

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

REGULATORY FUNCTION: COMPETITION		CO2A
OBJECTIVE CO2	ACTION CARD CO2A	
Operators’ competition behaviour is audited through collected legal and contractual information	OVERSEE OPERATORS’ TENDERING AND CONTRACTING PROCESSES, MODIFICATIONS, TERMINATIONS, RECONFIGURATIONS, AND MERGERS	
COST: High	FREQUENCY: Regular	
TARGET GROUPS: Regulators, service operators, service clusters, anti-monopoly institutions		
DESCRIPTION		
<p>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.</p>		
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: KENYA		
<p>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.</p>		
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	

LINKS

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

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.