **Berle and Means**, *The Modern Corporation and Private Property* (originally published in 1932, 1991 edn, New Brunswick: Transaction Publishers)
- **Brealey R** and Myers S and Allen F, *Principles of Corporate Finance* (11th edn, McGraw Hill 2014)
- **Brech E.F.L**, *Organization: The Framework of Management* (Longman 1957)
- **Cahill D**, *Corporate Finance Law* (Round Hall Sweet and Maxwell 2000)
- **Chang J**, *Business Process Management Systems: Strategy and Implementation* (Auerbach Publications 2006)
- **Chiu I**, *Regulatory Convergence in EU Securities Regulation* (Kluwer Law International 2008)
- **Chow G,** *Dynamic Economics: Optimization by the Lagrange Method* (OUP 1997)
- **Davis E** & Pointon J, *An Introduction to Corporate Finance: Finance and the Firm* (Oxford University Press 1994)

- **Elton E**, Gruber M, Brown S and Goetzmann W, *Modern Portfolio Theory and Investment Analysis,* (8th edn, John Wiley & Sons 2011)
- **Fell L**, *An Introduction to Financial Products and Markets* (1stedn, Continuum 2000)
- **Garner C**, *A Trader's First Book on Commodities: An Introduction to the World's Fastest Growing Market* (2ndedn, Pearson 2013)
- **Goodhart et al.** and the Bank of England, *Financial Regulation: Why, How, and Where Now?* (Routledge 1998)
- **Grinold R** and Kahn R, *Active Portfolio Management: A Quantitative Approach for Producing Superior Returns and Controlling Risks* (2nd edn, McGrow Hill 2000)
- **Hastings N**, *Physical Asset Management* (Springer 2010)
- **Henderson L**, *Pareto's General Sociology: A Physiologist's Interpretation* (HUP 1935)
- **Hillier D** and others, *Corporate Finance*, (2nd European edition, McGraw Hill 2013)
- **Hudson A**, *Equity and Trusts* (3rd edn, Cavendish 2003)
- **Hughes D**, *Asset Management in Theory and Practice: An Introduction to Modern Portfolio Theory* (New Age International 2005)
- **Hull JC**, *Options Futures and other Derivatives* (8thedn, Prentice Hall 2012)
- **Kula G** & others, *Beyond Smart Beta: Index Investment Strategies for Active Portfolio Management* (Wiley 2017)
- **Maginn J.L** & others, *Managing Investment Portfolios: A Dynamic Process* (3rd edn, Wiley 2007)
- **Mantysaari P**, *Comparative Corporate Governance: Shareholders as Rule-maker* (Springer 2005)
- **Martellini L** and others, *Fixed-Income Securities: Valuation, Risk Management and Portfolio Strategies* (Wiley 2003)
- **Mason J.G** and Simon H.A, *Organizations* (John Wiley and Sons 1958)
- **Mintzberg H**, *The Structuring of Organizations* (Prentice Hall 1979)

- **Muller C** and Ruttiens A, *A Practical Guide to UCITS Funds and their Risk Management* (Edi-Pro 2013)
- **OECD** (2008), *Introductory Handbook for Undertaking Regulatory Impact Analysis (RIA)*, Version 1.0 OECD Publishing, Paris
- **Palmiter A**, *Corporation: Examples and Explanations*, (6thed, Wolters Kluwer 2009)
- **Pillai R.S.N** and others, *Legal Aspects of Business* (Mercantile laws including industrial and company laws, S. Chand 2011)
- **Pyle R** & Bast C, *Foundations of Law: Cases, Commentary and Ethics*, (6thed, Cengage Learning 2016)
- **Rechtschaffen A**, *Capital Markets, Derivatives and the Law* (2nd ed, OUP 2014)
- **Reszat B**, *European Financial Systems in the Global Economy* (John Wiley & Sons 2005)
- **Scott D**, *Wall Street Words: An A to Z Guide to Investment Terms for Today's Investor* (3rd edn, Houghton Mifflin 2003)
- **Shafritz J.M** and others, *Classics of Organization Theory* (8th edn, Cengage Learning 2015)
- **Sinclair Hunt M**, *Performance Management* (Updated by Helen Simms, Cambridge)
- **Stapley N**, *The Stock Market: A Guide for the Private Investor* (Woodhead Faulkner 1986)
- **Stigum M** and Crescenzi A, *Stigum's Money Market* (4th edn, McGraw Hill 2007)
- **Swedroe L**, Grogan K and Lim T, *Active versus Passive Management* (John Wiley & Sons 2010)
- **Vernimmen P** and others, *Coporate Finance : Theory and Practice* (5th edn, Wiley 2017)
- **Vermaelen T**, *Share Repurchases* (Now publishers 2005)
- **Weber M**, *The Theory of Social and Economic Organization* (Translated by A.M Henderson and Talcott Parsons, Free Press 1947)

Books in French

- **Ambroise-Castérot C**, *Droit Pénal Spécial et des Affaires* (5th edn, Gualino 2016)
- **Barbiéri JF**, *Responsabilité Civile des Commissaires aux Comptes* (Francis Lefebvre 2017)
- **Bonfils P** & Gallardo E, *Droit Pénal des Affaires* (2nd edn, LGDJ 2016)
- **Bonneau T** & Drummond F, *Droit des Marchés Financiers* (3rd ed, Economica 2010)
- **Casimir JP** and Germain M, *Dirigeant de Sociétés : Juridique, Fiscal, Social* (5th edn, Groupe Revue Fiduciaire 2017)
- **Couret A** and others, *Droit Financier* (2nd edn, DALLOZ 2012)
- **Degand J**, Les Sociétés d'Investissement Mobilières et Immobilières Les SICAV (DUNOD Paris 1969)
- **Didier P**, *Droit Commercial* (Tome 2 : Les Sociétés Commerciales, Economica 2011)
- **François F** and others, *Dirigeant de Société : Statuts Juridique, Social et Fiscal* (3rd edn, DALLOZ 2015)
- **Germain M** and Magnier V, *Traité de Droit des Affaires* (Tome 2 : Les Sociétés Commerciales, 21st edn, LGDJ 2014)
- **Gibirila D**, *Droit des Sociétés* (5th ad, Ellipses 2015)
- **----------**, *Responsabilité Civile des Dirigeants de Société* (Francis Lefebvre 2016)
- **Le Cannu P** and Dondero B, *Droit des Sociétés* (6th ed, LGDJ 2014)
- **Le Tourneau P**, *Droit de Responsabilité et des contrats Régimes d'Indemnisation* (11th edn, DALLOZ 2017)
- **Merville AD**, *Droit Financier* (3rd edn, Gualino 2017)
- **Mousseron P**, *Les Conventions Sociétaires* (2nd ed, LGDJ 2014)
- **Mousseron P** et Chatain-Autajon L, *Droit des Sociétés* (2nd ed, Joly 2014)
- **Poracchia D**, *Commissaire aux Comptes* (Dalloz 2017)

- **Riassetto I** & Storck M, *Les Organismes de Placement Collectif* (Tome 1 : OPVCM, 2nd edn, Joly 2016)
- **Robert A**, *Responsabilité des Commissaires aux Comptes et des Experts Comptable*s (Dalloz 2011)
- **Schmidt D**, *Les Conflits D'intérêts Dans La Société Anonyme* (Joly 2004)
- **Storck M**, 'La Nature Juridique des Fonds Communs de Placement : Un Patrimoine d'Affectation' in *Mélanges Gilles Goubeaux* (Dalloz-LGDJ 2009)
- **Thaller E**, *Traité élémentaire de Droit Commercial* (3rd ed, 1904)
- **Valette JP**, *Droit de la Régulation des Marchés Financiers* (Gualino Editeur 2005)

Books in Arabic

- **Akili A**, Alwaseet *fi Qanon Tijari* (Dar Thakafeh 2008)
- **Sami F**, *Sharah Qanon Tijari* (Vol 1, Dar Thakafeh 2008)
- **---------**, *Sharikat Tijaryah: Ahkam Ammah wa Khassah* (Dar Thakafeh 2010)

Edited Books:

Books in English

- **Andenas M** & Wooldridge F (eds), *European Comparative company Law* (Cambridge 2009)
- **Babbel D** and Fabozzi F (eds), *Investment Management for Insurers* (Frank Fabozzi Associates 1999)
- **Basile I** and Ferrari P (eds), *Asset Management and Institutional Investors* (Springer 2016)
- **Best M** and Soulier JL (eds), *International Securities Law Handbook* (3rdedn, Kluwer Law International 2010)
- **Campbell C** (ed), *Legal Aspects of Doing Business in Europe* (vol. II, Yorkhill law publishing 2009)

- **Carroll C** and Kay S (eds), *Investment Funds: Jurisdictional comparison* (1st edn, Thomson Reuters 2012)
- **Davis M** and Stark A (eds), *Conflicts of Interest in the Professions* (OUP 2001)
- **Haire M** (ed), *Modern Organization Theory* (John Wiley and Sons 1959)
- **Lo A.W** (ed), *The Industrial Organization and Regulation of the Securities Industry* (University of Chicago Press 1996)
- **Mayes D** and Toporowski J (eds), *Open Market Operations and Financial Markets* (Routledge 2007)
- **Munkert M.J** & others (eds), *Founding a company: Handbook of Legal forms in Europe* (Springer 2010)
- **Thevenoz L** and Bahar R (eds), *Conflicts of Interest Corporate Governance and financial Markets* (Kluwer Law International 2007)
- **Tully S** (ed), *Research Handbook on Corporate Legal Responsibility,* (1st edn, Edward Edgar Publishing Limited 2005)
- **Varrenti A** and De Las Cuevas F (eds), *Company Directors: Jurisdictional Comparison* (1st edn, Sweet & Maxwell 2012)
- **Veil R** (ed), *European Capital Markets Law* (Rebecca Ahmlingtr, Hart 2013)
- **Zenios S** and Ziemba W (eds), *Handbook of Asset and Liability Management* (Vol. 1 Theory and Methodology, 1st edn, Elsevier 2006)
- **Zenios S** & Ziemba W (eds), *Handbook of asset and liability management* (Vol II: Applications and case studies, Elsevier 2007)

Books in French

- **Ansault JJ**, d'Avout L et Binctin N (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015)
- **Canivet G**, Martin D and Molfessis N (eds), *Les Offres Publiques d'Achat* (Litec Lexix Nexis 2009)

- **Tocqueville JG** et Puel S et Boujard E, 'OPCVM' in *Répertoire de Droit des Sociétés* (Dalloz 2013)

Contribution to book :

- **Ansault JJ**, 'Les Pactes Extrastatutaires sous la Surveillance de l'ordre Public sociétaire' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015)
- **Conte P**, 'L'Abus de Confiance Commis au sein d'une Personne Morale Echappant à la Qualification d'Abus de bien Sociaux' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015) page
- **Frederic** Ichay, 'France' [2012] in IBA Guide on shareholders' Agreements
- **Magnier V** et Paclot Y, 'Le Gouvernement d'entreprise en France, Vingt ans après' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015)
- **Moulin JM**, 'La Force Normative du Code AFEP-MEDEF' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015)
- **Schiller S**, 'Les Fautes des dirigeants Sociaux' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015)
- **Terré D**, 'Le Mythe de la Gouvernance' in Jean-Jacques Ansault, Louis d'Avout et Nicolas Binctin (eds), *Mélanges en l'honneur du Professeur Michel Germain* (LGDJ 2015)

Articles/Comments:

French written

- **Barban P,** 'L'Identification des Actionnaires' in 'Dossier : Réflexions Collective sur la Nouvelle Directive Droits des Actionnaires' (2017) 12 Revue des Sociétés p. 678

- **Bellezza A**, 'Les Apports de la Loi Sapin II en Matière Financière' (2017) 3 Revue de Science Criminelle et de Droit Pénal Comparé p. 544
- **Bouloc B**, 'Rémunération non autorisée d'un Dirigeant', Cass. Crim., n° 15-84.229, *Revue des Sociétés*, 2017, n° 10, p. 591
- **Boussard L**, 'L'adaptation des entreprises à la réforme des listes d'initiés: les outils internes au service de la prévention des délits et manquements d'initiés' (2016) 50 Revue Internationale de la Compliance et de l'Ethique des Affaires p. 16
- **Chevallier J**, 'Autorités Administratives Indépendantes et la Régulation des Marchés' (1995) 1 Justice et Economie p. 81
- **Constantin A**, 'De Quelques Aspects de l'Assurance de Responsabilité Civile des Dirigeants Sociaux ' (2003) 7 RJDA p. 595
- **Coupet C**, 'Loi Sapin II : Consécration Légale du Say on Pay' (2017) 2 Droit des Sociétés
- **----------**, 'Garantie non Autorisé par le Conseil d'Administration: Quelle Responsabilité pour le Dirigeant Social?' (2018) 3 Revue Droit des Sociétés p. 29
- **Décima O**, 'Le Fantôme de ne bis in idem' (2015) 15 Recueil Dalloz p. 874
- **Deckert K**, 'Le choix d'Aiguillage, un Bon Choix?' in La Réforme du Contentieux Boursier : Répression des Abus de Marché en France et Solution Etrangères (2016) 11 Bull. Joly Bourse p. 468
- **Delpech X**, 'Dirigeant de fait' (2018) 571 Juris Associations p. 50
- **De Raval d'Esclapon T**, 'Responsabilité du dirigeant à l'égard des tiers : le cas particulier d'un comité de surveillance d'une SAS', Cass. Com., n° 16-16.015, *Revue des Sociétés*, 2018, p. 319
- **Didier P**, 'Le Consentement Sans l'Echange : Contrat de Société' (1995) 11 Revue de Jurisprudence commerciale p. 74
- **Dondero B**, 'Exercice Ut Singuli de l'Action Sociale et Astreinte' (2010) 2 Bull. Joly Sociétés p. 122

- **Douvreleur O**, 'La Nouvelle Procedure d'Agrement « par analogie » des OPCVM' (2008) 1 RTDF p. 80
- **Dufour O**, 'Emetteurs, Sécurisez le Traitement de vos Informations Privilégiées' (Interview de Christian Schricke DG de l'ANSA) (2017) 116 (1) Bull. Joly Bourse p. 9
- **Dupré de Boulois X,** 'La Personne Morale, la Vie privée et le Référé', Cass. 1er civ., n° 15-14.072, *RDLF*, 2016, chron. n° 16
- **François B**, 'Parité au sein des Instances Dirigeants des Sociétés Cotées' (2018) 4 Revue des Sociétés p. 275
- **----------**, 'Mixité au Sein des Conseils : Lancement de l'Indice Zimmermann' (2017) 4 Revue des Sociétés p. 260
- **----------**, 'Quota de Femmes dans le Conseil d'Administration : Premier Bilan Négatif' (2017) 10 Revue des Sociétés p. 606
- **----------,** 'Bilan 2017 du Say-on-Pay' (2017) 10 Revue des Sociétés p. 607
- **Ginestet C**, 'Cumul de peines et de Sanctions Administrative', Cons. Cons., n° 2015-513/514/526, *Dalloz Recueil*, 2016, p. 2428
- **----------**, 'Sanctions', Cons. Cons., n° 2014-453/454, *Dalloz Recueil*, 2015, p. 2468
- **Giudicelli-Delage G**, 'Les dispositifs spécialisés de lutte contre la criminalité économique et financière – D. interne/ D. comparé' Synthèse in 'L'organisation des dispositifs spécialisés de lutte contre la criminalité économique et financière en Europe' LGDJ 2004
- **Hauriou M**, 'L'Institution et le Droit Statutaire' (1906) 2 Récueil de Législation de Toulouse p. 134
- **Jourdain P**, 'Autorité de la Chose Jugée au Pénal et Responsabilité Civile du Dirigeant Social : la Condamnation Pénale du Dirigeant suffit-elle à Caractériser une Faute Civile Personnelle Détachable de ses Fonctions ?' (2000) 2 RTD civ. P. 342
- **Keita B**, 'L'Applicabilité Directe et Rétroactive du Règlement MAR en Matière de Répression des Manquements à la Communication Financière ' (2018) 1 Bull. Joly Bourse p. 23

- **Lecourt B,** 'L'Actionnaire de Long Terme, Nouvelle Notion Européenne' in 'Dossier : Réflexions Collective sur la Nouvelle Directive Droits des Actionnaires' (2017) 12 Revue des Sociétés p. 675
- **----------,** 'Les Rémunérations des Dirigeants des Sociétés Cotées' in 'Dossier : Réflexions Collective sur la Nouvelle Directive Droits des Actionnaires' (2017) 12 Revue des Sociétés p. 692
- **Lucas F.X**, 'Les Actionnaires ont-ils tous la qualité d'associé ? Brefs propos discursifs autour du thème de l'associé et de l'investisseur' (2002) 4 Revue de Droit Bancaire et Financier p. 1
- **Marain G,** 'L'Opposabilité des Pactes d'Actionnaires' (2017) 10 Revue des Sociétés p. 542
- **Muller AC**, 'Information Priviligée: Sensibilité de l'Information', AMF SAN-2017-08, *Revue des Sociétés*, 2018 (1), p. 64
- **Muresianu D**, 'L'Information Privilégiée « exogène » : toute Information Privilégiée doit-elle Provenir d'un Emetteur' (2017) 6 Bull. Joly Bourse p. 411
- **Oudenot D** et Fournier E, 'Création des Entreprises' in Jean-Marc Bahans 'Actualité du Registre du Commerce et des Sociétés (2016-2017)' (2017) 9 Bull. Joly Sociétés p. 555
- **Parleani G**, 'Arrêt Polbud : Nouvelle Faveur (Temporaire ?) à « l'Optimisation » des Transferts de Sièges Sociaux dans l'Union Européenne' (2018) 1 Revue des Sociétés p. 47
- **Poracchia D** et Martin D, 'Regard sur l'Intérêt Social' (2012) 9 Revue des Sociétés p. 475
- **----------,** 'Une Société n'a pas une Vie Privée', Cass. 1er civ., n° 15-14.072, *Revue de Droit et Patrimoine*, 2017 (268), p. 60
- **----------**, 'Action Sociale ut-singuli', cass. Com., n°s 14-16.621 14-26.370, *Revue Droit et Patrimoine*, 2017, p. 66

- **Portier P**, 'L'Encadrement des Rémunération des Dirigeants de Sociétés Cotées dans la Loi Sapin 2' in Didier Poracchia, 'Le Droit des Sociétés dans la Loi Sapin 2' (2017) 2 Bull. Joly Sociétés p.p 64/81
- **Quilichini P**, 'Réguler n'est pas Juger, Réflexions sur la Nature du Pouvoir des Sanction des Autorités de Régulation Economique' (2004) 20 AJDA p. 1060
- **Raynouard A**, 'Langues Françaises, Marches Financiers et Sources du Droit', CE, n° 21-3425, *Dalloz Recueil*, 2001 (21), p. 1713
- **Riassetto I**, 'Rachat des Parts d'un OPC par un autre OPC et Respect des Obligations Professionnelles des Société de Gestion de Portefeuille' (2015) 2 Bull. Joly Bourse p. 90
- **Roussel S**, 'Les Greffiers des Tribunaux de Commerce, le Registre National du Commerce et des Sociétés, l'INPI et Infogreffe', CE, 6e et 1er ch. Réunies, n° 39-7403, *Gazette du Palais*, 2017 (44), p. 34
- **Salles S**, 'Nouvelle Affirmation de l'Objectif de Préservation de l'Ordre Public Economique – A Propos des Sanctions Administratives Prononcées par l'AMF' (2017) 43 Gazette du Palais p. 24
- **Tap JB**, 'La Faute de gestion dans ses états', CA Paris n° 15/17109, *Revue des Sociétés*, 2018, p. 241
- **Vasquez AA**, 'Une Première Application de la Composition Administrative en Matière d'Abus de marché par l'Autorité des Marchés Financiers' (2017) 256 Petites Affiches p. 6

English written

- **Berle A**, 'Control in Company Law' (1958) 58 (8) Columbia Law Review p. 1212
- **Bertsimas D** and Pachamanova D, 'Robust Multi-period Portfolio Management in the Presence of Transaction Costs' (2008) 35 Computer and Operation research p.3
- **Blanaid C**, 'Corporate Responsibility in the Light of the Separation of Ownership and Control' (1997) 19 (50) Dublin University Law Journal

- **Boissay F** and Capiello L, 'Micro Versus Macro- Prudential Supervision: Potential Differences, Tensions and Complementarities' (2014) ECB Financial Stability Review p. 135
- **Bonazzi L** and Islam S**,** 'Agency Theory and Corporate Governance: A study of the Effectiveness of Board in their Monitoring of the CEO' (2007) 2 (1) Journal of Modelling in Management p. 7
- **Cartwright P**, 'The Vulnerable Consumer of Financial Services: Law, Policy and Regulation' (2011) Financial Services Research Forum
- **Chetcuti Dimech F** and Caruana F, 'Collective Investment Schemes' (2009) 28 (6) IFLR p. 69
- **Cihak M** and Podpiera R, 'Integrated Financial Supervision: Which Model?' (2008) 19 (2) North American Journal of Economic and Finance p.135
- **Chui M**, 'Derivatives Market, Products and Participants: An Overview' 35 IFS Bulletin
- **Clarke D**, 'Three Concepts of the Independent Director' (2007) 32 Delaware Journal of Corporate Law p. 73
- **Committee I** Investment Companies Funds and Trusts, 'Basic Principles of Investor Protection for Collective Investment Undertakings' (1980) 8 (12) International Business Lawyer p. 313
- **Eisenberg M**, 'The Duty of Corporate Directors' and Officers' [1989] 51 U. Pitt. L. Rev. p. 945
- **Elson C**, 'Directors Compensation and the Management-Captured Board: The History of a Symptom and a Cure' (1996) 50 (1) SMU Law Review
- **Elton E** and Gruber M, 'The Multi-period Consumption Investment Problem and Single Period Analysis' (1974) 26 (2) Oxford Economic Papers p. 289
- **Fairgrieve D** & Howells G, 'Collective Redress Procedures: European Debate' (2009) 58 (2) International and Comparative Law Quarterly p. 379
- **Fama E**, 'Agency Problems and the Theory of the Firm' (1980) 88 Journal of Political Economy p. 288

- **Fox J** & Larsch J, 'What Good are Shareholders?' (2012) Harvard Business Review
- **Hansen R** & Lott J, 'Externalities and Corporate Objectives in a World with Diversified Shareholder/Consumers' (1996) 31 (1) Journal of Financial and Quantitative Analysis p. 43
- **Haron H**, 'Determinants of Directors' Remuneration in Malaysian Public Limited Companies ' (2013) 6 (2) Indian Journal of Corporate Governance
- **Haugen R.A** & Senbet L.W, 'Resolving Agency Problems of External Capital Through Options' (1981) 36 (3) Journal of Finance p. 629
- **Hechler Baer M**, 'Governing Corporate Compliance' (2009) 50 Boston College Law Review p. 949
- **Houghton J**, 'Does Max Weber's Notion of Authority Still Hold in the Twenty First Century?' (2010) 16 (4) Journal of Management History p. 449
- **Huang R.D** and Stall H.R, 'Dealer Versus Auction Markets: A Paired Comparison of Execution Costs on NASDAQ and the NYSE' [1996] 41 Journal of financial Economics
- **Jensen M.C** and Meckling W.H, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 Journal of Financial Economics p. 305
- **Johnson L**, 'The Modest Business Judgement Rule' (2000) 55 Bus. Law p. 625
- **Khanna V**, Kim H and Lu Y, 'CEO Connectedness and Corporate Fraud' (2015) 70 (3) The Journal of Finance p. 1203
- **Kraakman R** and Park H and Shavell S, 'When are Shareholders Suits in Shareholder interests' (1994) 82 (5) George Town Law Review p. 1733
- **Langevoort D**, 'Monitoring: The Behavioral Economics of Corporate Compliance with Law' (2002) 2002 (1) Columbia Business Law Review p. 71
- **----------**, 'Cultures of Compliance' (2017) 54 (4) American Criminal Law Review p. 933
- **Linsmeier T** and Pearson N, 'Value at Risk' (2000) 56 (2) Financial Analysts Journal p. 47

- **Lomnicka E**, 'The Home Country Control Principle in the Financial Services Directives and the Case Law' (2000) 11 (5) European Business Law Review p. 324
- **Lydenberg S**, 'Responsible Investor: Who they are, What they Want' (2013) 25 (3) Journal of Applied Corporate Finance p. 44
- **Manne H**, 'Mergers and the Market for Corporate Control' (1965) 73 (2) Journal of political Economy p. 110
- **Markowitz H**, 'Portfolio Selection' (1952) 7 (1) Journal of Finance p. 77
- **Marling H** and Emanuelsson S, 'The Markowitz Portfolio Theory' 15 November 2012
- **McColgan P**, 'Agency Theory and Corporate Governance: A Reviewof Literature from a UK Perspective' (2001)
- **Melecky M** and Podpiera A.M, 'Institutional Structures of Financial Sector Supervision Their Drivers and Historic Benchmarks' (2013) 9 Journal of Financial Stability p. 428
- **Money-Kyrle R** and Hodges C, 'European Collective Action: Towards Coherence' (2002) 19 (4) Maastricht Journal of European and Comparative Law p. 477
- **Morley J**, 'Collective Branding and the Origins of Investment Fund Regulations' (2012) 6 (3) Virginia Law and Business Review p. 341
- **Onday O**, 'Classical to Modern Organization Theory' (2016) 4 (2) International Journal of Business and Management Review p. 15
- **Pirrong C**, 'A Theory of Financial Exchange Organization' [2000] 43 J.L & Econ.
- **Presthus R**, 'Towards a Theory of Organizational Behavior' (1958) 3 (1) Administrative Science Quarterly p. 48
- **Reichenbach F**, 'The Obligations and Liabilities of Directors and officers of Companies and their Protection by Insurance' (1981) 9 (1) International Business Lawyer p. 5
- **Ringold D**, 'Social Criticisms of Target Marketing: Process or Product' (1995) 38 (4) American Behavioral Scientist p. 578
- **Rogers J** and **Hertz R**, 'Corporate Disclosure of Material Information: The Evolution and the Need to Evolve Again ' (2013) 25 Applied Corporate Finance p. 50

- **Russen G**, 'Financial Collateral Arrangements' (2007) 2 (4) Journal of international Commercial Law and Technology p. 250
- **Samuelson P**, 'Lifetime Portfolio Selection by Dynamic Stochastic Programming' (1969) 51 (3) Review of Economics and Statistics p. 239
- **Sattout I** & Doubet G, 'Reform of the Kuwaiti Companies Law: Simplification and Innovation to Encourage Investments' (2015) 2 Revue de Droit des Affaires Internationales p. 153
- **Scott W**, 'Organization Theory: An overview and an Appraisal' (1961) 4 (1) Journal of the Academy of Management p.7
- **Sharpe W,** 'Capital asset Prices: A Theory of Market Equilibrium under Conditions of Risk' (1964) 19 (3) Journal of Finance p. 425
- **Shleifer A** & Vishny R.W, 'Management Entrenchment: The Case of Manager-Specific Investments' (1989) 25 Journal of Financial Economics p. 123
- **Simoes Coelho P** and others, 'Collective Capital Investment Schemes' (2009) 28 (6) IFLR
- **Smith C** and Cooper-Martin E, 'Ethics and Target Marketing: the Role of Product Harm and Consumer Vulnerability' (1997) 61 (3) Journal of Marketing p. 1
- **Spencer M**, 'Weber on Legitimate Norms and Authority' (1970) 21 (2) The British Journal of Sociology p. 123
- **Webb J.M**, 'Of Banks and Mutual Funds: The Collective Investment Trust' (1966) 20 (2) Southwestern Law Journal
- **Wymeersch E**, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors' [2007] 8 (2) EBOR p. 237
- **Yosifon D**, 'The Consumer Interest in Corporate Law' (2009) 43 University of California Davis Law Review p. 243

Reports/ studies:

- Active vs. passive Portfolio Management (Broadridge Investor Communication solutions) 2013 < https://www.vanguard.co.uk/documents/portal/literature/active-passive-investing-guide.pdf > Accessed 31 May 2017
- ***AMF***, 'Rapport de Médiateur de l'*AMF* 2017' (12 Avril 2017)
- **ANSA** Comité Juridique du 1er octobre 2003, communication n° 04-005
- **ANSA**, 'Questions Relatives aux Rémunérations, Avantages et Indemnités de Départ Destines aux Mandataires Sociaux et Dirigeants Apres La Loi du 26 Juillet 2005' (Comité Juridique, n° 05-060 [2005])
- **ANSA**, 'Responsabilité des Administrateurs Signataires d'un Prospectus' (Comité Juridique, n° 06-036 [2006])
- **ANSA**, 'Action de préférence sans droit de vote– obtention du droit de vote à terme : comptabilisation ou non de ces droits de vote pour le calcul du seuil de l'OPA obligatoire' (Comité Juridique, 12-026 [2012])
- **ANSA**, 'Droit Formant Rompus: Exercice des Droits de vote' (Comit*é* Juridique, n° 12-014 [2012])
- **ANSA** & others, 'Guide sur la réforme de l'Audit Légal' (2016)
- **ANSA**, 'Votes sur la Rémunération des Dirigeants des Sociétés Cotées : Questions Diverses sur le Vote ex Ante' (Comité Juridique, n° 07-017 [2017])
- **ANSA,** 'Contrat de Société et Intérêt Social : Plan d'Action pour la Croissance et la Transformation des Entreprises Propositions de loi Entreprise nouvelle et nouvelle gouvernances' (Note, n° 17-054 [2017])
- **Asmundson I**, 'What are Financial Services? How consumers and Businesses Acquire Financial Goods such as Loans and Insurance' (Finance & Development , IMF 2011)
- **Basel II** Committee on Banking Supervision, Principles for the Sound Management of Operational Risk (Bank of International Settlements, June 2011)

- **Bissara P**, 'Présentation Sommaire de la Réforme du Régime des Valeurs Mobilières émises par les Sociétés Commerciales' (ANSA, Report n° 04-058 [2004])
- **CE**, Les Autorités Administratives Indépendantes (Réflexions sur les Autorités Administratives Indépendantes, rapport public 2001) 52 EDCE 253
- **CESR**, 'Memorandum of Understanding on the Exchange of Information and Surveillance of Securities Activities' (1999) 05-335
- **CESR**, Guide to Clear Language and Layout for the Key Investor Information Document [CESR/10-1320] of 20 December 2010
- **CESR**, 'Risk Management Principles for UCITS' (Guidelines: CESR/09-178, 2009)
- **Commission**, 'White Paper on Completing the Internal Market' (White Paper) COM (85) 310 final
- **Commission**, 'Recommendation on the Principles Applicable to the Bodies Responsible for Out-Of-Court Settlement of Consumer Disputes ' (Recommendation) COM (1998) 257 final OJ L 115/31
- **Commission**, 'Recommendation on the Principles for Out-Of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes' (Recommendation) COM (2001) 1016 OJ L 109/0056
- **Commission**, 'Communication on Widening Consumer Access to Alternative Dispute Resolution' COM (2001) 0161 final
- **Commission**, 'Annex to the Green Paper on the Enhancement of the EU Framework For Investment Funds' (Staff Working Paper) COM (2005) 314 final
- **Commission**, 'Recommendation on the Role of Non-Executive or Supervisory Directors of Listed Companies and on the Committees of the (Supervisory) Board' (Recommendation) COM (2005) 162 OJ L 52/51
- **Commission** Staff Working Document Impact Assessment Accompanying the document Commission Delegated Regulation supplementing Regulation (EU) No 600/2014 of the European Parliament and of the Council with regard to definitions, transparency,

portfolio compression and supervisory measures on product intervention and positions {C(2016) 2860 final} {SWD(2016) 156 final}, 18.5.2016, SWD(2016) 157 final, p. 61

- **Commission**, 'Communication on Reinforcing Integrated Supervision to Strengthen Capital Markets Union and Financial Integration in a Changing Environment' COM (2017) 542 final
- **Darškuvienė V**, 'Financial Markets' (2010) Leonardo da Vinci programme project on the Development and Approbation of Applied Courses Based on the Transfer of Teaching Innovations in Finance and Management for Further Education of Entrepreneurs and Specialists in Latvia, Lithuania and Bulgaria
- Declaration on Propriety, Integrity and Transparency in the Conduct of International Business and Finance (May 2010) C/MIN(2010)3/FINAL; accessible on the following website
- **De Larosière** Group, 'The High-Level Group of Financial Supervision in the EU' (Chaired by Jacques Larosière, Brussels 2009)
- **Deutche Borse Group**, 'The Global Derivatives Market: An Introduction' (2008)
- **Directorate** for Financial and Enterprise Affairs, 'Governance of Collective Investment Schemes' (Discussion draft for comment – OECD, 2004)
- **ECB**, 'Annual Report 2004' [2005]
- **ESMA**, 'The Consistent Implementation of Commission Regulation (EC) No 809/2004 Implementing the Prospectus Directive' (ESMA update of CESR recommendations) ESMA/2011/81 of 23 March 2011
- **ESMA** guidelines ESMA/2011/112
- **ESMA**, 'Guidelines on Cooperation Arrangements and Information Exchange: Between Competent Authorities and Competent Authorities and ESMA' ESMA/2014/298 of 27 March 2014
- **ESMA**, 'Points for Convergence in Relation to MAR Accepted Market Practices or Liquidity Contracts' (Opinion) ESMA70-145-76 of 25 April 2017

- **ESMA**, 'Questions and Answers on the Market Abuse Regulation' ESMA/2016/1644 of 20 December 2016
- **ESMA**, 'MAR Guidelines: Persons Receiving Market Soundings' ESMA/2016/1477 of 10 November 2016
- **ESME** report on MiFID and admission of securities to official stock exchange listing (2007)
- **EU Commission** Memo 12/232 on Regulation on Over-the-Counter Derivatives and Market infrastructures of 29 March 2012
- **EU Commission** Memo 17/592 on Shareholders rights Directive Q&A of 14 march 2017
- **European Central Bank**, 'Statistical Classification of Financial Markets Instruments' (July 2005)
- **FSB**, 'Collective Investment Schemes'
- **FSB**, 'Thematic Review on Risk Governance: Peer Review' (February 2013)
- **Gerner-Beuerle C** & others, 'Study on Directors Duties and Liability' (Prepared for the European Commission DG Market , 2013)
- **Global Indicators Group**, 'Better rules of the Game: Introducing New Global Indicators on Regulatory Governance' (World Bank 2016)
- **Group Thirty**, 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' (2008)
- **IFRS** Foundation Staff, 'IAS 32 Financial Instruments : Presentation' (2012) IFRS Technical
- **IMF** Monetary and Exchange Affairs Department, 'Support Document for the Code of Good Practices on Transparency in Monetary and Financial Policies' (Part I Introduction, 2000)
- **IOSCO** Technical Committee, 'Protection of Minority Shareholders in Listed Issuers' June 2009

- **Kolassa D**, 'European System of Financial Supervision ESFS' (European Fact sheet 03/2017)
- **Lumpkin S**, 'Supervision of Financial Services in OECD Area' (OECD, 2002) < http://www.oecd.org/finance/insurance/2089622.pdf >
- **Mylenko N**, 'Oversight frameworks and practices in 114 economies - full report', Washington, DC, World Bank Group (2013)
- **National Professional Services Group**, 'A Look at Current Financial Reporting Issues' (PWC, 29 June 2015)
- **OECD** (2011), Board Practices: Incentives and Governing Risks, Corporate Governance, OECD Publishing. < http://dx.doi.org/10.1787/9789264113534-en >
- **OECD** (2014), Risk Management and Corporate Governance, Corporate Governance, OECD Publishing. < http://dx.doi.org/10.1787/9789264208636-en >
- **OECD** (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris < http://dx.doi.org/10.1787/9789264236882-en
- **Pierre Delvolvé** in Rapport sur la Colloque de Justice Hors du Juge (1984) 4 Cahier Droit Entreprise 18
- Technical Committee of **IOSCO**, 'Supervisory Framework for Markets' (May 1999)
- **Thompson J** and Choi S.M, 'Governance Systems for Collective Investment Schemes: Schemes in OECD Countries' (Occasional Paper No. 1 – OECD 2001)
- **Valiante D**, 'Europe Untapped Capital Market: Rethinking Financial Integration After the Crisis' EU Capital Market Union Report 2016
- **Vanguard**, 'Active and Passive Investing' 2017
- **World Bank,** 'Governance and Development' (1992) Washington DC
- **World Bank** Group, 'Good Practices for Financial Consumer Protection' (2012)
- **World Bank** Group report 'Commodities Market Outlook' dated October 2016

Working papers:

- **Geis G**, 'Ex-Ante Corporate Governance' (2016) Virginia Law and Economics Research Paper Series 11/2016, 41 (3)
- **Gilson R**, 'From Corporate Law to Corporate Governance' [2016] ECGI Working Paper Series in Law 324/2016
- **Hermalin B** and Weisbach M, 'Understanding corporate Governance through Learning Models of Managerial Competence' [2014] National Bureau of Economic research Working Paper no. 20028
- **Jacobzone S**, Choi C and Miguet C (2007), "Indicators of Regulatory Management Systems", OECD Working Papers on Public Governance, No. 4, OECD Publishing, Paris. http://dx.doi.org/10.1787/112082475604
- **Lannoo K**, 'Supervising the European Financial System' (2002) CEPS Policy Brief 21/2002
- **Miller G**, 'The Compliance Function: An Overview' [2014] NYU Law & Economics Working Papers 393/2014
- **OECD** (2005), "White Paper on Government of Collective Investment Schemes (CIS)", *Financial Market Trends*, Vol. 2005/1. http://dx.doi.org/10.1787/fmt-v2005-art5-en
- **Yataganas X**, 'Delegation of Regulatory Authority in the European Union: The Relevance of the American Model of Independent Agencies' (2001) Jean Monnet Working Paper 3/01

Conference papers:

- **Ladegaard P**, 'Good Governance and Regulatory Management' (Regulatory Management and Reform Seminar, Moscow, Nov. 2001)
- **Witherell B**, 'The Role of Market Discipline and Transparency in Corporate Governance Policy' (Banque de France International Monetary Seminar, Paris, May 2003)

Loose-leaf services:

- Commodities Market: an overview <http://shodhganga.inflibnet.ac.in/bitstream/10603/37257/3/chapter2.pdf> Accessed 6 November 2016
- An Approach on how to trade in commodities market <http://www.karvycommodities.com/Documents/AnApproachToHowToTradeInCommoditiesMarket13052013.pdf> Accessed 6 November 2016
- *Chapter 1 Review : Ownership and management*, (7 August 2014) http://www.competitionrx.fr/documents/MG%20PhD%20files/4%20-%20Chapter%201%20-%20Ownership%20&%20Management.PDF

Theses:

- **Grosbois E**, 'Responsabilité Civile et Contrôle de la Société' (DPhil thesis, Université de Caen 2012)
- **Kawas B**, 'A Robust Optimization Approach For static Portfolio Management' (master thesis, Lehigh University 2005)
- **Laiho T**, 'Agency Theory and Ownership Structure: Estimating the Effect of Ownership Structure on Firm Performance' (Master thesis, Aalto University 2011)
- **Valiergue J**, 'Les Conflits d'Intérêts en Droit Privé : Contribution à la Théorie Juridique du Pouvoir' (DPhil thesis, Université de Bordeaux 2016)
- **Warburton A.J**, 'The effect of organizational form of firm performance' (DPhil thesis, University of Michigan 2009)

Websites/Blogs:

Official websites:

- AMF: https://www.amf-france.org
- Euronext: https://www.enternext.com
- FASB: http://www.fasb.org

- Greffe: https://www.infogreffe.fr/
- IOSCO: https://www.iosco.org
- JSC: https://www.jsc.gov.jo
- Securities and Exchange Commission: https://www.sec.gov
- http://www.info-financiere.fr/

Internet Articles:

- **Bamdé A,** 'La Notion de Société' (27 septembre 2016)
- 'Collective Investment Managers' < http://www.asisa.co.za/_docs/Chapter%202.pdf > accessed 6 August 2014
- **Gillis A**, 'Internal Audit vs. Compliance' (30 May 2013)
- **Hayes M**, 'You Inc. The Benefits and Costs of Incorporating your Business' (14 December 2012)
- **Institutional Shareholder Services** 'Gender Parity on Boards Around the World' (Harvard Law School Forum on Corporate Governance and financial Regulation, 5 Jan. 2017)
- **Jonathan Lee**, '8 Reasons why Companies should have a Shareholders Agreement' (23 May 2013)
- **Jones W**, 'Third Party Management Companies: A New Governance Model' (Deloitte, 2014)
- **Kow W.T**, 'Compliance Function in Financial Institutions' [2006] IFAST Financial
- **Loth R**, "Active Vs. Passive Management", 2014, Investopedia <http://www.investopedia.com/university/quality-mutual-fund/chp6-fund-mgmt/> accessed 11 July 2014
- **Osman A**, 'L'Opération de Fusion est-elle Considérée Comme Transformation de la Société Absorbée' (Village de la Justice, 22 Fevrier 2016) < https://www.village-justice.com/articles/operation-fusion-est-elle,21517.html > Accessed 21 December 2017

- **Pietrancosta A**, 'Say on Pay: The New French Legal Regime in Light of Shareholders' Rights Directive II' (Oxford Business Law Blog, 30 November 2017) < https://www.law.ox.ac.uk/business-law-blog/blog/2017/11/say-pay-new-french-legal-regime-light-shareholders-rights-directive > accessed 18 December 2017
- **Saab M**, 'Difference or Distinction between Memorandum of Association and Articles of Association'
- **SEC**, 'Disclosure regarding portfolio managers of registered management investment companies' (December 2004)
- **SEC**, 'Invest Wisely: An Introduction to Mutual Funds' (2 July 2008) <https://www.sec.gov/investor/pubs/inwsmf.htm> Accessed 28 September 2016
- **Surbhi S**, 'Difference between Memorandum of Association and Articles of Association'
- **Thune K**, 'What is a Mutual Fund? Definition, Basics, Advantages and Types: A Simple Explanation' (24 September 2016) <https://www.thebalance.com/what-is-a-mutual-fund-2466580> Accessed 28 September 2016
- **Volker M**, 'The Shareholders Agreement' (2008) Business Basics for engineers <http://www.sfu.ca/~mvolker/biz/agree.htm 1/> Accessed 2 December 2015
- **Williams D**, 'Max Weber: Traditional, Legal-Rational and Charismatic Authority' < http://danawilliams2.tripod.com/authority.html > Accessed 06 November 2017

Blogs and websites:

- Authorization law and legal definition <http://definitions.uslegal.com/a/authorization/> Accessed 21 January 2016
- Classical Organization Theory < http://www.hrmguide.co.uk/history/classical_organization_theory.htm > Accessed 10 September 2017
- Difference between Memorandum and Articles of Association <http://www.preservearticles.com/201104085066/memorandum-and-articles-of-association.html> Accessed 7 December 2015

- Legal Theory Lexicon 001: Ex-ante and Ex-post (Legal Theory Blog, 14 September 2003) < http://lsolum.typepad.com/legal_theory_lexicon/2003/09/legal_theory_le_2.html > accessed 18 December 2017
- Mackenzie Law, 'Shareholders Agreement and Articles of Association' <http://www.mckenzielaw.co.uk/how-we-help-business/companies-and-shareholders-agreements/> Accessed 7 December 2015
- Museum of American Finance, 'Curriculum Guide: The Financial Markets'
- 'PLC – Public Limited company Incorporation' <http://www.fletcherkennedy.com/plc.html> Accessed 17 November 2015
- https://www.investor.gov/introduction-investing/basics/how-market-works/market-participants
- Registration definition, <http://www.investopedia.com/terms/r/registration.asp> Accessed 3 February 2016

International Standards:

- IFRS
- IAS

Dictionaries and encyclopedias:

- http://www.businessdictionary.com/definition/articles-of-association.html Accessed 3 December 2015
- American Heritage Dictionary of the English Language (5th edn, 2011)
- Burton W, *Burton's Legal Thesaurus* (4th edn, McGraw Hill 2007)
- Business Dictionary, accessed 05 June 2017 <http://www.businessdictionary.com/definition/management-company.html>
- Cambridge Advanced Learner's Dictionary (3rd edn, 2008)
- Collins English Dictionary (12th edn, 2014)

- Collins Thesaurus of the English Language (3rd edn, 2008)
- Echaudemaison C, Dictionnaire d'Economie et de Sciences Sociales (2nd edn, Nathan 2018)
- Farlex Financial Dictionary (Farlex international 2017)
- *Financial Glossary*. S.v. "Stocks and Shares." Retrieved March 31 2017 from< http://financial-dictionary.thefreedictionary.com/Stocks+and+Shares>
- Garner B, *Black's Law Dictionary* (10th e, 2014)
- Law J (ed), A Dictionary of Finance and Banking, (5thedn, OUP 2014)
- Pass C, *Collins Dictionary of Business* (3rd edn, Collins 2005)
- Sheppard S.M, The Wolters Kluwer Bouvier Law Dictionary (compact edn, 2011)
- Stewart W, Collin's Dictionary of Law (Collins 2006)
- The Merriam-Webster Dictionary (11th edn, Merriam-Webster Mass Market 2004)
- West Encyclopedia of American Law (2nd edn, 2008)

Legal texts:

EU:

Directives:

- Directive 93/22/EEC of 10 May 1993 on investment services in the securities field OJ L 141/27
- Directive 2001/34/EC of 28 May 2001 on the admission of securities to official stock exchange listing and on information to be published on those securities [2001] OJ L 184/0001
- Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services [2002] OJL 271/16

- Directive 2002/87/EC of 16 December 2002 on the supplementary supervision of credit institutions, insurance undertakings and investment firms in a financial conglomerate [2002] OJL 35/1
- Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2003] OJL 345/64
- Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments [2004] OJL 145/1
- Directive 2006/48/EC of the European Parliament and of the Council of 14 June 2006 relating to the taking up and pursuit of the business of credit institutions [2006] OJ L 177/1
- Commission Directive 2007/14/EC of 8 March 2007 laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market [2007] OJ L 69/27
- Directive 2007/16/EC of 19 March 2007 implementing Council Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards the clarification of certain definitions [2007] OJ L 79/11
- Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies [2007] OJ L 184/17
- Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [2009] OJ L 302/32
- Directive 2010/43/EU of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards organizational requirements, conflicts of interest, conduct of business, risk management and content of the agreement between a depositary and a management company [2010] OJ L 176/42

- Directive 2011/61/EU of the European Parliament and of the Council of 8 June 2011 on Alternative Investment Fund Managers and amending Directives 2003/41/EC and 2009/65/EC and Regulations (EC) No 1060/2009 and (EU) No 1095/2010 OJ L 174/1
- Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council [2011] OJ L 304/64
- Directive 2013/11/EU of the European Parliament and of the Council of 21 May 2013 on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR) [2013] OJ L164/63
- Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC [2013] OJ L 182/19
- Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonization of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC [2013] OJL 294/13
- Directive 2014/56/EU of the European Parliament and of the Council of 16 April 2014 amending Directive 2006/43/EC on statutory audits of annual accounts and consolidated accounts [2014] OJ L 158/196

- Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU [2014] OJL 173/349
- Directive 2014/91/EU of the European Parliament and of the Council of 23 July 2014 amending Directive 2009/65/EC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) as regards depositary functions, remuneration policies and sanctions [2014] OJ L 257/186
- Directive 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L 132/1

Regulations:

- Regulation (EU) 1287/2006 of 10 August 2006 Implementing Directive 2004/39/EC of the European Parliament and the Council as regards record keeping obligation for investment firms, transaction reporting, market transparency, admission of financial instruments to trading and defined terms for the purposes of that Directive [2006] OJ L241/1
- Regulation (EU) No 583/2010 of 1 July 2010 implementing Directive 2009/65/EC of the European Parliament and of the Council as regards key investor information and conditions to be met when providing key investor information or the prospectus in a durable medium other than paper or by means of a website OJ L 176/1
- Regulation (EU) No 1092/2010 of the European Parliament and of the Council of 24 November 2010 on European Union macro-prudential oversight of the financial system and establishing a European Systemic Risk Board [2010] OJ L 331/1
- Regulation (EU) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Securities and Markets Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/77/EC [2010] OJ L 331/84

- Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories OJ L 201/1
- Regulation (EU) No 537/2014 of the European Parliament and of the Council of 16 April 2014 on specific requirements regarding statutory audit of public-interest entities and repealing Commission Decision 2005/909/EC [2014] OJ L 158/77
- Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation) and repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC OJ L 173/1
- Regulation (EU) No 909/2014 of the European Parliament and of the Council of 23 July 2014 on improving securities settlement in the European Union and on central securities depositories and amending Directives 98/26/EC and 2014/65/EU and Regulation (EU) No 236/2012OJ L 257/1
- Commission Delegated Regulation (EU) 2016/301 of 30 November 2015 supplementing Directive 2003/71/EC of the European Parliament and of the Council with regard to regulatory technical standards for approval and publication of the prospectus and dissemination of advertisements and amending Commission Regulation (EC) No 809/2004 [2016] OJ L 58/13

Other:

- European Convention of Human Rights

France:

Code:

- Code AFEP/MEDEF of November 2016
- Code Civil
- Code de Commerce
- Code de la Consommation
- Code Monétaire et Financier

- Code Pénal
- Code de Procédure Pénale
- Code du Travail

AMF:

- *AMF* General Regulation
- *AMF,* Instr. DOC-2006-09, 'Examen pour l'attribution des cartes professionnelles de responsable de la conformité et du contrôle interne et de responsable de la conformité pour les services d'investissement'
- *AMF,* Instr. DOC-2008-03, 'Authorization procedure for investment management companies, disclosure obligations and pass porting'
- Standard Authorization Application Package of the AMF Instruction DOC-2008-03, 7 August 2015
- *AMF*, Instr. DOC-2011-15, 'Modalités de calcul du risque global des OPCVM et des FIA agréés'
- *AMF*, Instr. DOC-2011-19, 'Procédures d'agrément, à l'établissement d'un DICI1 et d'un prospectus et à l'information périodique des OPCVM coordonnés français et des OPCVM coordonnés étrangers commercialisés en France'
- *AMF*, Instr. DOC-2013-07, 'Requirements relating to the Professional Competence of Financial Investment Advisor, the updating of their knowledge and reporting to the *AMF* by their associations'
- *AMF,* Instr. DOC-2014-01, 'Programme d'Activité, Obligations des Prestataires de Services d'Investissement et Notification de Passeport'
- *AMF,* Instr. DOC-2016- 01, 'Authorization procedure for investment firms acting as a UCITS depositary: Review procedure for the performance specifications of other UCITS and AIF depositaries', 6 April 2016

- *AMF*, Instr. DOC-2016-04, 'Information à diffuser en cas d'offre au public ou d'admission aux négociations de titres financiers sur un marché règlementé', 21 Octobre 2016

Others:

- *Décret* n° 2005-112 of 10 February 2005 modifiant le décret n° 67-236 du 23 mars 1967 sur les sociétés commerciales et relatif aux valeurs mobilières émises par les sociétés commerciales
- Euronext Harmonized Rule Book of 2016
- Euronext Notice 2-01 dated 4 August 2014 on the Registration of Authorized Representatives and Responsible Persons
- Loi Toubon, Loi n° 94-665 du 4 Août 1994 relative à l'emploi de la langue françaises
- Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité
- Loi Copé Zimmermann, Loi n°2011-103 du 27 Janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle
- Loi Sapin 2, Loi n° 2016-1691 relative à la transparence, à la lutte contre la corruption et à la modernisation de la vie économique
- Loi n° 2017-55 du 20 janvier 2017 portant statut général des autorités administratives indépendantes et des autorités publiques indépendantes
- *Ordonnance* n° 2004-604 of 24 June 2004 portant réforme du régime des valeurs mobilières émises par les sociétés commerciales et extension à l'outre-mer de dispositions ayant modifié la législation commerciale

Jordan:

Code:

- Administrative Justice Code no. 27 of 2014
- Amending law no. 4 of the year 2002 of Company Law of 1997

- Banking Law no. 28 of the year 2000
- Civil Code no. 43 of 1976
- Code of Civil Procedures no. 24 of 1988
- Company Code no. 1 of 1989
- Company Code no. 22 of 1997
- Criminal Code no. 16 of 1960
- Insurance Regulatory Law no. 33 of the year 1999
- Law on the Protection of the Arabic Language no. 35 of 2015
- Law Regulating the Practice of the Auditing Profession no. 73 of 2003
- Securities Law no. 23 of 1997
- Securities Law no. 18 of 2017
- Temporary Securities Law no. 76 of 2002

Bylaw:

- Company's Bylaw no. 77 of 2008
- Internal Bylaw of the Amman Stock Exchange of the year 2004
- Licensing Bylaw of 2018
- Securities Commission Fees Bylaw of 1999
- Securities Depository Center Membership Internal Bylaw of 2004

Regulation:

- Anti-Money Laundry and Terrorist Financing Regulation of 2010
- Collective Investment Regulation of 1999
- Corporate Governance Regulation of 2017
- Disclosure Regulation of 2004
- Investor Protection Fund Regulation of 2018

- Issuing Regulation of 2005
- Licensing Regulation of 2005
- Registering and Depositing Regulation of 2004
- Regulation for Listing Securities on the Amman Stock Exchange for the year 2016

Others:

- Foundations for complaints handling under its updated version of 2012
- Instructions for self-withdrawal of financial license of 2013

USA:

- Dodd Frank Act
- Investment Advisor Act of 1940
- Investment Company Act of 1940
- Securities Act of 1933

Authorities Decisions:

- *AMF,* dec., n° 2004-5, Application de la Règle des « quatre yeux » dans les Sociétés de Gestion de Portefeuille
- *AMF* Sanctioning Commission decision of 7 June 2007, n° SAN-2007-19
- *AMF* Sanctioning Commission decision of 21 October 2011, n° SAN-2011-18
- *AMF* Sanctioning Commission decision of 7 November 2012, n° SAN-2012-18
- *AMF* Sanctioning Commission decision of 20 December 2012, n° SAN-2012-21
- *AMF* Sanctioning Commission decision of 13 March 2013, n° SAN-2013-07
- *AMF* Sanctioning Commission decision of 20 March 2013, n° SAN-2013-08
- *AMF* Sanctioning Commission decision of 17 October 2014, n° SAN-2014-19
- *AMF* Sanction Commission decision of 30 October 2014, n° SAN-2014-21
- *AMF* Sanctioning Commission decision of 17 March 2015, n° SAN-2015-06

- *AMF* Sanctioning commission decision of 29 September 2017, n° SAN-2017-08
- *AMF* Sanctioning Commission decision of 2 November 2017, n° SAN-2017-09
- *AMF* Sanctioning Commission decision of 14 December 2017, n° SAN-2017-11
- *AMF* Sanctioning Commission decision of 18 December 2017, n° SAN-2017-12
- *AMF* Sanctioning Commission decision of 21 December 2017, n° SAN-2017-15
- *AMF* Sanctioning Commission decision of 13 April 2018, n° SAN-2018-03

Recommandations :

AMF:

- *AMF* Recommandation DOC-2010-20: Offre au Public de Titres Financiers à Vocation Principale de Déductibilité Fiscale
- *AMF*, recommandation DOC-2012-19: Guide d'élaboration du programme d'activité des sociétés de gestion de portefeuille et des placements collectifs autogérés
- *AMF*, Recommendation DOC-2016-09: Financial Statements

OECD:

- OECD (2012), Recommendation of the Council of the OECD on Regulatory Policy and Governance, OECD, Paris < https://www.oecd.org/governance/regulatory-policy/49990817.pdf >

IOSCO:

- IOSCO Objectives and Principles of Securities Regulation

Jurisprudence:

EU:

- Case C-19/11 Markus Geltl v Daimler AG [2012] ECR I
- *Grande Stevens and others v Italy* (2015) App nos 18640/10, 18647/10, 18663/10, 18668/10 and 18698/10 (ECtHR, 04 march 2014)

- Case C-106/16 Polbud – Wykonawstwo sp. Z.o.o [2017] ECJ

Jordan:

Cour de cassation:

- Jo. cass. civ., 29 mar. 1983, n° 768/1982 (Basis of redress for contractual liability)
- Jo. cass. civ., 18 feb, 1987, n° 125/1987 (Derivative shareholder action)
- Jo. cass. civ., 25 July 2000, n ° 470/1999 (Character of founding shareholder)
- Jo. cass. civ., 31 jan. 2000, n° 1056/1999 (Faute seperable)
- Jo. cass. civ., 10 may 2001, n° 332/2001 (Basis of redress for contractual liability)
- Jo. cass. civ., 22 March 2004, n° 140/2003 (Issuing equity securities)
- Jo. cass. civ., 16 aug. 2005, n° 1292/2005 (Standard of care)
- Jo. cass. civ., 11 Sept. 2005, n° 1228/2005 (Issuing equity securities)
- Jo. cass. civ., 7 sept. 2009, n° 897/2009 (Standard of care)
- Jo. cass. civ., 13 jan. 2011, n° 3663/2010 (Derivative shareholder action)
- Jo. cass. crim., 23 oct. 2017, n° 2149/2017 (Actor of crime)

Administrative Court:

- Jo. co. admin., 31 Jan. 2007, n° 534/2006 (Powers of company controller)
- Jo. co. admin., 31 Jan. 2007, n° 535/2006 (Powers of company controller)
- Jo. co. admin., 06 Oct. 2010, n° 421/2010 (Reasoned administrative decision)
- Jo. co. admin., 5 July 2015, n° 90/2015 (Insider dealing)
- Jo. co. admin., 11 Oct. 2015, n° 154/2015 (Notification of administrative decision)
- Jo. co. admin., 20 dec. 2015, n° 383/2015 (Limitation of legal recourse of higher commission decisions)
- Jo. co. admin., 7 feb. 2016, n° 443/2015 (Notification of administrative decision)

- Jo. co. admin., 14 march 2016, n° 543/2015 (Limitation of legal recourse of higher commission decisions)
- Jo. co. admin., 03 Jan. 2017, n° 229/2016 (Reasoning of administrative decision)
- Jo. co. admin., 11 Jan. 2017, n° 391/2016 (Legal value of administrative decision)
- Jo.co. admin., 23 Jan. 2017, n° 208/2016 (Legal value of administrative decision)
- Jo. co. admin., 24 Jan. 2017, n° 517/2016 (Legal value of administrative decision)

Explanatory decisions:

- Explanatory decision, n° 1/2012
- Explanatory decision, 28 Aug. 2013, n° 4/2013 (Preference shares)

France:

Cour de cassation

Chambre Civile

- Cass. 2e Civ., 5 mai 1993, Bull. II n°167 (protection of reputation)
- Cass. 1er civ., 15 nov. 1994, n° 92-18.981 (enforceability of contracts towards third party)
- Cass. civ., 15 juill. 1999, n° 97-13.303 (Institutional or contractual nature of company)
- Cass. 1er civ., 14 dec. 1999, n° 97-15.756 (liability under civil and criminal law)
- Cass. 1er civ., 12 oct. 2004, n° 01-03.213 (enforceability of contracts towards third party)
- Cass. 1er civ., 17 mars 2016, n° 15-14.072 (private life of moral person)

Chambre Commerciale

- Cass. com., 6 fevr. 1962, *Bull. civ.* IV, n° 80 (Delegation of powers)
- Cass. com., 26 janv. 1970, n° 67-14787 (Shareholder character)
- Cass. com., 17 Fevr. 1975, n° 73-13.242 (Comité d'entreprise in GAM)
- Cass. com., 15 nov. 1983, n° 82-14.719 (Multiple defenders)

- Cass. com., 12 mars 1985,n° 84-17.163 (protection of business name)
- Cass. com. 3 June 1986, n° 85-12.118 (Equality between shareholders)
- Cass. com., 19 fév. 1991, n° 89-13.997 (Seat)
- Cass. com., 19 Fév. 1991, n° 89-14.000 (Statutory vs. real seat)
- Cass. com., 6 oct. 1992, n° 90-21.011 (Tortuous responsibility of auditors)
- Cass. com., 3 Janv. 1995, n° 91-18.109 (Lack of monitoring)
- Cass. com., 10 oct. 1995, n° 93-15.553 (Dirigeant de fait)
- Cass. com., 27 Fév. 1996, n° 94-11.241 (Duty of loyalty)
- Cass. com., 3 Juin 1997, n° 94-12.450 (Precise delegation)
- Cass. com., 24 Fév. 1998, n° 96-12.638 (Duty of loyalty)
- Cass. com., 20 Oct. 1998, n° 96-15.418 (*faute separable* and non-authorized transactions)
- Cass. com., 5 Oct. 1999, n° 97-17.090 (Precise nature of inside information)
- Cass. com. 10 Oct. 2000, n° 98-10.236 (Common interest)
- Cass. Com., 12 Fév. 2002, n° 00-11.602 (protection of business name)
- Cass. com., 20 mai 2003, n° 99-17.092 (Faute separable)
- Cass. com., 1 Fév. 2004 : Banque et Droit 2004, n° 95 (Exemption from prospectus)
- Cass. com., 13 Dec. 2005, n° 04-12.135 (Deliberations of board)
- Cass. com., 14 Fév. 2006, n° 05-11822 (Clearly defined operation in control request)
- Cass. com., 19 dec 2006, n° 05-17802 (Merger and transformation)
- Cass. com., 10 Fév. 2009, n° 07-20.445 (Faute separable)
- Cass. com., 9 mars 2010, n^{os} 08-21.547 08-21.793 (Shareholder individual action)
- Cass. com., 30 mars 2010, n° 08-17.841 (Presumption of personal fault)
- Cass. com., 7 Avril 2010, n° 09-13.972 (Financial knowledge)
- Cass. com., 18 mai 2010, n° 09-14.281 (Tortuous liability of auditors)

- Cass. com., 18 dec. 2012, n° 11-24.305 (Duty of loyalty)
- Cass. com., 19 mars 2013, n° 12-14.213 (No collective redress action verses third party)
- Cass. com., 8 mars 2016, n° 2016-012510 (Limitation of mangement liability)
- Cass. com., 8 mars 2016, n° 14-16.621 (collective action/ ut-singuli)
- Cass. com., 21 juin 2016, n° 14-26.370 (collective action/ ut-singuli)
- Cass. com., 8 Nov. 2017, n° 16-10.626 (*faute separable* and non-authorized transactions)
- Cass. Com., 20 dec. 2017, n° 16-16.015 (*faute separable* member of surveillance committee)

Chambre Criminelle

- Cass. crim., 10 oct. 1963, n° 61-94.203 (individual action)
- Cass. crim., 26 oct. 1967, n° 66-92.255 (protection of correspondances)
- Cass. crim., 13 mars 1972, n° 71-91.378 (misconduct, abstention and omission)
- Cass. crim., 12 avr. 1976, n° 1976-096115 (auditors' liability)
- Cass. crim., 12 oct. 1976, n° 75-90.239 (protection of reputation)
- Cass. crim., 19 oct. 1979, n° 77-92.742 (action *ut singuli* before criminal courts)
- Cass. crim., 2 mars 1983 non publié au bulletin
- Cass. crim., 18 Fév. 1991, n ° 90-82.288 (Secondary insider)
- Cass. crim., 11 mars 1993, n^{os} 90-84.931, 91-83.655, 92-80.773 (scope of delegation)
- Cass. crim., 15 mars 1993, n° 92-884 (Primary insider presumption of knowledge)
- Cass. crim., 15 mars 1993, n° 92-82263 (existence of knowledge)
- Cass. crim., 26 mai 1994, n° 93-83.180 (conditions for exonerating delegation)
- Cass. crim., 23 mai 1995, n°94-81.141 (protection of domicile)
- Cass. crim., 26 Juin 1995, n° 93-81.646 (Unlawful use of inside information)
- Cass. crim., 19 oct. 1995, n° 94-83884 (delegation of powers and transfer of liability)

- Cass. crim., 26 Oct. 1995, n° 94-83.780 (Tertiary insider/Precise nature of inside information)
- Cass. crim., 13 mai 1996, n° 95-83.057 (conditions for exonerating delegation: authority)
- Cass. crim., 9 juill. 1996, n° 1996-003580 (triggering factor of time limit)
- Cass. crim., 11 dec. 1996, n° 95-85.341 (conditions for exonerating delegation: means)
- Cass. crim., 20 fév. 1997, n° 96-81.613 (triggering factor of time limit)
- Cass. crim., 19 mai 1999, n° 98-83.587 (auditors' liability)
- Cass. crim., 18 avril 2000, n° 99-85.183 (necessity of explicit incrimination of moral person)
- Cass. crim., 31 oct. 2000, n° 2000-007197 (reports with incorrect information)
- Cass. crim., 7 sept. 2003, n° 05-80163 (abuse of confidence)
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- Cass. crim., 16 Nov. 2005, 04-85.815 (False and misleading information)
- Cass. crim., 31 Jan. 2007, n° 02-85.089 (Statutory vs. real seat)
- Cass. crim., 31 Jan. 2007, n°05-82.671 (Statutory vs. real seat)
- Cass. crim., 19 sept. 2007, n° 06-85.003 (proving delegation to limit liability)
- Cass. crim., 28 avril 2009, n° 08-83.843 (liability for unintentional fault)
- Cass. crim., 8 dec. 2009, n° 09-82.183 (conditions for exonerating delegation: competences of delegee)
- Cass. crim., 22 oct. 2014, n° 13-81743 (abuse of assets)
- Cass. crim., 29 juin 2016, n° 15-85.523 (engaging management criminal liability with company's)
- Cass. crim., 22 mars 2017, n° 15-84.229 (unauthorized management remuneration)

Chambre Sociale

- Cass. soc., 10 mai 1973, n° 71-12.690 (management liability before third party)

Cour d'appel

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- CA Paris, 31 mars 2000, RJDA 2001, n° 43 (fault related to management exercise)
- CA Paris, 1er ch. Sect. h, 24 oct 2008, n° 2008-02551 (reasoning of investigation decisions)
- CA Paris, 1re ch., sect. H, 26 nov. 2008, n° 51/14613 (length of administrative proceeding)
- CA Paris, 28 janv. 2010, n° 09/24356 (staying the execution of administrative decision)
- CA Paris, 5-8, 24 janv. 2017, n° 16/15840 (domestic registration)
- CA Paris, 10 août 2017, n° 15/17109 (faute de gestion)
- CA Nancy, 19 juill. 1946, D. 1947, p. 525, note A.C (legal personality of board)
- CA Orléans, ch. com., éco. et fin., 12 mai 2011, n° 10-02.984 (Management company)
- CA Versailles, 11 juin 1998, n° 1998-055284 (obligation of moyen)
- CA Versailles, 17 janv. 2002, n° 2000-7792 (distinction between direct liability before shareholders' and third party)

Conseil d'Etat

- CE, 5 janv. 1965, n° 62-099 (acte anormal de gestion)
- CE, 9 Oct. 1996, n° 17-0363 (Legal value of administrative decision)
- CE, 9 déc. 1999, n° 363834 (personality of AAI)
- CE, 20 dec. 2000, n° 21-3415 (French language and financial market)
- CE, 20 Dec. 2000, n° 22-1215 (ex-efficio and withdraw of authorization)
- CE, 11 Fév. 2003, n° 27-6376 (Urgent suspension of administrative decision)
- CE, 17 Nov. 2004, n° 25-7402 (breach of management company program of activity)

- CE, 18 oct. 2006, n° 277597 (nature of amicable resolution mission)
- CE, 30 oct. 2007, n° 30-1380 (interest in administrative decision)
- CE, 6 Juin 2008, n° 31-6001 (Urgent suspension of administrative decision)
- CE, 28 dec. 2009, n° 30-1654 (Guarantee right of defense)
- CE, 6e et 1er sousec. réunies, 18 Fév. 2011, n° 32-2786 (breach of professional obligation)
- CE, 22 Juin 2011, n° 32-0746 (acte anormal de gestion)
- CE, 6e et 1er sousec. réunies, 13 juill. 2011, n°s 33-7552 34-5402 (refusal to authorize management company)
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- CE, 28 nov. 2014, n° 36-2868 (interest in administrative decision)
- CE, 2 juill. 2015, n° 36-6108 (Gurantee right of defense)
- CE, 6e et 1er ch. réunies, 12 juill. 2017, n° 39-7403 (*greffe* not a producer of data bases)

Conseil Constitutionnel:

- Cons. cons., déc. n° 2014-453/454 QPC, 18 mars 2015
- Cons. cons., déc. n° 2015-513/514/526 QPC, 14 janvier 2016
- Cons. cons., déc. n° 2017-634 QPC, 2 juin 2017

USA:

- 3rd circuit, Fin Hay Realty v. United States (1968)
- Landreth Timber Co. v. Landreth, 471 US. 681 n.2 (1985)
- New Brunswick & Canada Railway Company vs. Muggeridge (1960)

- *Brane v. Roth*, 590 N.E. 2d. 587 (Ind. App. 1992)
- *Aronson v. Lewis* 473 A.2d 805, 812 (Del. 1984)
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