



A guide to developing consumer protection law



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A guide to developing consumer protection law

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A guide to developing
consumer protection law



Credits

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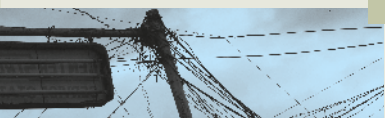
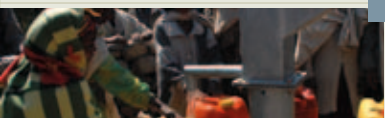
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Introduction

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These guidelines are intended to assist national consumer protection associations and advocates for consumer rights in the Southern African Development Community (SADC). They contain practical instruments designed to:

- Identify, as well as deconstruct the national laws which impact consumers and assist in the comparison of a national framework with other jurisdictions
- Develop an agenda for regulatory reform
- Develop an approach to continuously and successfully advocate for a consumer protection legal reform agenda.

The temptation is strong to develop a ‘best practice’ model law approach, or to simply copy-paste another state’s legislation, particularly when dealing with a new subject matter about which there is no national legislative precedent (such as access to information laws or microfinance legislation).

But new regulations should be considered in relation to the existing legal frameworks, as well as the economic, social and political context in which they will be implemented. In no area of the law is this more evident than with consumer protection issues, because Consumer Protection (CP) principles tend to be dispersed throughout a nation’s commercial code.

The guidelines offer methods and instruments to guide an advocacy group from the initial analysis of their existing legal and regulatory framework, through to the design of a coherent, feasible reform agenda, and towards ultimately obtaining successful reforms.



CC Standard Bank, Johannesburg, by Keso

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Consumer protection regulation

How does one classify categories of laws which protect the consumer? How do common law jurisdictions, with legal traditions that evolved from English law, treat the issue of consumer rights, as compared to civil law states which have a Roman, French or Dutch legal tradition? And what about those countries which have a hybrid legal system, as do several of the SADC states?

There is no simple answer to this question, thus the best analysis is a thorough analysis of the legal framework section by section.

In some cases, consumer protection principles are included in uniform commercial codes, where all goods and services sold have an implied guarantee of 'merchantability', which means that the goods or services are fit for the purpose intended. For example, a washing machine should function for cleaning clothing. It should not be used for other purposes, like making yoghurt, because the merchant is not marketing and selling the washing machine for that purpose (this is a real example seen in India). Commercial codes may also establish required procedures for curing defects in products or services. Because common law countries derived their legal systems from English law, and rely on judicial application of the law to each new fact pattern or case, one must also analyse case law on consumer protection to determine what legal precedence exists.

Consumer protection can also be treated as an extension of **criminal law**, considering commercial **torts** such as the manufacture and marketing of inherently dangerous products (eg exploding ovens, defective automobiles, or harmful pharmaceuticals), which can inherently damage the social order.

Consumer protection is also implied in the **contract** process, and in how the parties to a contract frame their agreements. In common law countries, for example, there is an implied obligation of 'good faith and fair dealing'

in every contract. This means that it is assumed that each party to the contract will do everything in its power to honour the terms of the agreement and respect the other party's rights.

CP can also be thought of as a **civil or human rights** issue: the right for consumers to organise themselves, to have access to information and public services, such as water, sanitation and electricity, and to defend their interests.

Consumer protection, finally, might also be a political objective, a framework for public policies in favour of the consumer. This section briefly discusses the social objective of a strong consumer protection regulatory framework.

Is consumer protection a right or a policy?

The United Nations Guidelines for Consumer Protection, adopted in 1985 and revised in 1999, propose a list of objectives described as 'legitimate needs': right to be heard; right to information; right to safety; right to choose; right to consumer education; right to consumer redress; freedom to form consumer groups; promotion of sustainable consumption patterns; and promotion of economic interests of consumers. Several of these objectives appear to have their origins in **human rights**, such as the right to safety for instance, which echoes the Universal Declaration of Human Rights' Security of Person. The freedom to form consumer groups and availability of redress can be traced both to political freedom, as well as to the right to access to justice.

The consumer advocate should therefore consider and evaluate the relative importance of these multiple objectives for the consumer in their own country.

Key references

- UNCTAD, Manual on consumer protection, New York and Geneva, 2004
- UNCTAD, United Nations Guidelines for Consumer Protection (1999) <http://www.unctad.org/en/docs/poditclpm21.en.pdf>
- OECD Toolkit for Policy Makers on Consumer Protection
- OECD Guidelines for Consumer Protection in the Context of Electronic Commerce (1999) http://www.oecd.org/document/51/0,2340,en_2649_34267_1824435_1_1_1_1,00.html

Voices of advocacy

Mohammed Abdou Ammor, Vice-president of the Moroccan Confederation of Consumers' Associations (CAC Maroc):

“The drafting of a consumer protection bill was obviously the one achievement that gave our association its singular status, since it led the government to draft a proper legislation. It was obliged to include universally recognised principles after the representatives' awareness was raised on the shortcomings of the initial governmental bill. All stakeholders now recognise our association as a credible actor and proactive instigator of change.

We believe that the drafting of a complete legal framework fully complying with international standards can boost the consumer protection sector and even bring new actors to join the movement.

Our objective is therefore to amend the current text to include the right for associations to act on behalf of consumers, and in particular the right to go to court as a civil party. We will continue to lobby directly through our contacts with representatives' groups and other stakeholders to achieve those rights.”

The consumer in the SADC region

All the needs set out by the UN guidelines stem from the empirical observation that there is an asymmetrical relationship between the supplier and the consumer: ie the respective bargaining powers and the knowledge base of consumers and suppliers are unequal.

Further, unmitigated free markets and freedom of contract are insufficient to guarantee the protection of the consumer.

There are often multiple reasons why the consumer and the supplier are not in an equal bargaining position. The very structure of the market may be a cause. For example, when there are monopolies such as parastatals, or few suppliers in the marketplace due to excessive dominance by a private supplier or by a cartel, the consumer is often disadvantaged by lack of choice (the 'take it or leave it' syndrome). There may also be disparate levels of consumer literacy and/or knowledge specific to certain sectors. This is particularly true in the financial services sector and pharmaceuticals. Clearly, the seller has an inherent knowledge of and thus significant advantage over the consumer regarding his/her own product/service.

Illiteracy rates among 15-24 year olds in the SADC region (UNESCO, 2006)

| | |
|------------------------------|-------|
| Botswana | 6.2% |
| Democratic Republic of Congo | 7.2% |
| Lesotho | 5.8% |
| Madagascar | 11.4% |
| Malawi | 19.4% |
| Mauritius | 3.2% |
| Mozambique | 23.6% |
| Namibia | 4.4% |
| South Africa | 5.6% |
| Swaziland | 4.7% |

The SADC region presents a particular challenge for the consumer advocate interested in balancing these asymmetries. The illiteracy rates as estimated by UNESCO reveal a particular vulnerability of a significant share of the population (UNESCO 2006).

Also, and similar to other regions in Africa, there has been increased liberalisation of exchanges, and the opening of trade borders, which put the SADC markets under particular stress. New and immature markets are particularly susceptible to asymmetries of information and poor consumer awareness. Consumers, who are constantly exposed to new products and services, such as in the financial services sector, can easily become overwhelmed. The pace of innovation also means that regulators are challenged to keep pace with market monitoring and controls. This is most evident in the 'telecom meets financial services sector': it is even challenging to determine which regulator has the authority to regulate this sector.

The demographic density in the region is estimated at only around 23.5 people per km² (FAO, 2001). This results in particularly scattered and underserved markets and an increased difficulty in accessing the existing consumer abuses.

Approximately 45% of the SADC population lives on USD1 per day (SADC, 2008). To say that poverty is an aggravating factor in the CP challenge in the region is an understatement. Poor populations are particularly vulnerable when faced with monopolies and lack of access to essential utilities. The poor are paradoxically often forced to purchase goods and services at a 'poverty premium', paying more than the non-poor simply because they lack options. This is typically the case for credit agreements as provided by

money lenders and unscrupulous financial institutions. The poor living in rural and financially underserved areas lack other options, and thus pay much higher interest rates and fees to financial services. It is well documented that drinking water sold by water vendors in unserved areas is far more expensive per litre than that distributed by piped systems. These are both just two of many examples of the 'poor pay more' syndrome.

Finally, the SADC region has another challenge; that of limited access to justice, which makes it long, difficult, costly and sometimes just plain impossible for consumers to exercise their rights in case of abuse.

The regulator and the market

One way to analyse consumer protection objectives is to examine the various stages of the contractual relationship between the consumer and the supplier, and to identify possible 'pressure points' where the regulator can and should be intervening to protect the consumer.

In the **pre-contractual phase**, the lawmaker can impose regulations to ensure that the consumer has access to all the information necessary to make a choice. Those regulations would include bans on misleading or false advertisement, content and warning labelling, as well as pre-existing conditions evidencing the consumer's 'consent to contract' (capacity to contract, free will, fair commercial practices etc). In the US, for example, tobacco companies are banned from advertising to children (though they get around this by event sponsorship of sports events and concerts in many African countries). The EU goes still further by banning tobacco advertising outright.

Then, the regulator can limit freedom of contract by forbidding or obligating sellers to utilise specific conditions in their contracts. This is the case when the regulator imposes standards with regard to product quality, price controls and/or establishes interest rate caps, or bans unfair contractual terms or practices.

In the **post-contractual phase**, the regulator can determine the conditions of access to redress mechanisms, which should be affordable, efficient and fair. It can also establish rules that shift the burden of proof (in favour of the consumer); such that liability falls upon the shoulders of the stronger party (generally the seller) to prove that it did not act inappropriately. An example would be the National Credit Act in South Africa, which places a burden on the financial institution to demonstrate that it did not engage in "reckless lending".

In addition to the attention allocated to corrective measures for a damaged contractual relationship, consumer protection seems to have evolved from 1962

to 1999 into an enlarged policy agenda to promote sustainable consumption and the economic interests of consumers (including corporate social responsibility and the emergence of cooperatives, and even more recently social businesses as defined by Grameen Bank founder and Nobel Prize winner Dr Muhammad Yunus to be non-loss making; non-dividend distributing entities dedicated to a solely development purpose).

Private law or public law?

A second issue that arises in our analysis of CPL is whether CP policies belong to the domain of the law; and if so, whether they belong to private or public law.

The following table is a simple summary of the nature of private and public law:

| | Domain | Examples | Redress mechanisms |
|--------------------|--|---|--|
| Private law | Relationship between economic agents | Sales practices Product liability and torts Etc | Recourse of the injured party against the responsible party in front of a tribunal |
| Public law | Relationship between economic agents and the state | Licensing of companies Quality standards Etc | Licensing process Controls Administrative sanctions Etc |



Clearly, consumer protection objectives are diverse in nature and can thus be subject to both private and public regulation. They can also implicate other forms of public intervention, which do not necessarily require any applicable regulation, such as the state promotion of and/or investment in consumer education.

Through its administration, the state authority can exercise control over the suppliers and their products, including those services provided by the state itself, which should be regulated as rigorously as any other service to consumers. The state can be assisted in this task by the vigilance of consumers themselves, as well as consumer advocates who establish methods of aggregating information on complaints and infractions (and share it with the state).

The private settlement of disputes is resolved by the judiciary or any alternative dispute resolution mechanisms, including ombudsmen, which deal with state-provided services in many countries. It allows direct interaction between the parties, and hopefully the eventual resolution of the consumer/supplier problem.



Benchmarking international regulations

Comparative legal analysis is a good way to begin thinking about one's own national agenda for consumer protection regulation. The analysis of foreign regulation is intended to stimulate ideas and inspiration for one's own jurisdiction; it is not intended to lead to the easy, but ineffective, way out: the mere copy-paste of another country's laws, policies or methods.

- **Don't make a leap of faith.** Consider that very few countries attempt to measure the level of implementation. Thus, the resultant impact of their consumer protection legislation reform remains unknown. It is very likely that such an analysis would reveal that some very complex laws have led to poor CP results, unintended consequences, or that the laws simply are not implemented at all (due to lack of budget or human resources for example).
- **Do your own due diligence on others' 'best practices'.** The concept of best practices in policy-making can be misleading. A best practice should be considered with respect to its specific context (is it applicable to your nation's legal framework, politics, culture, geography even weather patterns in place?) and the results. For example, in 2010 Kenya enacted a new Constitution, which is viewed by the international community as quite innovative and forward-thinking in its strong support for fundamental rights. The Kenyan Constitution references consumer protection as a fundamental right. Tunisia is now drafting a new Constitution. It could certainly be interesting for Tunisian jurists to analyse how the Kenyans drafted their Constitution, and what priorities they attached to various fundamental rights. It would not be a good idea, however, to blindly copy and paste from another country's law of the land.

A best practice is most useful when it is accompanied by an analysis of the context, including information on the implementation and the measurement of impact in that particular context.

- **The need to harmonise or to coordinate with other states?**

Harmonisation of regulation between countries is not an end in itself. It can have two purposes: the regulation encompasses universally relevant commitments including human rights, or the regulation administers the circulation of goods and services (such as financial services) across borders.

- **Getting started with comparative law research: legal resources**

The following is a non-exhaustive checklist of possible sources for consumer protection principles in law:

International law

- **International or regional treaties impacting consumer treatment:**

- Economic partnership agreements
- COMESA treaty
- SADC and East African Community Treaty
- WTO treaties, eg agreements on agriculture, services, intellectual property.

Other nations' laws which have an extraterritorial effect, primarily US and EU legislation, for example relating to food safety, which has proved to be contentious. US legislation on such malpractices as false claims and corruption and antitrust/competition can provide protection outside of the US when companies are traded on the US stock exchanges and have financial assets located in the US.

- **Multinational signatory documents indicating intention to pursue a particular policy:**

- Millennium Development Goals (MDGs)
- UN resolution on consumer protection guidelines (1985).

One should also bear in mind that some commercial practices are extremely harmful to developing countries and their consumers but are explicitly allowed under national law in other countries and under international law such as WTO agreements. Some such practices (eg agricultural export subsidy from EU and US) are sometimes presented as favouring consumers in Africa, but consumer organisations have illustrated that consumers can be harmed by such policies which are quite legal.

National law

- **Constitution**

- **Contract Law:**

- Unfair contract terms
- Form of contracts.

- **Consumer protection laws:**

- Consumer protection act
- Fair trading
- Advertisement
- Control of supplies
- Product safety
- Weights and measures
- Freedom of information acts.

- **Sectoral laws:**

- Telecom
- Financial services (banking act, insurance, credit and consumer credit)
- Food industry
- Access to public services and utilities (water, energy)
- Health/pharmaceutical issues.

- **Redress:**

- Civil procedure
- Legal aid
- Class action legislation
- Alternative Dispute Resolution (ADR)
- Ombudsman
- Regulatory bodies with complaints function
- Parliamentarians with complaint windows for constituents.

Case law

Case law reflects the progress, successes and shortcomings of consumer protection regulation. Most countries only publish cases from the higher level courts, such as the Supreme Court or its equivalent - the ultimate level in the hierarchy of appeals. Monitoring, collecting, publishing and commenting judicial decisions are cumbersome tasks, but will provide a crucial compass for an advocacy group working on consumer protection regulation. You can also find articles about relevant laws in law journals and reviews published by law schools and international scholars.

Databases for foreign regulation

The following is a non-exhaustive collection of databases online where you may find applicable regulation on consumer protection, product liability, torts, competition or other related texts.

African databases

Namibia

<http://www.namlii.org>

Jurdi Burkina (West Africa)

<http://www.juriburkina.org/juriburkina>

South Africa

<http://www.jutalaw.co.za>

Southern Africa

<http://www.saflii.org>

East Africa

<http://www.lawafrica.com>

Ghana

<http://www.datacenta.com>

OHADA

<http://www.ohada.com>

Global databases

US Law Library of Congress

<http://www.loc.gov/law/help/guide.php>

Legal office FAO lex

<http://faolex.fao.org>

Inter-Parliamentary Union

<http://www.ipu.org/english/home.htm>

Ecolex

<http://www.ecolex.org/start.php>

Lexis Nexis

<http://www.lexisnexis.ca/en>

Tralac

http://www.tralac.org/cgi-bin/giga.cgi?cat=1036&limit=10&page=0&sort=D&cause_id=1694&cmd=cause_dir_news

Lexadin

<http://www.lexadin.nl/wlg>

World Legal Information Institute

<http://www.worldlii.org>

Office of the High Commissioner for Human Rights

<http://www.ohchr.org/EN/Pages/WelcomePage.aspx>

International Consumer Protection and Enforcement Network

[http://icpen.org/for-consumer-experts/library?downloads=1&keywords=act&cat\[2\]=0&cat\[1\]=0&cat\[210\]=0&cat\[3\]=0&cat\[4\]=0&cat\[32\]=0](http://icpen.org/for-consumer-experts/library?downloads=1&keywords=act&cat[2]=0&cat[1]=0&cat[210]=0&cat[3]=0&cat[4]=0&cat[32]=0)

ILO Natlex

http://www.ilo.org/dyn/natlex/natlex_browse.home

EUR-Lex

<http://eur-lex.europa.eu/en/index.htm>

Common law countries

<http://www.commonlii.org>

Global competition forum

<http://www.globalcompetitionforum.org>

MLibrary - University of Michigan

<http://www.lib.umich.edu/searchmethods>

GlobaLex

<http://www.nyulawglobal.org/Globalex/index.html>

Checklist: a tool for comparative analyses

The following is intended as a tool to aid in researching the legal framework for consumer protection. Here, CP issues are referred to by the substantive legal issue, as opposed to source of law.

This grid can be used to benchmark the regulation in your own as well as neighbouring countries, and will allow for a systematic comparison of the areas covered, as well as the different regulatory options chosen by the regulator.

Lawmakers and regulation under current drafting

Is the legal system common-law based, civil law or a mixed legal system?

Is there a strong influence of traditional or customary law?

Legal sources for consumer protection

- Is there a legal definition for 'consumer'? (This is not necessarily a prerequisite to establishing legal rights or 'the law', but can be indicative).
- Is the country a signatory to any international agreement that protects the rights of consumers? UN treaty on political, social and economic rights? UN guidelines for consumer protection of 1985?
- Is the country party to any regional agreements which impact consumer rights?
- Does the country's constitution reference any rights that could be construed as affording protection to the consumer?
- Is there a generally applicable consumer protection law? Do sectoral laws define the rights of consumers in those sectors?
- Are state-provided services covered by CP law?

Commercial practices and advertisement regulation

- Obligation to inform (publicity on prices; hazards of use, etc)
- False advertisement regulation
- Does existing legislation govern information provided to and data requested from the consumer? (Including advertising; product labelling; data privacy)

Form of contracts (written form, mandatory clauses etc)

- Written form mandatory? For what kind of products/services? Are consumer rights contained in the statute for general services, such as health services and utilities?
- Are there restrictions on contracts of adhesion (requiring publication of contracts online, guarantee of a 'cooling off' period for the consumer)?

Regulation of contract content and legislation on liability and guarantees

- Is there legislation regarding standards and quality of goods sold?
- Are there laws pertaining to torts, negligence, misrepresentation and/or defects?
- Are there laws pertaining to formation and substance of contract (including implied obligations, such as duty of 'good faith & fair dealing', warranties or standards of care)?

Competition law

- Is there a competition law?
- Does antitrust legislation exist? Are there laws on predatory pricing? Anti-competitive practices? Are there anti-usury laws? Price controls?

Specific industry regulations

- Are there laws/regulations for standards regarding specific industries?
- Food and beverages?
- Pharmaceuticals? With regard to HIV/AIDS, are there related laws that impact consumers such as a right to retroviral medications?
- Professional service providers (doctors, dentists, midwives, lawyers, financial brokers, real estate agents etc)?
- Financial service institutions? If yes, is there a limit on the amount of interest that can be charged on loans? Are savings deposits protected by law?
- Are financial services promoters (brokers/agents) licensed and regulated?
- Are financial services that target the poor regulated (microfinance; burial societies; rotating savings clubs)?
- Is there a right to debt reorganisation, insolvency or bankruptcy or other protections against indebtedness or debt relief available? Is there an existing credit bureau?
- Does legislation exist regarding the consumers' right to access to public services (water, electricity/gas, sanitation, fire/police protection, telecommunications)?

Dispute resolution mechanisms and recourses

- Are there magistrates, economic courts or small claims courts specialising in disputes of low value?
- Are there any specialised complaint procedures within government regulators, or ombudsmen? Are consumer ombudsmen generic or sector specific?
- Is legal aid a right? If so, how accessible is it to consumers?
- Has a legal action ever been brought on behalf of consumers collectively or individually?
- Is there a public interest advocacy litigation tool like the class action, or are consumer advocacy groups allowed to initiate litigation on behalf of consumers?
- Are financial services promoters (brokers/agents) licensed and regulated?
- Are financial services that target the poor regulated (microfinance; burial societies; rotating savings clubs)?
- Is there a right to debt reorganisation, insolvency or bankruptcy or other protections against indebtedness or debt relief available? Is there an existing credit bureau?

Other generic consumer issues

- Are there laws that protect the community's rights (ie community land titling, which protects against environmental degradation, or regarding conservation of biodiversity and traditional knowledge?)
- Is there a freedom of information act allowing consumers access to government data?

Other related rights

- Is there legislation regarding the freedom of association? Other legislation allowing formation of NGOs and civil society entities?



CC African Colours, by Kiyosho-be

Regulatory assessment

4

A notable shortcoming of the best practices approach to regulation is that it creates regulatory solutions without first conducting the fundamental analysis of the existing legal frameworks, or indeed relating to the needs of consumers in a given context.

Often, legislative tools are already in place on paper, but are not enforced for lack of political will, for lack of funds or even for lack of legislative clarity. Conversely, some local customs and practices may exist without any recognition in law.

Legislative safeguards may be scattered across different items of legislation. In other instances, reforms are undertaken with no considerations to pre-existing related norms, and their potential interaction with the new regulation.

Another aspect to consider is the 'legal security' for all economic actors.

Legal security refers to the stability and predictability of a given legal framework related to an industry, or an economic activity. Unclear or changing legal environments dissuade investments and innovation, sometimes causing market paralysis. For example, a proposed change in the financial laws, such as the enactment of a microfinance bill, would immediately cause foreign investors to postpone making an investment until the legislation was passed, and they could be assured that their investment decision would be a wise one.

Regulatory impact assessment (RIA), therefore, is a set of tools to dissect and understand the legislative process and its efficacy. It is a complex but necessary issue to consider.

Too often however, governments do not apply RIA, or use it at a very late stage of the regulatory process, to justify

a decision already taken. That is not necessarily the most efficient use of public resources. A regulatory impact assessment, which is genuine and performed at the early stages of the legislative process, can be a powerful tool for reformers and consumer advocates to support their case for CPL reform.

Needs analysis and indicators for success

Monitoring the de facto reality of the consumer in your country should build a case for reform AND attract media attention. Examples of fields to research are:

- Major indicators of consumer welfare including measure of access to utilities and public services, income, food, education and housing
- Price benchmarking exercises
- Competition measurements
- Monitoring of advertisements and offers
- Measure of access to justice indicators (cost of justice, procedural delays etc).

as they develop more efficient ways to share information on prices and abuses, and can organise themselves to reverse the power relationship with the provider.

SADC countries face a particular challenge to that extent as the population density is low, and there is an unequal access to communication means, the internet in particular, and very poor awareness by consumers (especially consumers in rural areas) of their rights and access to justice. There is also often a disparity in income class between consumer advocates and the very consumers they represent.

The success of an advocacy proposition will therefore depend very much on the capacity of advocacy groups to cooperate to share and analyse information, and to aggregate information which is representative of the entire territory. An advocacy group may also need to bear the burden of leading the consumers to justice: either by acting on their behalf (for example, through linkages with legal aid groups, university law clinics and public interest advocacy litigation) or through class actions.

Voices of advocacy

Flavian Zeija, advocate and co-founder of Justice for Microfinance Consumers of Uganda:

“ I did research on the mistreatment of consumers in courts of law at the hands of microfinance institutions in Uganda. I now intend to conduct research on microfinance consumers who are unable to obtain money due to them from microfinance institutions which was saved in accounts held by their deceased spouses (due to a lack of Letter of Administration). When a person dies in Uganda intestate or without a will, the beneficiaries must obtain letters of administration.

The cost of obtaining these letters is quite high, yet very few Ugandans make wills (due to a superstition that it brings on death). As a result, I have observed over time that when clients die with savings, their spouses cannot obtain them. The money remains on the account forever, however small. ”

One challenge that is at the core of consumer protection advocacy is that of gathering data from widely dispersed and different consumer perspectives (extreme poor, rural dwellers vs the urban dwelling middle class for example). The bargaining power of the consumers grows



CC Ethiopian girls carrying water, by Waterdotorg

Voices of advocacy

Mohammed Abdou Ammor, Vice-president of the Moroccan Confederation of Consumers' Associations (CAC Maroc):

“

We coordinate communication within the CAC. Some associations favour work on the ground. Our association prefers working on the establishment of a legal and institutional framework favourable to the consumer protection movement.

CAC Maroc allows for the centralisation of information from every region and member associations. Complaints are handled with the support of experts, in order to identify liabilities. Assistance and support for the victims is provided to obtain damages via mediation or to bring their complaints to the judiciary”



Example: a study on access to justice in Namibia

- Promoting access to justice in the High Court of Namibia, 2010

<http://www.scribd.com/doc/37726415/Promoting-Access-to-Justice-in-the-High-Court-of-Namibia-First-Report-The-Case-for-Judicial-Case-Management>





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5 Key issues

Institutional framework for consumer protection

The primary purpose of consumer protection regulation is to protect consumers, thus ultimately a sound institutional framework for consumer protection must be developed simultaneously. Public agencies can and should be established for the control and enforcement of effective regulation, as well as to enable and document the public discourse, and raise public awareness of their rights.

Key points to consider:

- **Distinct roles:** The institutional framework for the defence of the consumer can serve two distinct purposes: the enforcement of existing regulation(s) on the one hand, and consultative activities for future regulatory on the other. Different countries have adopted different approaches to the division of these roles, but it should be carefully considered that entrusting one entity with a dual mandate could cause complications and generate confusion and possible conflicts of interest. For example, entrusting a financial services regulator with prudential as well as consumer protection mandates could cause the latter issue to be treated as the less important of the two duties. Such potential conflict may be still more acute were a financial services regulator to be entrusted with industry promotion (such as financial inclusion initiatives) as well as consumer protection.
- **Independence:** A consumer protection regulator should consider all the necessary means to guarantee the independence and integrity of consumer protection institutions. Independence should also be assured with regard to suppliers (through publishing and applying transparent procurement protocols), and also from the government itself and other public institutions. Indeed,

it is likely that the mandate of other state bodies will enter into conflict with the interest of the consumer, such as the promotion of trade or the promotion of foreign investment for instance. Consideration of these issues should include reflections on:

- Appropriate standards on conflicts of interest for board members
- Budget autonomy.
- **Enforcement institutions**
(Consumer protection agency)
 - Coordination between other public administrations on consumer rights enforcement
 - Market surveillance and control and product testing
 - Registration and issuance of licences for certain type of activities.
- **Consumer advisory councils or committees**
Their function is to set up consultative mechanisms to be an instrument for proposing reform for government policies on consumer protection. They could be composed of either industry stakeholder representatives and consumer representatives sitting together or consumer representatives sitting as a separate body with technical advisers. Their function would be to:
 - Consider data on consumer abuses and consumer protection enforcement, and make proposals for improvement through regulation, legislation and good practice
 - Organise awareness raising activities for the consumers.

Benchmarking consumer agencies

- The website of all consumer agencies member of the International Consumer Protection and Enforcement Network (ICPEN):

<http://icpen.org/for-consumer-experts/who-we-are/participants>

The challenge of utilities regulation

Principal utilities include water, energy, public transport, telecommunications & post and sanitation. These services present certain common characteristics which allow for a common analysis regarding consumer protection strategies.

They are structured as 'natural monopolies', that is businesses structured as a network whereby:

- Due to economies of scale, it will 'naturally' be more efficient if handled only by one or very few actors

- The 'barrier to entry' – and the high initial investment – are such that it is virtually impossible for small actors to compete with the monopoly or quasi-monopoly industry leader.

SADC countries face particular challenges with regard to utilities. Challenges include access, quality and price. It is estimated that only 60% of Africa has access to potable water supplies and only 60% to adequate sanitation. What those figures do not convey is the disparities in service that plague the distribution of utilities in the SADC region. The CI-RAF 2004 review for consumer protection and quality of life in Africa revealed that "consumers in the informal and peri-urban were paying as much as three to 10 times more for water" (CI-WSP, 2004).

As a result, the World Health Organization suggests for instance that marginal investment in water supply in Sub-Saharan Africa could lead to more than 10 times return in terms of savings on health and convenience (WHO, 2004). This illustrates perfectly the intricacy and importance of utilities issues with a democratic governance.

Yet, official water providers in SADC are notably unsustainable institutions, relying heavily on donor funds and development finance. The low density of population and the erratic urban extension in the region accounts for part of the difficulty to develop efficient networks. Poor infrastructure and administrative inefficiencies in the management of utilities led some African countries to private providers. However, there are actually very few examples of outright privatisations. There is a degree of private sector involvement under short-term contracts like 'Johannesburg Water', which terminated as planned, and the Dar-es-Salaam contract which was discontinued before its full term. Today, Water Services Providers (WSPs) in the region include either public and private institutions, or the results of public private partnerships. They can operate at the national or local level.

Considering those dynamics, utilities will have to be dealt separately in a consumer protection regulation. The following is a list of concerns to address:

Institutional issues:

The lawmaker should regulate the structure of utilities markets; the law-making process should imply a public debate (whether direct or indirect, via representatives).

Key decision points include:

- Licensing of the actors (public, private, ownership structure, technical capacity etc).
- The representation of consumers vis-a-vis the management of utilities and regulatory authorities

(ie regular consultation with consumer associations or community representation in the monitoring of service providers).

- How to protect the interests of those consumers unserved by fixed networks; government has (or should have) responsibility for all, not just those served by a network of pipes or wires.

Access and price

The issue of access to utilities is perhaps the most difficult to articulate in the form of a regulation.

- Contrary to most consumer protection issues, access concerns those contracts that are not enacted, or the 'non-consumer'. The lawmaker therefore can opt to consider the issues as a policy and set up incentives to serve the underserved; or the lawmaker can take the position that water is a right, and penalise the non-delivery of services. Or a combination of both approaches can be adopted. Some consumer advocates, such as Namibia Legal Aid, have taken the position that failure to provide water and sanitation services by Namibia Water Company is a violation of the country's Constitution. The South African constitution has similar provisions for a range of vital services, and yet many municipalities fail to deliver these services comprehensively. However, a system based on judicial challenge comes up against the reality that development of infrastructure can take a very long time as physical systems have to be constructed.
- The lawmaker can decide whether to regulate the tariffs of utilities, connection charges and procedures and the relevant taxation regime – VAT in particular – taking in consideration the issues of sustainability on the one hand, and access on the other hand. Considering the monopolies and parastatals of utilities markets, and therefore the absence of bargaining power on the consumer side, the lawmaker might consider unfair contract terms to be even more egregious than in the general contract law regulation.
- The main challenge for the lawmaker will be creativity in establishing regulatory and redress mechanisms which:
 - Are a strong incentive for extension and improvement of services
 - Allow for the regrouping and representation of consumers
 - Are manageable in terms of administration of justice.

Quality

Finally, perhaps the most obvious regulation item is the definition of quality. Critical issues will be:

- Whether to regulate directly the quality of service, (including extent and reliability) or to rely on licensing mechanisms for the providers.

- Quality of product, eg the establishment of norms and standards for drinking water quality.
- The establishment of independent bodies to monitor and control quality.

More resources on utilities regulation:

- Southern Africa Development Community Telecommunications Regulatory Association of Southern Africa - Consumer Protection Guidelines http://www.itu.int/ITU-D/projects/ITU_EC_ACP/hipssa/docs/SADC_Consumer_Protection_Guidelines.pdf

Water and Sanitation Program
<http://www.wsp.org/wsp/>

SADC Water Sector ICP Collaboration Portal
<http://www.icp-confluence-sadc.org/>

ISO standard 24510: Activities relating to drinking water and waste-water services – guidelines for the assessment and improvement of the service to users.

Articles

- Down and dirty: providing water for the world, Robin Simpson
<http://www.consumersinternational.org/media/692834/cpr%20final%20water.pdf>
- Moving from protest to proposal: Building the capacity of Consumer Organisations to engage in Urban Water Supply and Sanitation Sector Reform, Consumers International, 2004
<http://www.consumersinternational.org/protestproposal>

Financial services

Financial services provide a particularly challenging area for consumer rights advocates due to the diversity of institutions which offer financial services, varying capacities and jurisdictions of regulators and the complexity of the services themselves.

Generally speaking, consumer advocates should strive to establish consistent and frequent dialogues with the Central Bank or other applicable financial services regulator. A complication arises when dealing with non-regulated financial service providers, such as non-government organisations which are delivering microfinance services to the poor, or revolving savings and loan associations such as SACCOs (which may or may not be regulated).

In those instances, consumer advocates should also look for allies within the financial services, like

trade associations and networks of microfinance associations. For example, ACCION International has a global network and related campaign (with 1,600 members), which profess to adhere to six principles of client protection. Further, the international donors and investors who are signatories of the Responsible Investing Campaign can also be called upon for assistance and collaborative efforts to protect the consumer. The German Development Cooperation and the Bill and Melinda Gates Foundation have formed the Alliance for Financial Inclusion or AFI, which is essentially a club of microfinance regulators focused on consumer protection as well as financial inclusion globally.

Voices of advocacy

Michael Gaweseb, Executive Director of Namibia Consumer Trust (NCT):

“The NCT has had a fair amount of success in drawing government’s attention to the financial services sector abuses and recently to the excessive banking fees that were being charged by the industry leaders. We conducted detailed research on fees charged as compared to profit margins by big banks in Namibia, as compared to other markets like South Africa and determined that the consumer was paying unjustifiably high prices.

Thus, armed with these facts from our research, NCT conducted an advocacy campaign throughout 2006 and addressed Parliament, went on TV and wrote a lot of letters to the media. We are happy to report that last year two acts were passed by the Bank of Namibia to protect financial consumers.”



Access to redress

Redress mechanisms are at the core of the consumer protection regulation. Not all redress issues however are contained in consumer protection law. Civil procedure and other sectorial legislative codes must be utilised in many cases.

There are numerous indicators available to measure access to justice in a given territory. The IFC Doing Business report, for instance, provides annual comparisons regarding numerous issues, including some related to access to justice. The “contract enforcement” indicators take into account the number of procedures, the delays and the cost involved in the enforcement of a contract. Averages in 2010 for the SADC regional region are as follows:

| | |
|--|-----------------|
| Number of procedures to enforce a contract | 37.1 procedures |
| Time to enforce a contract | 645.1 days |
| Costs | 52 % of claim |

These figures are extremely optimistic, as they concern business-to-business disputes. Therefore, it can be assumed that delays and times for a non-professional consumer are worse, and that such delays and the costs for a poor consumer might amount to a 100% barrier to justice.

Thus, consumer advocates may want to establish relations with other avenues of justice, such as traditional courts.

A more complete dashboard for access to justice indicators related to consumer disputes should be constructed (see RIA section), but this data suffices to identify access to justice as ‘a major challenge of consumer protection regulation in the SADC region’. The choice of new redress mechanisms scenarios should be bound to careful examination of costs and efficiency objectives.

Key issues to analyse in the regulation are:

- **Traditional/customary judicial institutions:** traditional dispute resolution mechanisms are sometimes in place locally and present several solid advantages to handle small consumer claims at a local scale. That said, any move in this direction needs to be accompanied by efforts to train traditional authorities with consumer protection laws and principles, as well as standards of fairness in the procedure.
- **Small claims procedures:** a simple idea is to introduce a simplified process for small claim procedures, in order to reduce costs and delays, while still using the same courts and magistrates.
- **ADR:** in some countries mechanisms are invented, which do not utilise existing courts, in order to alleviate

procedural delays and costs and look for conciliations. This may have the advantage of extending jurisdiction to state-provided services that might otherwise be largely exempt:

- **Ombudsmen:** they are government or semi-government bodies. Their decisions are usually not binding, but rather in the form of mediation, weighted by their moral and technical authority. Their mandate can be larger than the strict application of the law, to also include a position to enforce industry standards and procedures in the public and private sectors.
- **Statute-based tribunals:** they can provide simplified procedures and specific industry knowledge; they may be attached to state regulators as in infrastructure.
- **Chambers of Commerce,** which have been used with success in financial services dispute resolution (in particular in Peru).
- **Class action:** the rationale of class action is to consolidate individual claims, which might not ordinarily be brought individually due to the smaller sums involved and to lower judicial expenditures while providing the consumer with a powerful tool to aggregate and act as a group plaintiff.
- **Standing requirements:** An alternative to class action mechanisms is the modification of judicial 'standing' requirements, so as to order the recognition

Illustration - Namibia

- The justiciability of social, economic and cultural rights in Namibia and the role of the non-governmental organisations, John Nakuta

http://www.unam.na/centres/hrdc/4_he_justiciability_of_social_economic_and_cultural_rights_in_Namibia.pdf

of consumer associations, which do not meet direct standing requirements (meaning that the consumer organisation did not directly experience harm), to represent consumers in court. This is a powerful tool for consumer associations as they can use their resources and expert knowledge directly to promote the enforcement of rights and the amelioration of jurisprudence.

- **Effective legal aid:** an effective legal aid system to support judicial costs is an important element to the introduction of actions in justice from the consumers. Legal aid mechanisms can be established by NGOs, and consumer advocates should explore whether local law faculties could be interested in establishing law student and faculty-assisted consumer protection legal aid. This is being done in Nigeria by Consumers Awareness Organisation.





Tools for legal advocacy

6

To prepare a successful advocacy campaign, the sharing of experience with similar organisations across the world is a very important step. This chapter provides a few suggestions on where to start planning for a strategy.

Targeting the audience for lobbying

Before getting started, it is necessary to map the gatekeepers (those who allow access to those in power) as well as the decision makers involved in the regulatory process:

- Ministries
- Consumer protection institutions (consumer advisory councils, consumer protection commission etc)
- Sectorial supervision bodies (sectoral regulators, central bank etc)
- Representatives and representative commissions
- Other consumer protection associations
- Think tanks
- Industry self-regulatory efforts (trade associations etc)
- Media and the public

Voices of advocacy

Dr Felicia Nwanne Monye, Founder of Consumer Awareness Organisation (CAO) and Professor of Law & Dean of Faculty of Law at the University of Nigeria:

“Recognise that you can be the best consumer advocate in the world, but you will not get very far unless you establish a working relationship with the regulator. You need the regulator to effect positive, lasting change.”

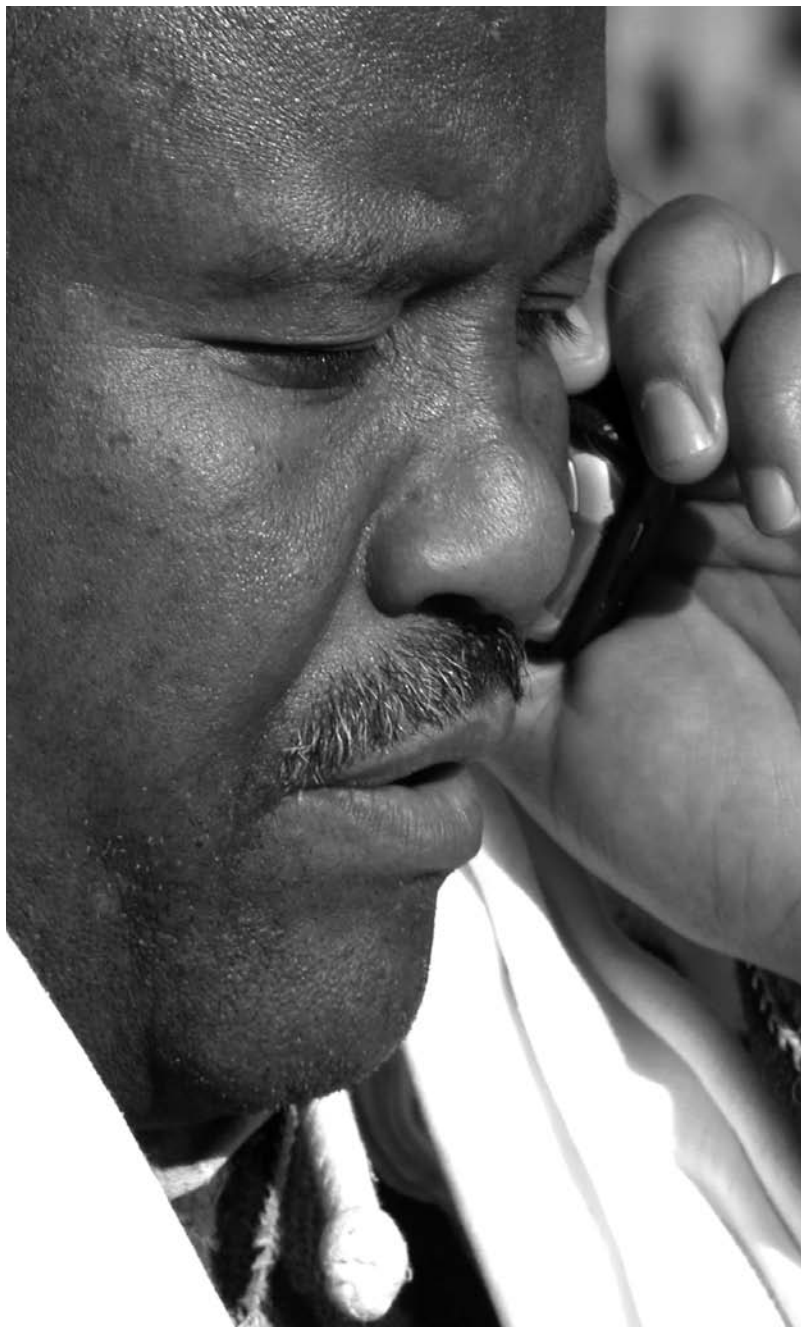
Voices of advocacy

Michael Gaweseb, Executive Director of Namibia Consumer Trust (NCT):

“ In September of 2005, following several years working for the government in the finance department of one of the ministries, I became a consumer advocate. And that experience working for the government was critical to being the consumer advocate I am today, because it helped me to understand the organisational psychology of a government office. And I learned how to use the government chain of command to the advantage of the consumer. For example, if I am trying to motivate one ministry to act, I might put the President and several other line ministers in copy on a communication. The fact that multiple eyes are on the same document may motivate people to take concrete action, because they know others are watching. Relationships are critical to the advocate; we cannot work in a vacuum. ”

Flavian Zeija, advocate and co-founder of Justice for Microfinance Consumers of Uganda:

“ The biggest obstacle we have faced is that the Association of Microfinance Institutions is not an enthusiastic partner in our advocacy work. They think that we are there to tell their customers not to pay. In reality, we are there to inform customers of their rights, as well as obligations to pay. From their perspective, an ignorant client means higher profits. ”



This mapping exercise should be completely thorough and regularly updated for, while people move on, institutions (generally) remain. It should contain information on the mandate of those institutions, as well as their past activities and public positions with regard to consumer protection issues. Keeping track of each actor's positioning might even mean writing down some quotes from public speeches or reports, or any information which will help identify clearly what the rationale is behind any positions, and the bottlenecks which need to be addressed. A successful advocate understands the concerns of its interlocutor, and can distinguish within institutions, departments, offices who is an ally, a source of information, and who holds the keys to decision making. Sometimes this is a time-consuming activity, but ultimately it will result in more effective advocacy.

Voices of advocacy

Dr Felicia Nwanne Monye, Founder of Consumer Awareness Organisation (CAO) and Professor of Law & Dean of Faculty of Law at the University of Nigeria:

“ Twenty years ago, when we first started our advocacy work, consumers were for the most part, unaware that they had rights. Now, people are beginning to find their voices. In fact, when we had radio call in programmes years ago, no one would call in. Now, conversely, the phone lines light up almost immediately with callers wanting their issues addressed. This is visible evidence of positive change (...)

You must have a good relationship with the media houses: take your curriculum to meet with journalists and media executives and discuss the issues. They will realise that they themselves are consumers, and you are in effect advocating for their rights as well. As a result of good relations with the media, you will get publicity for the issues important to all consumers. ”

Partners, potential donors and fundraising

This section lists possible allies and resources for advocacy activities. It also provides some advice on how to approach and convince them to join your cause.

- Perform your own due diligence on donor organisations and verify frequently that your proposed project is within the donor's thematic focus (which could change over time).
- Ensure that the topics are at least indirectly related. For example, do not send a project proposal on childhood obesity to an organisation focused solely on rule of law and judicial reform. However, if an organisation is focused on intellectual property and access to knowledge issues, then a project proposal on the relationship between childhood obesity and access to information about food ingredients (for example) could be of interest to this donor.
- In any case, a good rule of thumb is 'it cannot hurt to ask'. You can send a formal letter of inquiry (preferably a real letter vs an email), stating the proposed nature of the project, and how in your perspective it is in line with the foundation or donor's stated mission (which you can read on their website).
- If possible, try to arrange to meet with a representative of the potential funder prior to submitting a project proposal. This can be done at industry conferences, or by asking for an on-site meeting. Additionally, try to engage the donor in your organisation's substantive activities, such as conferences, research or the actual implementation of projects where their experience and knowledge base is appropriate. This could be a win-win situation as both you and the donor can have the opportunity to know one another's organisations better and work together towards a common objective.
- There are donors who work internationally and have local/national budgets. Become familiar with the various international and intergovernmental organisations and their local offices, which may be interested in partnering and supporting your consumer protection work. Examples include the United Nations Environment Programme (www.unep.org), UN Food and Agriculture Organization (www.FAO.org), the UN's International Fund for Agricultural Development (www.ifad.org), the United Nations Development Programme (www.undp.org), the UN's World Food Programme (www.WFP.org), the UN Conference on Trade and Development (www.unctad.org), the World Bank (www.worldbank.org), the Consultative Group to Assist the Poor (www.CGAP.org), for financial services consumer protection issues, the Alliance for Financial Inclusion (www.afi-global.org), and development banks, such as the African Development Bank (www.afdb.org/en) and the Arab Bank for Economic Development in Africa (www.badea.org/en/map.html).
- In addition to the intergovernmental organisations, there are many bilateral government organisations which may be interested in consumer protection projects locally, such as but not limited to America's USAID (www.usaid.gov), the German GIZ, Norway's Norad (www.norad.no), Sweden's SIDA (www.sida.se) and UK's Dfid (www.dfid.gov.uk), France's AfD, Switzerland's SDA. Many countries have aid organisations working in Africa, thus it is important to become acquainted with the local mission office, normally located in the capital cities.
- Then, there are innumerable private foundations, which are interested in social justice and consumer protection issues. Again, the following list is merely intended to provide consumer advocates with examples and a starting point. It is still necessary to do independent research to verify that the foundation's goals are indeed your own.



Foundation examples include:

The Bill and Melinda Gates Foundation
www.GatesFoundation.org

Ford Foundation
www.fordfoundation.org

The MacArthur Foundation
www.macfound.org

The Michael & Susan Dell Foundation
www.msdf.org

The Carnegie Foundation
www.carnegiefoundation.org

Open Society
www.Soros.org

Omidyar Network
www.omidyar.com

The Sigrid Rausing Trust
www.sigrid-rausing-trust.org

The Mo Ibrahim Foundation
www.moibrahimfoundation.org/en

Schwab Foundation
www.schwabfound.org

MasterCard Foundation
www.mastercardfdn.org

CitiFoundation
www.citifoundation.com

Global Fund For Women
www.globalfundforwomen.org

Mama Cash
www.mamacash.nl

Charles Mott Foundation
www.mott.org

Stewart Mott Foundation
www.srmfoundation.org/AboutUs.html

DOEN Foundation
www.doen.nl

Google Foundation
www.google.org

Voices of advocacy

Mohammed Abdou Ammor, Vice-president of the Moroccan Confederation of Consumers' Associations (CAC Maroc):

“Resources are the main bottleneck of associations. To keep their credibility, they need to stay independent from the public administration, from the providers, from political parties and any sort of corporation. Therefore, the research for project funds remains the best guarantee for independence.

Being part of a larger international network such as CI constitutes a plus to receive technical support, financial resources, and especially increase reputation towards the public, the authorities, the international organisations and the donors.”

Dr Felicia Nwanne Monye, Founder of Consumer Awareness Organisation (CAO) and Professor of Law & Dean of Faculty of Law at the University of Nigeria:

“We collaborate with a variety of other entities, including government entities like the Consumer Protection Council and the Standards Commission. We also work closely with Consumers International, and are particularly active with the Access to Knowledge campaign (A2K). Further, we are engaged in the ISO process. We also collaborate with several Nigerian NGOs engaged in competition work and consumer empowerment, like the Consumer Advocacy League (www.ceon-camon.org).”



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International NGOs, networks, charities and associations

International Consumer Research & Testing
www.international-testing.org/index.html

International Consumer Protection and Enforcement Network (ICPEN)
<https://icpen.org>

Consumers International
www.consumersinternational.org

Legal support

Legal aid/University law clinics

Bar Associations & Women's lawyers associations

Multinational law firms with pro bono departments and pro bono networks
Orrick; Allen & Overy; O'Melveny & Myer

Advocates for International Development
www.a4id.org



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http://rru.worldbank.org/Documents/PapersLinks/informal_economy.pdf





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