



I was happy to have had an opportunity to attend a Roundtable organized by Prof Ruth Okediji on Competition Law for Heads of Competition Authorities from the African, Caribbean and Pacific (ACP) Regions at Harvard University. I was asked to speak on building credibility for competition authorities and on the lessons from the Caribbean, and more specifically from the Jamaican experience. I was especially pleased to be on the same panel as my colleague from Barbados, Mrs Peggy Griffith, Chief Executive Officer of the Barbados Fair Trading Commission. When I was first asked if I would make a presentation on this topic, I thought the request came at a favourable or appropriate time, at least from my perspective. I have been struggle lately with finding useful indices for measuring performance of executive agencies, including my own, and lamenting the fact that there is no useful index.

On the other hand, we have to recognise that public managers often advance instruments to measure meaningless indices. So public organizations continue to make demands on the public purse, many of those demands cannot be met in poor countries like my own. At the same time there is little clarity as to the objectives many of these bureaucracies expected to achieve and, I suspect, there must be some uncertainty whether or not these objectives are been met. To add further insult to injury, not only do the executives of these agencies make claims on behalf of their agencies, but they also make their personal claims for promotion and advancement, and yet we cannot determine with any certainty whether or not they are succeed in advancing the cause of the agency. It seemed to me at first that the concept of 'credibility' was one of these indefinite indices of performance that is almost impossible to quantify or measure.

Credibility, after all, speaks to the quality of being credible; meaning able to be believed or to be convincing. It did not take me long to realise that I was either being too lawyerlike or too old because that could not have been the context in which I was invited to contribute to the discussion. I suspect that in this context it was intended for credibility to carry its modern usage of "acceptability". After all, Professor Ruth Okediji introduced me this discourse under the topic, "Prospects for legal transplants in Africa: The case of competition law and policy." We can certainly speak with some authority on the subject of legal transplants In the Commonwealth Caribbean and, with our contemporary history of introducing competition authorities, and we can also speak of our experiences with their acceptability. As Mrs Griffith had spoken on the experience of Barbados and Professor Haraksingh was schedule to speak from the CARICOM perspective, I confined contribution to the Jamaican experience.

It is possible to speak of establishing the credibility, or if you prefer the acceptability, of the

Jamaican competition authority under four broad heads: First, in introducing the pro-competition regime; second, in establishing and empowering the competition authority; third, in tackling the anticompetitive environment; and finally, in pursuing pro-competition advocacy and support. Let me say at once that I recognise the difficulty of offering concrete evidence on whether we have succeeded or failed in our efforts and I do not wish to convey any information other than that I representing my own subjective interpretations. Moreover, there is and have been some significant differences between members of the Jamaica Fair Trading Commission on some of these questions. At least, I can say that the commissioners have had differences among themselves while I have been a member of it, and I refuse to believe that the Commission is disagreeable only when I am present.

### **Introducing the pro-competition regime**

The credibility or acceptability of a competition authority begins with the introduction of the competition regime itself. For example, prior to the last two of three decades, Jamaica's was a highly regulated economy. The principal market participants functioned, and some functioned well, in a state directed market environment and regarded competition as threatening. In that type of economy, fair competition often means freedom from competition. I recall, several years ago and prior to the CARICOM Competition Authority, been told by a business leader in St Lucia that he was anxiously awaiting the CARICOM competition regime because with it the local bottling plant in St Lucia would be protected from imports from Trinidad. While in Jamaica, until the 1980's the state would allocate shares of lumber imports and the local flour mill would allocate its output to a specified number of distributors. Because in the Commonwealth Caribbean we had such highly regulated and protected market regimes, market participants got accustomed to a certain degree of clientelism and the removal of that, in some quarters, would be highly unacceptable.

I cannot offer any prescription of what will make an impending competition regime acceptable, especially to those who have a vested interest in fixing markets; but certainly some preparatory work needs to be done. Civil society needs to be engaged to create a heightened sense of awareness of the utility of competitive markets. Some aspects of a new competition regime may be more acceptable than others, and it would be useful to emphasise those. For example, the Fair Competition Act of Jamaica included many consumer protection provisions and the policy behind that approach was that the overall legislation would be more acceptable and less intimidating because of these additions. In the current dispensation, now that the competition regime is firmly established, a consumer affairs commission enforces those provisions and not the competition authority (by voluntary devolution).

### **Establishing and empowering the competition authority**

There is the tendency to create new bureaucracies but not to enable them and empower them.

A competition authority is a costly exercise; and it competes for resources from other parts of the public bureaucracy. It needs to attract highly trained, and perhaps even more important, highly trainable staff. The authority needs to invest in this training, and recognise that these skills are transferable to other authorities and other market participants, so a degree of attrition is inevitable. If the authority is not obviously capable, it cannot be credible. Once we agree that a competition authority cannot be credible if it is not capable, then the challenge will be to develop that capability. This can be done in a number of ways, not in the least is developing relationship with other authorities in other jurisdictions. Over the last two or three decades we have been developing an international cadre of competition authority professionals are keen to share their expertise and resources. The capabilities, and thus the credibility, of a competition authority are no longer purely national characteristics.

The need to increase the capability of a competition authority cannot be confined only to its staff and members. The Jamaican competition regime is highly dissected. Industries like broadcasting, light and power, telecommunications and antidumping are regulated by another authorities, and some cases disputes from those are appealed to other tribunals. Yet, in the local competition authority has an interest and a duty to promote competition. A credible regime requires a credible competition authority and credibility in those other agencies as well. Part of the responsibility of the authority must be to increase the capability of those others agencies also. Finally, and for reasons that I could explain later, the Jamaican competition regime must rely more on the courts than for its enforcement that many of you are probably accustomed to. Thus, the overall credibility of the completion authority requires increased capabilities of the judges. It is a little ironical that we are at this stage, because the design of the Jamaican regime was predicated on the assumption that the judges would not fully appreciate nor understand a pro-competition regime. So the competition authority must do now, what the state should have done earlier, and promote the knowledge and skills of the judiciary in competition matters.

## **Tackling the anti-competitive environment**

The credibility of a new competition authority depends on its ability to pick popular fights and win them. If that is so, and I think that it is, then the authority should early pick fights that it can win and avoid fights that it must not lose. The Jamaican competition authority only understood the first half of that injunction, and in its early days it certainly picked some popular fights that it won. The fixing of bread prices, the fixing of architectural fees, and restricting of access to legal services in the home mortgage industry are examples of those. On the other hand, quixotically taking on the coffee industry, the legal profession and the local stock exchange were battles that we could not have easily won and the consequence for losing them was disastrous.

## **Pursuing pro-competition advocacy and support**

One of the lessons we have learned in the Jamaica Fair Trading Commission is that credibility

comes with being capable and being right, and not necessarily from confrontation. As such some of the authority's most effective battles come from just advocacy. While it may not be true that the authority in Jamaica has the bully pulpit, but its voice is very heard and quite often heard over the participants in the market. An authority can achieve a great in promoting competing by just lending the weight of its opinion to the cause.

Not only will advocacy help to promote the right conduct in the market, it can also serve to develop and drive the policy of government. A government can get no better advice, certainly no better informed advice, than it will get from the completion authority. There is perhaps no better test of credibility than a government's willingness to accept the authority's advice and market participant's deference to the authority's opinions.

## **Consequences of Capability**

There are consequences where an agency is regarded as credible. One is the tendency for trade organizations to want to coop the authority. Another is a tendency to defer too much to it, rather than pursue a private right of action.