

CO2A: Oversee operators' tendering and contracting processes, modifications, terminations, reconfigurations, and mergers

REGULATORY FUNCTION: COMPETITION		CO2A
OBJECTIVE CO2 Operators' competition behaviour is audited through collected legal and contractual information	ACTION CARD CO2A <h2>OVERSEE OPERATORS' TENDERING AND CONTRACTING PROCESSES, MODIFICATIONS, TERMINATIONS, RECONFIGURATIONS, AND MERGERS</h2>	
COST: High FREQUENCY: Regular TARGET GROUPS: Regulators, service operators, service clusters, anti-monopoly institutions		
DESCRIPTION Once rules and conditions for market competition are established and licences are issued, regulators collect information related to the dynamics among operators. With an objective of identifying potential and existing concerted practices, regulators collect information about operators' public tenders, market alliances, merges, acquisitions, and other practices that may contradict competition rules. Regulators then analyse consequences regarding fair and open competition. For example, a merger between several operators initially registered to compete against each other, may result in a monopoly of the newly established operator. Regulators also seek information about operators' public purchases, to ensure that procured items are available on equal conditions to other competitors. A non-exhaustive list of potential anti-competitive abuses includes changes in contractual status that may result in competitive advantages such as decreased taxes.		
EXPECTED OUTCOMES <ul style="list-style-type: none"> • The potential creation of a dominant position or operator monopoly is prevented. • Operators are obliged to declare any changes that could potentially reduce competition. • Regulators work in partnership with anti-monopoly institutions to prevent any cross-sectoral abuses. 		
EXAMPLE 1: KENYA In Kenya , the regulator WASREB, within the license analysis checklist, established under the Water Act 2002, always evaluates operators' procurement policies in the following way.		
INFORMATION ON COMMERCIAL MANAGEMENT		
i. Copy of customer contract	Check against model customer contract	The water service provider (WSP) to provide a customer contract aligned to the model customer contract by WASREB
ii. Customer complaint handling procedure	Check against CEG	WSP to develop a customer service policy
iii. Customer service charter	Check against minimum service standards	Well provided
iv. Procurement policy	Approved procurement policy, or evidence of following PPAD Act 2015	WSP to provide an approved and signed procurement policy.
v. Evidence of stakeholder conference	Evidence of stakeholder conference invitation, list of participants, minutes within the last two financial years	To provide properly written and signed minutes since inception. Also provide conference invitation, list of participants
vi. Tax compliance certificate/status	Check validity, validate with iTax	

EXAMPLE 2: COLOMBIA

In Colombia, Law No. 142 of 1994 on Public Utilities makes it possible to enter into contracts through a public call for private companies to finance, operate and maintain aqueduct and sewerage utilities. The law includes tariffs among the criteria for granting such contracts, as long as the formula for determining such tariffs as proposed by the bidder complies with the guiding criteria of financial efficiency, neutrality, solidarity, redistribution, financial sufficiency, simplicity and transparency.

Such tariff formulas must be part of the contract, and the Regulatory Committee on Drinking Water and Basic Sanitation (CRA), pursuant to law, may modify them when the abuse of a dominant position, a violation of the neutrality principle or abuse of the system's users is detected. The CRA may also intervene in the event of tariff practices restricting competition, such as:

- Charging users in a competitive market, or market whose tariffs are not subject to regulation, tariffs below the value of operating costs, especially when the provider offers services in other markets in which it has a dominant position, or in which its tariffs are subject to regulation.
- Offering tariffs below the value of operating costs with the aim of forcing the competition out, preventing the entry of new providers or gaining a dominant position in the market or among potential users.
- Discriminating against users with the same commercial characteristics as others, by granting one group higher tariffs than the other group, even when this discrimination should occur in a competitive market or market without regulated tariffs. Operators are obliged to declare any changes that could potentially reduce competition.

EXAMPLE 3: CHILE

In Chile, pursuant to the General Law on Sanitary Services, the provision of public utilities associated with producing and distributing drinking water and collecting and disposing of wastewater may be carried out within a system of open market competition, by virtue of a concession granted by a Public Works Ministry decree upon the recommendation of the Superintendency of Sanitary Services (SISS).

Within this framework, providers are obliged to hold public tenders to acquire assets or contract services that exceed the minimum established by law. Accordingly, providers must inform the SISS every year on contracts and transactions associated with the purchase of goods and services, so that the entity may compare the prices of such contracts and transactions with market prices, on the basis of a representative sample, and identify any statistically significant differences that should be reported to the Superintendency of Securities and Insurance, which may respond by issuing sanctions and specific measures.

On the other hand, in the event of merger agreements between two or more providers, these must be subject to SISS approval so that the entity may verify that the agreement doesn't infringe any legal regulations. In this sense, the SISS should issue its opinion within seventy (70) days of the date on which approval is requested.

LINKS

Kenya: Kenya Water Act 2002: <https://wasreb.go.ke/downloads/ESAWAS.pdf>

Colombia: Utilities Law No. 142 of 1994: http://www.secretariassenado.gov.co/senado/basedoc/ley_0142_1994_pr002.html#90

Chile: General Law on Sanitary Services, Statutory Decree No. 382 of 1988: <https://www.bcn.cl/leychile/navegar?idNorma=5545&idParte=>

INTERNAL CAPACITIES NEEDED AND THE ROLE OF PARTNERS

Implying the need for a range of legal anti-competitive skills, this action is primarily supported by national anti-monopoly institutions. Regulators' staff must however, be trained on how to detect contractual changes, what to analyse in terms of consequences, and when to object to them. Many of these could be outsourced to anti-monopoly institutions or performed jointly, while competing operators will play an important role in flagging to regulators any anti-competitive behaviour.