

② Mr. Mogere Coo LPS)

PS process

01/12/21

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CONSUMERS FEDERATION OF KENYA (COFEK)

P.O Box 28053-00200, NAIROBI: admin@cofek.co.ke; hotline@cofek.africa

November 30, 2021

Mr Jeremiah M. Nyegenye
Clerk to the Senate
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 Senate to the following:

The humble petition of the Consumers Federation of Kenya (Cofek) to the Senate 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.

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① DLPS

Please deal with
4/12/21

③ Mr. Chaniq
Please process
2/12/21
01/12/21

Ms. Kavete
Please review
the petition
and facilitate
appropriately
D. Chama
01/12/2021

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 Senate - comes to the aid of consumers as follows;

- (a) That the Senate 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) Orderw 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 of the Constitution. Parliament has a duty to oversight the Executive on ensuring that various structures, systems and other

attendant measures are in place to protect consumers in line with Article 46. It has not. The current Consumer Protection Act, 2012 does not in any reflect the letter and spirit of Article 46 of the Constitution.

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 the joint Committees of Energy and Finance and or as or you may deem it 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

