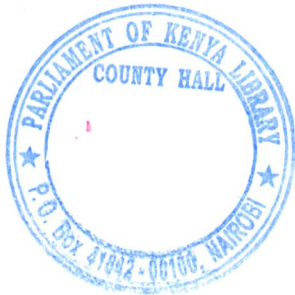


Approved for tabling in the House.

Pat SWA  
7/6/2022



REPUBLIC OF KENYA

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – SIXTH SESSION

DEPARTMENTAL COMMITTEE ON ENERGY

REPORT ON THE CONSIDERATION OF PUBLIC PETITION NO. 005 OF 2022 BY  
CONSUMER FEDERATION OF KENYA REGARDING OPERATIONS OF THE OPEN  
TENDER SYSTEM FOR IMPORTATION OF FUEL PRODUCTS

THE NATIONAL ASSEMBLY	
DATE: 07 JUN 2022	
Tabled	
TABLED BY:	N/Chairperson Hon. G. Cheruipot
CLERK AT THE TABLE:	Mainah. Mw

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Parliament Buildings  
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June, 2022

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## **Appendices**

1. Minutes of Committee sittings
2. Petition

**Abbreviations**

COFEK	Consumer Federation of Kenya
EPRA	Energy and Petroleum Regulatory Authority
KPRL	Kenya Petroleum Refineries Limited
KPC	Kenya Pipeline Company
KRA	Kenya Revenue Authority
MoPM	Ministry of Petroleum and Mining
OMC	Oil Marketing Companies
OTS	Open Tender System
PDL	Petroleum Development Levy

## **CHAIRPERSON'S FOREWORD**

Public Petition No. 005 of 2022 by the Consumer Federation of Kenya regarding operations of the Open Tender System (OTS) for importation of fuel products was conveyed to the House by the Hon. Speaker on 3<sup>rd</sup> February 2022.

Pursuant to the provisions of the National Assembly Standing Order 227(1), the Petition was forwarded to the Committee to consider the prayers therein and subsequently report to the House on the same.

While considering the Petition, the Committee held a meeting with the Petitioner, Mr. Stephen Mutoro, the Secretary General of the Consumer Federation of Kenya (COFEK) who canvassed for the Petition, and officials from the Ministry of Petroleum and Mining (MoPM) and the Energy and Petroleum Regulatory Authority (EPRA) to provide responses to the allegations made in the petition.

The Committee in submitting this report thanks the offices of the Speaker and Clerk of the National Assembly for the logistical and technical support during consideration of the Petition. The Committee also thanks the Petitioners, COFEK, as well as the Ministry of Petroleum and Mining (State Department for Petroleum), for engaging with it and providing complete information that has informed findings of this report.

Pursuant to the provisions of Standing Order 227 and 199, it is my pleasant duty to table the Report of the Departmental Committee on Energy on its consideration of Public Petition No. 005 of 2022 by Consumer Federation of Kenya regarding operations of the Open Tender System for importation of petroleum products.

**Hon. Jeremiah Kioni, MP**

**Chairperson, Departmental Committee on Energy**

## **EXECUTIVE SUMMARY**

This report responds to the prayers sought by Petitioner in Public Petition No. 005 of 2022 by Consumer Federation of Kenya regarding operations of the Open Tender System (OTS) for importation of petroleum products.

The Petitioner requested the National Assembly, through the Departmental Committee on Energy to inquire into the matter to oversee operations of the OTS to ensure free and fair tendering process, develop necessary legal framework to guarantee national values and principles of governance, cause the ministry to publish OTS awards and recommend that the Competition Authority of Kenya (CAK) inquire into alleged dominance by some marketers, and ensure a level playing field. The petitioner averred that the OTS is run in an opaque manner, shrouded in secrecy and susceptible to abuse by cartels.

The Committee observed that the Ministry has no Regulations and relied on legal notices on the operations of the OTS. Further, despite all marketers participating in the bid opening and award process, consumers and other stakeholders had no such access. The Ministry demonstrated that the OTS has indeed realized savings for the country, and based on the fact that all bidders bid on the basis of the same landing cost, 'small' companies were also able to win.

The Committee recommends that the Ministry of Petroleum and Mining submits Regulations as envisioned in section 93 of the Energy Act, conducts the monthly bidding in an open manner as provided for in the Public Procurement and Asset Disposal Act 2015, and publish in its website details of all its monthly bids.

The Committee unanimously adopted this report on 3<sup>rd</sup> June 2022.

## PART I

### 1.0 PREFACE

#### 1.1 Mandate of the Committee

1. The Departmental Committee on Energy is established pursuant to the provisions of Standing Order No. 216. The Committee is mandated to;
  - i) *investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;*
  - ii) *study the program and policy objectives of Ministries and departments and the effectiveness of the implementation;*
  - iii) *study and review all legislation referred to it;*
  - iv) *study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;*
  - v) *investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;*
  - vi) *to vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments);*
  - vii) *examine treaties, agreements and conventions;*
  - viii) *make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;*
  - ix) *make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;*
  - x) *consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and*
  - xi) *examine any questions raised by Members on a matter within its mandate.*
2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider matters relating to the Fossil Fuel Exploration, Development, Production, Maintenance and Regulation of Energy.
3. In executing this mandate, the Committee oversees the following Ministries, Departments and Agencies:
  - i) The Ministry of Energy; and
  - ii) The Ministry of Petroleum and Mining (Petroleum Department).

## 1.2 Membership

4. The Departmental Committee on Energy comprises the following Members:

### **Chairperson**

The Hon. Jeremiah Kioni, M.P.  
Ndaragwa Constituency

### **Jubilee Party**

### **Vice Chairperson**

The Hon. Gladwell Cheruiyot, MP  
Baringo County Women Representative

### **Kenya African National Union (KANU)**

The Hon. Joseph Kirui Limo, MP  
Kipkelion East

### **Jubilee Party**

The Hon. Ali Wario, MP  
Bura Constituency

### **Jubilee Party**

The Hon. Ekomwa Lomenen James, MP.  
Turkana South Constituency

### **Jubilee Party**

The Hon. Mary Wamaua Njoroge, MP.  
Maragua Constituency

### **Jubilee Party**

The Hon. Joseph Wathigo Manje, MP.  
Kajiado North Constituency

### **Jubilee Party**

The Hon. Elisha Odhiambo, MP  
Gem Constituency

### **Orange Democratic Movement (ODM)**

The Hon. Lemanken Aramat, MP.  
Narok East Constituency

### **Jubilee Party**

The Hon. Elsie Muhanda, MP  
Kakamega County Women Representative

### **Orange Democratic Movement (ODM)**

The Hon. Rashid Kassim Amin, MP.  
Wajir East Constituency

### **Wiper Democratic Movement- Kenya**

The Hon. Annie Wanjiku Kibeh, MP  
Gatundu North Constituency

### **Jubilee Party**

The Hon. (Eng.) Vincent M. Musau, MP.  
Mwala Constituency

### **Maendeleo Chap Chap Party**

The Hon. Julius Mawathe, MP  
Embakasi South Constituency

### **Wiper Democratic Movement – Kenya**

The Hon. Amina Gedow Hassan, MP.  
Mandera County Women Representative

### **Economic Freedom Party**

The Hon. Richard Ken Chonga, MP  
Kilifi South Constituency

### **Orange Democratic Movement (ODM)**

The Hon. Michael Mwangi Muchira, MP  
Ol Jorok Constituency  
**Jubilee Party**

The Hon. Walter Owino, MP  
Awendo Constituency  
**Orange Democratic Movement (ODM)**

The Hon. Pavel Oimeke, MP  
Bonchari Constituency  
**Orange Democratic Movement (ODM)**

5. The following technical staff facilitate the Committee;

Mr. Victor Weke  
**Senior Clerk Assistant**

Ms. Mary Lemerelle  
**Clerk Assistant II**

Dr. Benjamin Ngimor  
**Senior Fiscal Analyst**

Mr. Sidney Lugaga  
**Legal Counsel I**

Ms. Noelle Chelagat  
**Media Relations Officer**

Mr. Brian Njeru  
**Fiscal Analyst III**

Ms. Mercyline Kerubo  
**Audio Recording Officer**

Mr. David Ngeno  
**Research Officer II**

Ms. Sheila Chebotibin  
**Sergeant at Arms I**

## **PART II**

### **2.0 CONSIDERATION OF THE PETITION**

#### **2.1 Background to the petition**

6. The Petitioner, Consumer Federation of Kenya (COFEK) is an independent, non-political, self-funded and non-profit society registered under the Societies Act, Cap 108. The Petitioner claims that COFEK is the apex body that is committed to consumer protection, education, research, consultancy, litigation, anti-counterfeits campaign and other matters related to consumerism.
7. Open Tender System (OTS) is defined in section 2 of the of the Petroleum Act 2019 as the mode of procurement of petroleum products in Kenya whereby the lowest bidder on any given product is allowed to import on behalf of all the other oil marketing companies.
8. Kenya imports refined petroleum products through the Open Tender System (OTS) and run through monthly tenders that entails sourcing of petroleum predominantly from the spot market whereby petroleum is sourced from the open market without any prior contracts. The system allows Oil Marketing Companies (OMCs) to access petroleum products at the same price and therefore ensure competition in the petroleum market.
9. Monthly tenders are floated to all OMCs inviting them to bid for petroleum cargoes.
10. The Ministry of Petroleum and Mining coordinates Open Tender System activity with oil marketing companies whereas the Kenya Pipeline Company provides product movement infrastructure including storage and oil pipeline services.

#### **Institutional and Legal frameworks on OTS in Kenya**

11. The Energy and Petroleum Regulatory Authority (EPRA) is established under the Energy Act No. 1 of 2019 with the mandate (among others) to undertake technical and economic regulation of the energy and petroleum sector. Section 10(b) (ii) requires EPRA to regulate the importation, refining, exportation, transportation, storage and sale of petroleum products.
12. The Petroleum Act No.2 of 2019 tasks EPRA with the regulation of the upstream, midstream and downstream petroleum sub-sectors.

13. Section 101(d) of the Petroleum Act 2019 gives powers to the Cabinet Secretary in charge of Petroleum upon recommendations from EPRA to make regulation providing for importation of petroleum through open tendering system and the manner in which such system shall operate
14. In regulating the petroleum sector in Kenya, EPRA develops regulations; participates in the development of standards for petroleum equipment, products and facilities; issues Construction Permits; issues operational licenses; audits petroleum facilities against regulations, standards and best practices; undertakes enforcement action in instances of identified non-compliances or non-conformities; investigates accidents and incidents relating to the handling of petroleum products; and collects and analyses petroleum statistics.
15. Section 74(1) (a) of the Petroleum Act 2019 requires persons wishing to undertake refining, importation, exportation, bulk storage or transportation of petroleum crude or products to have valid licenses issued by EPRA.
16. Further Section 86(1) of the Petroleum Act provides that before constructing a pipeline or a bulk storage facility, one must apply for a construction permit from EPRA.

## **2.2 Prayers sought**

17. The Petitioners submitted that the manner in which the Ministry of Energy, through the Energy and Petroleum Regulatory Authority (EPRA) had been operating the OTS was opaque, shrouded in secrecy and susceptible to abuse by cartels.
18. Subsequently, the Petitioner requested the National Assembly to act to protect consumer interests through recommendation of the following prayers;
  - i) That National Assembly puts in place measures to oversight the operations of OTS to promote a free, fair tender platform for the benefit of fuel consumers;
  - ii) Develop regulations, and/or any other necessary legislation to align the activities of the monthly OTS for fuel products with the Constitution of Kenya 2010;
  - iii) Provide a framework to publicly advertise and make public all OTS awards – historical and from now henceforth – showing date of contracts, the bidders, when the tenders are floated, bids received, bids evaluation, cargo sizes, past winners (since 2005), respective storage capacities, beneficial owners of the winning bidders, among other information;
  - iv) That winning bidders and details on the pricing and delivery schedules should be updated on an online portal immediately the award has been made;

- v) That the disclosures shall include showing the cargo price per liter and a companion of the prevailing fuel prices for gasoline, diesel, kerosene and jet fuel;
- vi) Order the Ministry of Mining and Petroleum to open up the OTS system to all oil marketing firms in Kenya as well as global oil traders who wish to participate. The increased competition will be beneficial to consumers as the lowest bid will be awarded;
- vii) Order the Competition Authority of Kenya to analyze the dominance in the OTS by analyzing historical data to establish how many times each oil marketing company has won, the prices quoted vs the prevailing global market prices, and the cumulative value of tenders won and the margins accrued therein;
- viii) Further orders that the Competition Authority of Kenya institutes a study into the OTS to flush out any aspects of uncompetitive misconduct such as cartel-like behavior, price fixing and market allocation;
- ix) Offer any other pro-public remedy on fuel pricing in Kenya.

### **3.0 HEARING OF THE PETITION**

19. The Committee held meetings with the Petitioner and MoPM on 20<sup>th</sup> May 2022.

#### **3.1 Consumer Federation of Kenya**

20. The Petitioner was represented by Mr. Stephen Mutoro, the Secretary General.

21. Other than the prayers contained in the Petition, the Petitioner expounded that Kenya, since 2005, imports its refined petroleum products through a system dubbed Open Tender System (OTS) hosted by the Ministry of Mining and Petroleum.

22. The winning bidder(s) delivers the cargo via port of Mombasa and is then availed to other market players.

23. The purpose of the OTS was to ensure petroleum products, whose prices are regulated monthly in Kenya, remain competitive as per market conditions. However, the conduct of the activities of OTS, despite its name denoting “open,” remains opaque, shrouded in secrecy, and exhibits cartel-like behaviour, denying Kenyan consumers the benefits on competitive pricing

24. The current fuel pricing mechanism does not make necessary disclosures on the procurement of fuel products, only making public a “landed cost” whose computation is not unambiguous as it includes demurrage and other charges such as shipping. It is therefore almost impossible to tell at what price Kenya secured its oil cargo vis-à-vis prevailing global prices in the market

25. Data from the Energy and Petroleum Regulatory Authority (EPRA) indicate that only 13 out of a possible 96 Oil Marketing Companies (OMCs) participate in the monthly OTS tenders.
26. There are credible allegations of a clique of companies dominating oil imports via the OTS in what appears to be cartel-like behavior.
27. There is no disclosure by the Ministry of Mining and Petroleum, and the Energy and Petroleum Regulatory Authority (EPRA) – neither on their websites, via public notices in the media, nor on the Public Procurement Information Portal - and thus there is no information on when the tenders are floated, bids received, bids evaluation, cargo sizes, past winners, beneficial owners of the winning bidders.
28. This runs afoul of the Constitution of Kenya, 2010 which has clear provisions on the need for public participation and access to information held by Government, in the public interest. Furthermore, Access to Information is the right of every citizen of Kenya under Article 35 of the Constitution. Kenya's National values and principles of governance include public participation, transparency and accountability as underscored in Article 10 of the Constitution.
29. Further, the June 13, 2018 Executive Order on 'Procurement of Public Goods, Works and Services by Public Entities' by HE President Uhuru Kenyatta requires all government entities and publicly-owned institutions to publish full details of tenders and awards – including directors of companies winning the OTS.

### **3.2 Ministry of Energy and Petroleum**

30. The State Department for Petroleum was represented by the following;
  - i. Mr. Andrew Kamau - Principal Secretary
  - ii. Mr. Daniel Kiptoo - Director General, EPRA
  - iii. Mr. Joseph Wafula - Chief Petroleum Economist
  - iv. Mr. Martin Wanyama - Operations Manager, Kenya Pipeline Company
  - v. Eng. Edward Kinyua - Director Petroleum, EPRA
31. They submitted that Ministry is responsible for ensuring the security of supply of petroleum products both to Kenya and the region. Kenya's annual consumption is approximately 10.2 million tones.
32. The Ministry played a purely facilitative role in the importation of petroleum products, and did not procure on its own.
33. The Ministry has the following technical segments:
  - Upstream
  - Midstream; and
  - Downstream

- Upstream is in charge of exploration while midstream defines refining and transportation downstream is in charge of ensuring refined products get to retail outlets;

34. The downstream unit is also responsible for coordinating operations related to importation and distribution of petroleum products in the country to ensure the economy runs without disruptions and the neighboring countries which rely on the port of Mombasa are served efficiently

### **Importation of petroleum products through OTS**

35. On 28<sup>th</sup> November 2003, the ministry of Energy then gazetted Legal notice No 197 in which open Tender system (OTS) for both crude oil refined petroleum products was established. The legal Notice required that Oil marketing company (OMCs) mandatorily process crude at the Kenya Petroleum Refineries Limited (KPRL).

36. Later, on 10<sup>th</sup> April 2012 the Ministry gazetted legal Notice No. 24 that required oil marketing companies to mandatorily lift petroleum products from Kenya Petroleum Refineries Limited (KPRL). This paved the way for transition of KPRL from a tolling to merchant arrangement.

37. With obsolete nature of refinery that was later closed in 2012, the country resorted to meeting its petroleum requirements through 100 percent import of refined petroleum products, through Kipevu Oil Terminal and Shimanzi Oil Terminal.

38. Initially OMCs would import 70 percent through the open Tender System (OTS) and 30 percent as private imports. However, some OMCs took advantage and at some point, in 2009 it was realized that 90 percent of products belonged to one OMC who was taking advantage of the system.

39. All the petroleum requirements are imported as refined petroleum products through the Open Tender System (OTS) as per the Legal Notice No. 24 of 10<sup>th</sup> April 2012. The open tender system stipulates the relationship between buyers and sellers of petroleum products.

40. The Ministry has modeled a competitive mode of procurement of petroleum products known as the OTS in which OMCs access petroleum products at the same landed price. The ministry together with *Supplycor* (supplying OMCs), Vessel Scheduling Committee and Kenya Pipeline Company (KPC) project the demand for petroleum products and invites bidders to supply the projected quantities.

41. Each OMC licensed to import petroleum products can participate in an OTS tender. Producers, rights obligations for all parties to the OTS (OMCs) articulated in a signed agreement (Tender

terms and conditions). The tender terms and conditions also outline penalties for defaulters on late payment, late delivery, under delivery, default among others.

### **Procedures of the OTS**

42. Invitation to tender is sent out at least 7 days before tender opening. The tender is clear on the quality, quantity and the delivery date. Tender closing time is 1415hrs and opening time is 1430hrs. The tender opening is supervised by MoPM and witnessed by both buyers and sellers;
43. The tender to import each of the products (Diesel, Super and Kerosene) is awarded to the shipper who quotes the lowest bid for freight and premium.
44. The importers advise receiving terminal on the financing arrangement if it's on collateral financing way before the vessel load. Tender parcel on arrival is superintended (for quantity and quality) by an internationally accepted independent surveyor/inspectors nominated by the importer.
45. On the discharge, survey issues an outturn report to all stakeholders (importer, receiving terminal, Kenya Revenue Authority (KRA) and KPRL. KPC who is the receiving terminal confirms to financiers' custody of the product.

### **Eligibility to bid the OTS**

46. For an OMC to be eligible to bid it must be;
  - i) Licensed by EPRA;
  - ii) Not be a defaulter both as buyer or seller;
  - iii) Have line fill in KPC;
  - iv) Have letter from bank guaranteeing financing;
  - v) Express the intention to bid 7 days prior to tender date; and
  - vi) For those just licensed they must have traded at least 12 months as buyers without default'
  - vii) Have not delivered products that do not meet both LKPC operational specifications and KEBs Specification

### **Default in the OTS**

47. Buyers who do not effect payment before the fifth (5th) working are deemed to be in default and seller is at liberty to dispose product. Such buyers are not allocated ullage in subsequent tender cycles;
48. Sellers that fail to transfer entitlement, who do not deliver on time, or don't deliver on specification product are in default.

## PART III

### 4.0 ISSUES FOR DETERMINATION AS PER THE PRAYERS SOUGHT IN THE PETITION

49. Based on submissions from the Petitioners and the State Department for Petroleum, the Committee made the following determination as per the prayers sought;

**i. On the free and fair operation of the OTS and need to publicize details of awards**

50. Despite submitting that information on the bids and winners of the same are readily available, the Ministry has no platform to publish this information to the general public.

51. The demonstration by the Ministry that all marketers who are bidding do attend the tender process and append their signatures to the documents, other interested stakeholders, including consumers have no such platform, hence the impression of ‘opaqueness’.

52. Documents submitted by the Ministry showed that the OTS had indeed seen savings accrued to the public; in 2022 so far, the economy had saved Kshs. 3.4 billion based on differences of the various fuel products pricing by highest and lowest (winning) bidders.

**ii. On Regulations, and/or any other necessary legislation to align the activities of the monthly OTS for fuel products with the Constitution of Kenya 2010**

53. The Ministry and EPRA currently operates the Open Tender System through Legal Notice 197 of 2003 and Legal Notice no. 24 of 10th April, 2022. The Notices were not made available to the Committee. The Ministry and EPRA are yet to enact Regulations envisioned under section 101(d) of the Petroleum Act, no. 2 of 2019 to provide for importation of petroleum through open tendering system and the manner in which such system shall operate.

**iii. On alleged dominance and need for Competition Authority of Kenya to investigate uncompetitive tendencies**

54. The Ministry also demonstrated that despite the impression that only large marketers were able to meet the supply obligations, the pricing which was based on competitive world markets (same landing cost) meant that any of them who could secure financial funding was able to win the tenders.

55. The Ministry submitted an analysis of winning bidders for the recent past, an extract of which is below;

- i. November 2020- Galana and OryxEnergies
- ii. December 2020- Gulf, Texas, OryxEnergies and Global Petroleum
- iii. January 2021- Global Petroleum, OryxEnergies and Gulf
- iv. February 2021- E3 Energy, OryxEnergies and Rubis
- v. March 2021- OryxEnergies and Galana
- vi. December 2021- OryxEnergies, Asharami, Kencor and Texas
- vii. January 2022- OryxEnergies, E3 Energies, Kencor and Asharami
- viii. March 2022- OryxEnergies, E3 Energy, Galana and Vivo.

56. The OTS currently has 108 marketers, and the Ministry submitted that from the demonstration above, not only big companies won tenders.

## PART IV

### 5.0 COMMITTEE RECOMMENDATIONS

#### 5.1 Specific to prayers

57. The Committee considered the submissions, observed and resolved to recommend the following:

58. **On prayers (i), (ii), (iii), (iv), and (v)** the Committee recommends that the Ministry of Petroleum and Mining and EPRA:

- (a) conduct the monthly tender process in accordance with provisions of regulating open tendering and the exceptions provided under Sections 91, 92, 93, 94, 95 and 96 under the Public Procurement and Asset Disposal Act of 2015 which requires openness, accessibility and transparency in the submission, receipt and opening of tenders.
- (b) submits Regulations providing for importation of petroleum through open tendering system and the manner in which such system shall operate envisioned under Section 101(d) of the Petroleum Act, no. 2 of 2019 to Parliament by 31<sup>st</sup> December 2022.
- (c) the Ministry of Petroleum and Mining and EPRA publishes details of bids including participating bidders, winners and their price quotations, in its website, commencing 90 days after tabling of this report in the National Assembly
- (d) that the Regulations should provide that the Ministry of Petroleum and Mining and EPRA shall maintain an online portal that is accessible to the public where they shall advertise and publish all information relating to bids and awards on the Open Tendering System including—
  - i. the date of the contracts, the bidders, when the tenders are floated, bids received, bids evaluation, cargo services, respective storage capacities and beneficial owners of winning bidders;
  - ii. details of pricing and delivery schedules;
  - iii. the cargo price per litre along with the prevailing prices of for gasoline, diesel, kerosene and jet fuel.

59. **On prayers (vi), (vii), (viii) and (ix)**, the Committee does not find evidence/ basis to make any recommendations.

## 5.2 Other recommendations

60. The Ministry of Petroleum and Mining should through its facilitative role encourage smaller marketers to organize themselves into larger conglomerate of bidders to attract foreign bank funding of the supply process.

SIGNED:  DATE: 3/6/2022  
HON. JEREMAH KIONI M.P.  
CHAIRPERSON, THE DEPARTMENTAL COMMITTEE ON ENERGY

**MINUTES OF THE 14<sup>TH</sup> SITTING OF THE DEPARTMENTAL COMMITTEE ON ENERGY  
HELD ON FRIDAY 20<sup>TH</sup> MAY, 2022 AT ENGLISH POINT MARINA HOTEL, AT 10.00 AM**

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**PRESENT**

1. The Hon. Jeremiah Kioni, M.P- **Chairperson**
2. The Hon. Gladwell Cheruiyot, MP- **Vice-Chairperson**
3. The Hon. Elisha Odhiambo, MP
4. The Hon. Joseph Wathigo Manje, MP
5. The Hon. Richard Chonga, MP
6. The Hon. Pavel Oimeke, MP
7. The Hon. Amina Gedow Hassan, MP
8. The Hon. Michael Mwangi Muchira, MP
9. The Hon. Walter Owino, MP
10. The Hon. Julius Musili Mawathe, MP
11. The Hon. (Eng.) Vincent Musyoka Musau, MP

**APOLOGIES**

1. The Hon. Mary Wamau Njoroge, MP
2. The Hon. Ekomwa Lomenen James, MP
3. The Hon. Lemanken Aramat, MP
4. The Hon. Ann Wanjiku Kibeh, MP
5. The Hon. Joseph Kirui Limo, MP
6. The Hon. Elsie Muhanda, MP
7. The Hon. Rashid Kassim, MP
8. The Hon. Ali Wario, MP

**IN-ATTENDANCE**

**COMMITTEE SECRETARIAT**

- |                          |   |                         |
|--------------------------|---|-------------------------|
| 1. Mr. Victor Weke       | - | Senior Clerk Assistant  |
| 2. Mr. Mary L. Lemerelle | - | Clerk Assistant II      |
| 3. Mr. Sydney Okumu      | - | Legal Counsel I         |
| 4. Mr. David Ng'eno      | - | Research Officer        |
| 5. Mr. Brian Njeru       | - | Fiscal Analyst III      |
| 6. Ms. Noelle Chelangat  | - | Media Relations Officer |
| 7. Ms. Mercylyn Kerubo   | - | Audio Officer           |
| 8. Ms. Lillian Seurei    | - | Secretary               |

**CONSUMER FEDERATION OF KENYA**

Mr Stephen Mutoro - Chief Executive Officer

**AGENDA**

1. Prayers
2. Preliminaries/Introductions/Communication from the Chair
3. Confirmation of Minutes
4. **Consideration of petition regarding operations of the open tender systems for importation of refined petroleum products**
5. Any Other Business
6. Adjournment/ Date of the next meeting

**MIN. NO. NA/ENERGY/2022/072: PRELIMINARIES**

The Chairperson called the meeting to order at ten minutes past ten o'clock and said a prayer. Self-introductions were made and the agenda of the meeting was adopted.

**MIN. NO. NA/ENERGY/2022/073: CONFIRMATION OF MINUTES**

The agenda item was deferred.

**MIN. NO. NA/ENERGY/2021/074: BRIEF ON THE PETITION REGARDING OPERATIONS OF THE OPEN TENDER SYSTEM FOR IMPORTATION OF FUEL PRODUCTS**

The secretariat took Members through a brief history and background of the process of Open Tender System (OTS) as defined in section 2 of the of the Petroleum Act 2019 as the mode of procurement of petroleum products in Kenya whereby the lowest bidder on any given product is allowed to import on behalf of all the other oil marketing companies.

The meeting noted that Kenya imports refined petroleum products through the Open Tender System (OTS) and are run through monthly tenders that entails sourcing of petroleum predominantly from the spot market whereby petroleum is sourced from the open market without any prior contracts. The system allows Oil Marketing Companies (OMCs) to access petroleum products at the same price and therefore ensure competition in the petroleum market.

The meeting further noted that serious complaints touching on the effectiveness of Open Tender System (OTS) have risen in the recent past and resolved that the Committee should urgently address the matters raised in the petition before it. The petition was referred to the Committee on Thursday, 3<sup>rd</sup> February 10, 2022.

**MIN. NO. NA/ENERGY/2021/075: PRESENTATION BY THE PETITIONER ON THE OPERATIONS OF OPEN TENDER SYSTEM FOR IMPORTATION OF FUEL PRODUCTS**

Mr. Stephen Mutoro, the Chief Executive Secretary of the Consumer Federation of Kenya informed the meeting that Cofek is Kenya's independent, self-funded, multi-sectorial, non-political and apex non-profit Federation committed to consumer protection, education, research, consultancy, litigation, anti-counterfeits campaign and business rating on consumerism and customer-care issues.

He stated that the purpose of the OTS was to ensure petroleum products, whose prices are regulated monthly in Kenya, remain competitive as per market conditions but the conduct of the activities of OTS, despite its name denoting "open," is denying Kenyan consumers the benefits on competitive pricing.

He said the current fuel pricing mechanism does not make necessary disclosures on the procurement of fuel products therefore almost impossible to tell at what price Kenya secured its oil cargo vis-à-vis prevailing global prices in the market

He said the data from the Energy and Petroleum Regulatory Authority (EPRA) indicates that only 13 out of a possible 96 Oil Marketing Companies (OMCs) participate in the monthly OTS tenders.

He stressed that there is no disclosure by the Ministry of Mining and Petroleum, and the Energy and Petroleum Regulatory Authority (EPRA) – neither on their websites, via public notices in the media, nor on the Public Procurement Information Portal - and thus there is no information on when the

tenders are floated, bids received, bids evaluation, cargo sizes, past winners, beneficial owners of the winning bidders.

He made the following prayers to the Committee: -

1. Place measures to oversight the operations of OTS to promote a free, fair tender platform for the benefit of fuel consumers
2. Develop regulations, and/or any other necessary legislation to align the activities of the monthly OTS for fuel products with the Constitution of Kenya 2010
3. Provide a framework to publicly advertise and make public all OTS awards – historical and from now henceforth – showing date of contracts, the bidders, when the tenders are floated, bids received, bids evaluation, cargo sizes, past winners (since 2005), respective storage capacities, beneficial owners of the winning bidders, among other information
4. That winning bidders and details on the pricing and delivery schedules should be updated on an online portal immediately the award has been made
5. That the disclosures shall include showing the cargo price per liter and a companion of the prevailing fuel prices for gasoline, diesel, kerosene and jet fuel.
6. Order the Ministry of Mining and Petroleum to open up the OTS system to all oil marketing firms in Kenya as well as global oil traders who wish to participate. The increased competition will be beneficial to consumers as the lowest bid will be awarded.
7. Order the Competition Authority of Kenya to analyze the dominance in the OTS by analyzing historical data to establish how many times each oil marketing company has won, the prices quoted vs the prevailing global market prices, and the cumulative value of tenders won and the margins accrued therein
8. Further orders that the Competition Authority of Kenya institutes a study into the OTS to flush out any aspects of uncompetitive misconduct such as cartel-like behavior, price fixing and market allocation.
9. Offer any other pro-public remedy on fuel pricing in Kenya

**The Chairperson appreciated the presentation made by the petitioner and stated that the issues raised were pertinent and within the law which will guide the Committee to seek answers from the Ministry of Petroleum and Mining and Energy & Petroleum Regulatory Authority. He particularly mentioned that concerns raised on Access to Information on Article 35 as one of the key issues the Committee will look into and make recommendations. The Chairperson assured the petitioner that the Committees report will be supplied to the petitioner, once the matter is concluded.**

**MIN. NO. NA/ENERGY/2022/076: ADJOURNMENT/ DATE OF NEXT MEETING**

There being no other business, the meeting was adjourned at eleven o'clock.

SIGNED.......... DATE 3/6/22.....  
(CHAIRPERSON)

**MINUTES OF THE 15<sup>TH</sup> SITTING OF THE DEPARTMENTAL COMMITTEE ON ENERGY HELD ON SATURDAY 21<sup>ST</sup> MAY, 2022 AT ENGLISH POINT MARINA HOTEL AT 11.30 AM**

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**PRESENT**

1. The Hon. Jeremiah Kioni, M.P- **Chairperson**
2. The Hon. Gladwell Cheruiyot, MP- **Vice-Chairperson**
3. The Hon. Elisha Odhiambo, MP
4. The Hon. Joseph Wathigo Manje, MP
5. The Hon. Richard Chonga, MP
6. The Hon. Pavel Oimeke, MP
7. The Hon. Lemanken Aramat, MP
8. The Hon. Amina Gedow Hassan, MP
9. The Hon. Michael Mwangi Muchira, MP
10. The Hon. Walter Owino, MP
11. The Hon. Rashid Kassim, MP
12. The Hon. Julius Musili Mawathe, MP
13. The Hon. Hon. Joseph Kirui Limo, MP
14. (Eng.) Vincent Musyoka Musau, MP

**APOLOGIES**

1. The Hon. Mary Wamau Njoroge, MP
2. The Hon. Ekomwa Lomenen James, MP
3. The Hon. Ann Wanjiku Kibeh, MP
4. V The Hon. Elsie Muhanda, MP
5. The Hon. Ali Wario, MP

**IN-ATTENDANCE**

**COMMITTEE SECRETARIAT**

1. Mr. Victor Weke - Senior Clerk Assistant
2. Mr. Mary L. Lemerelle - Clerk Assistant II
3. Mr. Sydney Okumu - Legal Counsel 1
4. Mr. David Ng'eno - Research Officer
5. Mr. Brian Njeru - Fiscal Analyst III
6. Ms. Noelle Chelangat - Media Relations Officer

**STATE DEPARTMENT FOR PETROLEUM**

1. Mr. Andrew Kamau - Principal Secretary
2. Mr. Joseph Wafula - Chief Petroleum Economist
3. Mr. Danie Kiptoo - Director General, Energy and Petroleum Regulatory Authority
4. Eng. Edward Kinyua - Director, Petroleum and Gas
5. Mr. Martin Wanyama - Operations Manager, Kenya Pipeline Company

**AGENDA**

1. Prayers
2. Preliminaries/Introductions/Communication from the Chair
3. Confirmation of Minutes
4. **Meeting with the Ministry of Petroleum & Mining and Energy and Petroleum Regulatory Authority to deliberate on the petition regarding operations of the open tender systems for importation of refined petroleum products**

5. Any Other Business
6. Adjournment/ Date of the next meeting

**MIN. NO. NA/ENERGY/2022/077: PRELIMINARIES**

The Chairperson called the meeting to order at twenty minutes to eleven o'clock and said a prayer. Self-introductions were made and the agenda of the meeting was adopted.

**MIN. NO. NA/ENERGY/2022/078: CONFIRMATION OF MINUTES**

The agenda item was deferred.

**MIN. NO. NA/ENERGY/2021/079: SUBMISSION ON OPERATION OF THE OPEN TENDER SYSTEM IN KENYA BY THE STATE DEPARTMENT FOR PETROLEUM**

Mr. Joseph Wafula, the Chief Petroleum Economist in the Ministry of Petroleum and mining made presentations to the Committee as follows:

1. The total Number of oil marketing companies active and participating in the Open Tender System in Kenya is approximately 94 with a retail network of about 2100. According to EPRA the total number of OMCs licensed and eligible to participate in OTS is approximately 110;
2. The difference in number of OMCs participating in OTS and the list submitted by EPRA is brought about by the fact that some OMCs have defaulted in the OTS and therefore non-compliant. Such companies meet compliance before being readmitted into the OTS participation;
3. All imports are imported into Kipevu Oil Storage terminal and transported by the Kenya Pipeline to Nairobi and other destinations for both the local and regional market;

**Licensing of Oil Marketing Companies**

1. On 28<sup>th</sup> November, 2003, the Ministry of Energy, then gazetted Legal notice No. 197 in which Open Tender System (OTS) for both crude oil and refined petroleum products was established.
2. The Legal Notice required that all Oil Marketing Companies (OMCs) mandatorily process crude at the Kenya Petroleum Refineries Limited (KPRL);
3. Later, on 10<sup>th</sup> April 2012 the Ministry gazetted Legal Notice No. 24 that required oil marketing companies to mandatorily lift petroleum products from KPRL. This paved the way for transition of KPRL from a tolling to merchant arrangement;
4. With obsolete nature of refinery that was later closed in 2012, Kenya resorted to meeting our petroleum requirements through 100 percent import of refined petroleum products;
5. Initially OMCs would import 70 percent through the open System and 30 percent as private imports. However, some OMCs took advantage and at some point in 2009 we realized that 90 percent of products belonged to one OMCs who was taking advantage of the system;
6. Currently Import of all refined petroleum products is 100 percent through the Open Tender System popularly referred to as the OTS which has agreed terms and conditions governing the seller and the buyer where bids on freight and premium are opened and the bidder with the lowest awarded the tender to import on behalf of all the oil marketing companies.

## **Criteria to bid**

### **Each OMC that intends to bid must meet the following:**

- i. Licensed by EPRA;
- ii. Not be a defaulter both as buyer or seller;
- iii. Have line fill in KPC;
- iv. Have letter from bank guaranteeing financing;
- v. Express the intention to bid 7 days prior to tender date; and
- vi. For those just licensed they must have traded at least 12 months as buyers without default.
- vii. Have not delivered product that does not meet both KPC operational specifications and KEBs specifications

## **Petroleum Products demand Projections**

1. Kenya Pipeline Company plans imports of petroleum products based on the hourly evacuation of petroleum products from their system which in turn is computed to estimate the daily consumption.
2. Each evacuation of products creates space in Kipevu Oil Storage system and ought to be filled continuously to ensure continuous operation of the system.
3. Planning of imports is projected on the basis of the projected volumes to be evacuated. In this regard therefore cargoes are planned to ensure continuous of products to the system. The empty space referred to as ullage is shared to all OMCs prorata their respective thrupt evaucated. Each OMCs has a share in all the cargoes as long as the OMC has expressed the intention to participate as guided by the ullage allocated.
4. Coordination of all the activities is coordinated by the Vessel Scheduling Meeting (VSM) that meets every fortnight and the OTS committee meeting monthly.

## **MIN. NO. NA/ENERGY/2021/080: OBSERVATIONS**

The Committee observed that: -

1. Legal framework to administer the Open Tender System is in place; The Petroleum Act, 2019 defines the Open Tendering System (OTS) as the mode of procurement of petroleum products in Kenya whereby the lowest bidder on freight and premium on any given product is allowed to import on behalf of all the other Oil Marketing Companies.
2. The terms and conditions are appended to by all OMCs licensed to import white petroleum products to Kenya. Any OMC that is licensed by EPRA and has signed the Open Tender terms and conditions is eligible to participate both as a buyer and seller.
3. For new entrants the tender terms and conditions required that they participate as buyers at least for 12 months as buyers without any default after which they are allowed to bid.
4. The Ministry of Petroleum and Mining sole role is facilitation and therefore is not a signatory to this agreement but rather plays a superintending role.
5. The bidder that imports become the seller and all others become buyers. For a company to participate in the OTS as a buyer, it must acquire an Import, Export and Wholesale of Petroleum Products license from the Energy and Petroleum Regulatory Authority (EPRA) and enter into a Transport and Storage Agreement (TSA) with Kenya Pipeline Company (KPC). Only then is the company allowed to sign the OTS Terms and Conditions and subsequently be allocated minimum capacity in the KPC system to begin trading operations

6. Participating as a seller in the OTS is at the OMCs own discretion but pursuant to fulfillment of the OTS Terms and Conditions which require that an OMC should have participated as a buyer for a period of 12 months without defaulting in its obligations in order to qualify to be a seller. It's incumbent on the seller to source for a Financing Bank to finance imports, a supplier of petroleum products and have a good understanding of the risks involved;
7. Before bidding in the OTS an OMC is required to present to the Ministry of Petroleum and Mining its intention to bid and the same is circulated to the entire industry for concurrence. It is worth noting that OMCs own the process
8. To be able to bid and win a cargo the OMC intending to bid will require to align to the following: -
  - a. Secure financing from a reputable bank in this case first world class banks considering the huge financing cost required;
  - b. Supplier of the cargo which would internationally oil traders or a large-scale refinery
  - c. Ability to understand the risk involved for inability to perform once awarded a cargo;
  - d. Ability to pay taxes on behalf of all other OMCs for the case of the Shimanzi Oil terminal imports.
9. Not all OMCs would have the capacity to align to these requirements and participate in the OTS
10. The competitive nature of the tendering system no one OMC is guaranteed to win tenders and supply the Kenyan market.

**MIN. NO. NA/ENERGY/2021/081: RECOMMENDATIONS**

**On prayers (i), (ii), (iii), (iv), and (v)** the Committee recommends that the Ministry of Petroleum and Mining and EPRA:

- (a) conduct the monthly tender process in accordance with provisions of regulating open tendering and the exceptions provided under Sections 91, 92, 93, 94, 95 and 96 under the Public Procurement and Asset Disposal Act of 2015 which requires openness, accessibility and transparency in the submission, receipt and opening of tenders.
- (b) submits Regulations providing for importation of petroleum through open tendering system and the manner in which such system shall operate envisioned under Section 101(d) of the Petroleum Act, no. 2 of 2019 to Parliament by 31<sup>st</sup> December 2022.
- (c) the Ministry of Petroleum and Mining and EPRA publishes details of bids including participating bidders, winners and their price quotations, in its website, commencing 90 days after tabling of this report in the National Assembly
- (d) that the Regulations should provide that the Ministry of Petroleum and Mining and EPRA shall maintain an online portal that is accessible to the public where they shall advertise and publish all information relating to bids and awards on the Open Tendering System including—
  - i. the date of the contracts, the bidders, when the tenders are floated, bids received, bids evaluation, cargo services, respective storage capacities and beneficial owners of winning bidders;


- ii. details of pricing and delivery schedules;
- iii. the cargo price per litre along with the prevailing prices of for gasoline, diesel, kerosene and jet fuel.

**On prayers (vi), (vii), (viii) and (ix),** the Committee does not find evidence/ basis to make any recommendations.

Further, the Ministry of Petroleum and Mining should through its facilitative role encourage smaller marketers to organize themselves into larger conglomerate of bidders to attract foreign bank funding of the supply process.

**MIN. NO. NA/ENERGY/2022/082:      ADJOURNMENT/ DATE OF NEXT MEETING**

There being no other business, the meeting was adjourned at eleven o'clock.

SIGNED.......... DATE 3/6/22.....  
(CHAIRPERSON)

→ Hon. Speaker,  
You may approve.  
andp Kisumu (D)  
3/2



Approved  
SNA  
3/2/2022

**REPUBLIC OF KENYA**  
**THE NATIONAL ASSEMBLY (SIXTH SESSION)**

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**CONVEYANCE OF PUBLIC PETITION**

*(No. 005 of 2022)*

**REGARDING OPERATIONS OF THE OPEN TENDER SYSTEM (OTS) FOR  
IMPORTATION OF FUEL PRODUCTS**

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**Honourable Members,** Standing Order 225(2) (b) requires the Speaker to report to the House any petition, other than those presented by a Member. Further, Article 119 of the Constitution provides for the right of any person to petition Parliament to consider any matter within its authority, including petitioning the House to enact, amend or repeal any legislation. In this regard, I wish to report to the House that my Office is in receipt of a Petition by Mr. Stephen Mutoro, Secretary General of the Consumer Federation of Kenya (COFEK) regarding the operations of Open Tender System for fuel supply.

**Honourable Members,** the Petitioner states that COFEK is an independent, non-political, self-funded and non-profit society registered under the Societies Act, Cap 108. It is the apex body that is committed to consumer protection, education, research, consultancy, litigation, anti-counterfeits campaign and other matters related to consumerism. The Petitioner claims that COFEK is concerned about the manner in which the Ministry of Petroleum and Mining has been operating the Open Tender System (OTS) that was deployed from 2005 as a system for regulating importation of refined petroleum products. The Petitioners lament that even though the system is dubbed "open", the manner in which it is run remains opaque, shrouded in secrecy and susceptible to abuse by cartels.

They are particularly concerned that the current pricing mechanism does not make necessary disclosures on the procurement of fuel products, which makes it almost impossible to determine the prices at which Kenya secures its refined petroleum products vis-à-vis the prevailing global oil prices.

**Honourable Members,** the Petitioners claim that whereas the intended purposes of the OTS was to ensure that petroleum products, whose prices are regulated on a monthly basis in Kenya, remain competitive as per market conditions, data from the Energy and Petroleum Regulatory Authority (EPRA) indicates that only 13 out of a possible 96 Oil Marketing Companies (OMCs) participate in the monthly OTS tenders. The Petitioners also allege that there are credible reports that the said Oil Companies unfairly dominate the OTS through anti-competitive cartel-like behavior, which denies consumers the benefits of competitive pricing. In addition, the Petitioners aver that neither the Ministry of Petroleum and Mining nor EPRA have made sufficient public disclosure of information relating to the tenders, including when the tenders were floated, when bids were received, the evaluation of the bids, the sizes of the cargo, past winners and beneficial owners of the winning bidders.

**Honourable Members,** the Petitioners are worried that the current situation contradicts the right to access to information enshrined in Article 35 of the Constitution of Kenya as well as the national values and principles of governance on public participation, transparency and accountability provided for in Article 10 of the Constitution as well as the President's Executive Order of 13<sup>th</sup> June 2018 on *'Procurement of Public Goods, Works and Services by Public Entities'* that require all public institutions to publish full details of tenders and awards, including the directors of the winning companies.

The Petitioners are therefore seeking the intervention of the National Assembly to inquire into the operations of the Open Tender System (OTP) for procurement of refined petroleum products and, among other reliefs –

- (1) Intervene through the Ministry of Energy and Petroleum to put in place measures for proper oversight of the operations of the OTS in order to ensure that the system promotes free and fair tendering processes that benefit consumers of fuel products through competitive pricing;
- (2) Develop necessary legislative framework to align the activities of monthly OTS with the national values and principles of governance on public participation, transparency and accountability and in order to secure consumer rights and guarantee the right to access to information;
- (3) Cause the Ministry of Energy, EPRA and other relevant Government agencies to make necessary disclosures on fuel imports made through the OTS, including ensuring public notification of all OTS awards and details of pricing for imported fuel products vis-à-vis the prevailing market prices; and,
- (4) Recommend to the Competition Authority of Kenya to inquire into alleged dominance of the OTS and price manipulation by certain Oil Marketing Companies in order to flush out firms involved in uncompetitive practices and to level the playing ground for all oil marketing firms.

**Honourable Members,** having determined that the matters raised by the Petitioner are well within the authority of this House, I order that, pursuant to the provisions of Standing Order 227(1), this petition be committed to the Departmental Committee on Energy. The Committee is required to consider the petition and report its findings to the House and to the Petitioner in accordance with Standing Order 227(2).

**I thank you!**

  
**THE HON. JUSTIN B.N. MUTURI, EGH, MP**  
**SPEAKER OF THE NATIONAL ASSEMBLY**

Date: ..... 3<sup>rd</sup> February, 2022. ....



**CONSUMERS FEDERATION OF KENYA (COFEK)**

P.O Box 28053-00200, NAIROBI: [admin@cofek.co.ke](mailto:admin@cofek.co.ke); [hotline@cofek.africa](mailto:hotline@cofek.africa)

October 12, 2021

**Mr Michael Sialai  
Clerk to the National Assembly  
Parliament Buildings  
NAIROBI**

Dear Sir,

**RE: COFEK PETITION ON MINISTRY OF MINING AND PETROLEUM 'OPEN TENDER SYSTEM' ON FUEL SUPPLY**

We, the Consumers Federation of Kenya (COFEK), a non-political and non-profit Society registered under the Societies Act, Cap 108 (Section 10) Laws of Kenya on March 26, 2010 and as informed by provisions of Article 37 and 119 of the Constitution of Kenya 2010 hereby draw the attention of the National Assembly to the following:

The humble petition of the Consumers Federation of Kenya (Cofek) to the National Assembly on the urgent clarity needed on Kenya's Open Tender System for petroleum products.

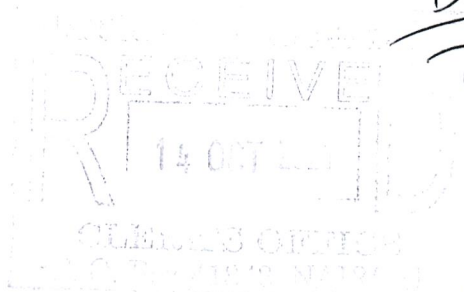
Cofek is Kenya's independent, self-funded, multi-sectorial, non-political and apex non-profit Federation committed to consumer protection, education, research, consultancy, litigation, anti-counterfeits campaign and business rating on consumerism and customer-care issues.

Kenya, since 2005, imports its' refined petroleum products through a system dubbed Open Tender System (OTS) hosted by the Ministry of Mining and Petroleum. The winning bidder(s) delivers the cargo via port of Mombasa and is then availed to other market players.

The purpose of the OTS was to ensure petroleum products, whose prices are regulated monthly in Kenya, remain competitive as per market conditions. However, the conduct of the activities of OTS, despite its name denoting "open," remains opaque, shrouded in secrecy, and exhibits cartel-like behaviour, denying Kenyan consumers the benefits on competitive pricing

The current fuel pricing mechanism does not make necessary disclosures on the procurement of fuel products, only making public a "landed cost" whose computation is not unambiguous as it includes demurrage and other charges such as shipping.

It is therefore almost impossible to tell at what price Kenya secured its oil cargo vis-à-vis prevailing global prices in the market. Data from the Energy and Petroleum Regulatory Authority (EPRA) indicates that only 13 out of a possible 96 Oil Marketing Companies (OMCs) participate in the monthly OTS tenders.



*DLS  
to advise  
ONA  
16/10/21*

*~~Mr. Denis Abwain - DLS~~  
Please note and assign  
supervisor 14/10/2021*

There are credible allegations of a clique of companies dominating oil imports via the OTS in what appears to be cartel-like behavior.

There is no disclosure by the Ministry of Mining and Petroleum, and the Energy and Petroleum Regulatory Authority (EPRA) – neither on their websites, via public notices in the media, nor on the Public Procurement Information Portal - and thus there is no information on when the tenders are floated, bids received, bids evaluation, cargo sizes, past winners, beneficial owners of the winning bidders.

This runs afoul of the Constitution of Kenya, 2010 which has clear provisions on the need for public participation and access to information held by Government, in the public interest.

Furthermore, Access to Information is the right of every citizen of Kenya under Article 35 of the Constitution. Kenya's National values and principles of governance include public participation, transparency and accountability as underscored in Article 10 of the Constitution.

Further, the June 13, 2018 Executive Order on '*Procurement of Public Goods, Works and Services by Public Entities*' by HE President Uhuru Kenyatta requires all government entities and publicly-owned institutions to publish full details of tenders and awards – including directors of companies winning the OTS.

**HEREFORE your humble petitioners Pray that The National Assembly - come to the aid of consumers as follows;**

- (a) That National Assembly puts in place measures to oversight the operations of OTS to promote a free, fair tender platform for the benefit of fuel consumers
- (b) Develop regulations, and/or any other necessary legislation to align the activities of the monthly OTS for fuel products with the Constitution of Kenya 2010
- (c) Provide a framework to publicly advertise and make public all OTS awards – historical and from now henceforth – showing date of contracts, the bidders, when the tenders are floated, bids received, bids evaluation, cargo sizes, past winners (since 2005), respective storage capacities, beneficial owners of the winning bidders, among other information
- (d) That winning bidders and details on the pricing and delivery schedules should be updated on an online portal immediately the award has been made
- (e) That the disclosures shall include showing the cargo price per liter and a ✓ companion of the prevailing fuel prices for gasoline, diesel, kerosene and jet fuel.
- (f) Order the Ministry of Mining and Petroleum to open up the OTS system to all oil marketing firms in Kenya as well as global oil traders who wish to participate. The increased competition will be beneficial to consumers as the lowest bid will be awarded.
- (g) Order the Competition Authority of Kenya to analyze the dominance in the OTS by analyzing historical data to establish how many times each oil marketing company has won, the prices quoted vs the prevailing global market prices, and the ✓ cumulative value of tenders won and the margins accrued therein
- (h) Further orders that the Competition Authority of Kenya institutes a study into the OTS to flush out any aspects of uncompetitive misconduct such as cartel-like behavior, price fixing and market allocation.
- (i) Offer any other pro-public remedy on fuel pricing in Kenya

Consumer Protection is part of the Bill of Rights. Parliament has a duty to oversight the Executive on ensuring that various structures, systems and other attendant measures are in place to protect consumers.

COFEK has severally raised this matter with relevant Ministry and the sector regulator in Government, in vain. It is for this reason the Petitioner prays that the matter is placed before joint Committees of Education and Agriculture and as or you may deem fit.

COFEK hereby confirms that the issues in respect of which this public-interest petition is made are not pending before any court of law, or constitutional or legal body.

YOUR PETITIONERS confirm that this petition is competently made and signed for and on behalf of the Consumers Federation of Kenya (Cofek) by its Secretary General, Mr Stephen Mutoro of ID No. 1371511 and of P.O Box 28053-00200, Nairobi.

I look forward to your early and favourable response.

Yours Sincerely,



Stephen Mutoro  
**SECRETARY GENERAL**