



ICN's Framework for Competition Agency Procedures, Part 2: What does the CAP mean for the ICN tomorrow?

By Paul O'Brien

(Federal Trade Commission)¹



Copyright © 2019

Competition Policy International, Inc. For more information visit CompetitionPolicyInternational.com

May 2019

On April 5, 2019, the ICN announced that it was creating a “Framework for Competition Agency Procedures,” referred to as the CAP.² After a period for agency consideration, the CAP was opened for registration on May 1 and will go into effect at the ICN’s annual conference May 15-17.

The CAP contains two aspects: 1) an annex of fundamental, consensus principles for sound agency procedures, and 2) implementation tools – a “cooperation process” and a “review process” – to help promote use of the principles. While both the substantive and administrative aspects of the CAP (the ICN’s third opt-in framework) borrow from previous instruments within the ICN, their combination represents an innovative leap in ICN efforts to promote implementation of its work.

Part 1 described the provisions of the CAP, its substantive principles and working procedures. This Part 2 will explore the potential impact of the CAP and ways in which the ICN could consider its framework model going forward.

Potential CAP Parameters for Success

Several parameters will help define the impact of the CAP.

The first, most obvious, metric for success is the number of competition agencies that choose to join the CAP.³ The first public indication of the number of early adopters will likely come via announcements at the ICN’s annual meeting, May 15-17. Given that the ICN’s Steering Group of 20 members approved the CAP, any number beyond 20 will be a good indication that the CAP has gained interest and participation across a cross-section of competition agencies. Section 1h of the CAP states that the “Co-Chairs will publish a list of Participants on the ICN website,” meaning the identity of CAP participating agencies should be public, and perhaps soon.⁴

Conformity with the CAP principles will also help determine the value of the CAP. The CAP’s ten substantive provisions (Annex b-k) include the fundamental principles of non-discrimination, transparency, investigative notice, timely resolution, confidentiality, impartiality, access to information and opportunity to defend, representation by counsel, written decisions, and independent review. Derived from agency best practices from around the world as well as ICN and OECD guidance, they have a solid foundation of consensus. The CAP also recognizes that its starting point is not full compliance, that convergence towards conformity will be needed. The CAP includes the ability for any participant to set limitations on its participation by identifying the laws and procedural rules that “prevent it from applying one or more of the Principles.” The impact of limitations is hard to project. Perhaps this provision will allow for more participating agencies by welcoming those that are not fully compliant with CAP principles. Once in the CAP framework, such agencies may be persuaded to make changes and move towards full CAP compliance. In this sense, the limitations provision could be a worthwhile ‘price’ outweighed by the benefits of more participation. One also could imagine widespread and liberal use of limitations hampering the impact of specific provisions of the CAP. Since the CAP Principles were developed and vetted by a cross-section of agencies, and were derived from ICN and OECD work, this seems unlikely. Participants are asked to identify limitations in the templates that describe their procedures, so the scope and impact of limitations should be discernable once Participants start to post templates.⁵

The use of the CAP “cooperation process,” more specifically the agency-to-agency dialogue provisions will be another indicator of the impact of the CAP. The dialogue provisions allow any participant to request that another participant “engage in a dialogue regarding any issue of competition law procure that is material” to the CAP. With its limitations and dialogue provisions, the CAP has built in realistic expectations that not all participants will instantly live up to its

principles, and more importantly has included tools to address this. Participant-to-participant dialogues may be a path to progress through one-on-one persuasion or at the least better understanding about how different procedures can be CAP-compliant.

There are some open questions with respect to the nature of dialogues. Section 2f begins with the idea that “Participants will discuss the issues raised in general” – perhaps disfavoring discussion of specific cases – but it also includes encouragement to “discuss procedural issues related to a relevant investigation or proceeding.” This is to be expected with a new framework. There will need to be some process of discernment in the nature of dialogues. Such learning curve may extend over a period of time given that dialogues are governed by the two involved participating agencies, without a clear mechanism to share experiences throughout the framework. Experience with dialogues is not guaranteed to be uniform. However, the text, in Section 2e, does strive for professional, cordial interaction with qualifiers that describe engagement “in good faith,” “in a mutually convenient manner,” and with “full and sympathetic consideration.”

This parameter of number and quality of dialogues will be harder to track, as the default for the peer-to-peer dialogues is that they will be kept confidential and any measures taken are within the discretion of the requested Participant, with no reporting provisions. It is possible that the Section 3c quadrennial reviews will reveal details about the number and nature of dialogues.⁶ It is difficult, perhaps impossible to say whether frequent or infrequent use of dialogues will be the better indicator of CAP success. Certainly, some extent of agency-to-agency discussion on procedures, even in the context of identified concerns, will be a sign of a healthy, working framework. Rare use of dialogues will be less clear. It could mean that compliance is higher than expected (and therefore dialogues are unnecessary) or perhaps could reflect some deference or discomfort with requesting the attention of other participants.

The use of CAP’s Section 3 Review Process will be another basis upon which to judge the effectiveness of the CAP, especially if template responses are meaningful enough to get a sense of compliance with CAP principles? The sample template⁷ is set up to track how participating agency procedures meet each CAP principle. The transparency of the templates – to be posted publicly on the ICN website – may be an underrated aspect of the CAP, perhaps even more important than the peer-to-peer dialogues given their much broader reach. The transparency of explaining agency procedures against the agreed upon standards could be a powerful benchmark that could bring to light opportunities for improvements and create momentum for change.

The Section 3c regular reporting on the “implementation and functioning of the Framework” also has potential to help explain and bolster the success of the CAP? The provision guarantees discussions at the ICN’s Annual Conference at least once every four years, but only says that the Framework “may report on general trends.” The provision also offers an enticing possibility for participants to “make proposals to modify the Principles,” though details are not specified. Many of these to-be-determined features of the review process will help define the success of the CAP, but they represent potentially compelling tools to drive progress, e.g., the ability to pursue modifications that strengthen the principles over time.

Anecdotal but powerful evidence of the impact of the CAP could come from specific examples of agency changes to procedures in line with CAP principles. The value of the CAP can be demonstrated in real-world improvements to procedures. To the extent that the CAP can identify and promote such “wins,” it will serve to underscore its value and enhance its credibility. There is no set path in the sparse text of the Framework for the systematic promulgation of implementation stories, but the review process perhaps has flexibility to develop the capacity and

tools to do so through its ability to “report on general trends.”⁸ While there may be a certain natural reluctance for an agency enthusiastically to publicize its procedural improvements (and thereby perhaps admit to past less-than-best practices), the CAP should consider ways to encourage self, and framework-wide, reporting on success stories.

What does the CAP mean for ICN tomorrow?

It is interesting to think of the CAP, and ICN’s earlier frameworks, in terms of an evolutionary step in the ICN’s approach to the implementation of its work. As noted by the CAP itself, this is not a move to hard commitments or treaty-like obligations. The scope of its principles is limited to applicable laws (Section 1i) and its dialogues are limited to the discretion of the affected agencies (Section 2g). With its earlier, opt-in enforcement cooperation frameworks, and now with the implementation-minded CAP covering agency process, the ICN has shown a willingness to expand its toolbox for implementation, allowing for additional opt-in commitments for and among willing member agencies. The ICN use of opt-in frameworks allows for additional cooperation among members willing to pledge their support that may have the potential to help boost convergence of traditionally-developed consensus recommendations.

There are at least three possible ways that the CAP model could lead to additional, potentially significant, developments within the ICN.

First, over time, the implementation and operation of the CAP could lead participants to modify or interpret the CAP principles – i.e., the CAP need not be a cap on ICN standards of procedural fairness. Section 3c sets out a periodic group review of the “implementation and functioning of the Framework,” including an ability to “make proposals to modify the Principles.” For a hint as to possible inspiration for potential future developments, the CAP’s sole footnote recognizes that the “ICN Recommended Practices for Investigative Process serve as a resource for agency consideration of additional consensus procedural standards and agency practices.” The Recommended Practices offer more detailed agency practices than the CAP Principles (10 pages vs CAP’s 3). The ICN Recommended might inspire future modifications to the CAP, if and when the aspirational recommendations are considered standard practices and fundamental norms. This could also signal a willingness to look at other ICN work or sources beyond the ICN as inspiration to strengthen CAP principles.⁹

Second, the implementation and operation of the CAP could lead participants to enhance the CAP working procedures or develop more robust implementation commitments. As written, there are some open questions with respect to the functioning of the cooperation process. Over time, the experience with dialogues could lead to new understandings or expectations, e.g., the development of multilateral or group dialogues (the current provision is written in the singular) or announcing outcomes or subject matters of dialogues, if agreed by the participants involved (the current provision designates dialogues as confidential).

Finally, experience with the CAP may lead to the consideration of ICN implementation frameworks on other topics, using similar or more structured implementation tools. Could a framework on merger notification rules, inspired by the ICN Recommended Practices on Merger Notification and Review Procedures, help push additional convergence in that area? Is an implementation framework on a topic such as leniency a plausible future step for the ICN? Could opt-in frameworks on substantive issues such as single firm conduct analysis be a viable way to promote convergence of ICN’s recommendations across jurisdictions in ways that recommendations alone may not? Experience with the CAP in the coming years may inform such possibilities.

While the intentions of opt-in frameworks are to spur additional implementation and convergence among a group of members that choose to undertake additional pledges, the ICN may also want to consider potential negative effects on its traditional, consensus-building approach. Could a proliferation of frameworks lead to a ‘tiered’ ICN, with members following different sets of recommendations (perhaps even different tiers of different members across different topics) based upon ability or willingness to opt-in to various frameworks? With a widely accepted set of basic principles consistent with existing ICN work, this is likely a question far removed from the CAP’s implementation, but possibly worth attention if the opt-in implementation model is considered for other topics.

The CAP, like any non-binding international consensus work, will face an implementation challenge. Even after obtaining agreement on general procedural norms differences may remain on what they mean in practice. Corrections or common understanding may be slow in coming due to the one-on-one interaction at the core of the CAP cooperation process and the default quadrennial cycle of review and possible modification. Further, even consensus rules do not ensure consistent application in every case. It may not be an easy road to achieve implementation by a large number of agencies with diverse rules and practices, and while the ICN will continue to strive for even higher standards, reaching consensus on them will remain a challenge. Fortunately, the CAP is designed with implementation challenges in mind. Dialogues may allow agencies to discuss misunderstandings or address divergence-in-practice from the principles. The CAP review process may create a regular impetus to discuss and lock-in additional improvements. While items such as the lack of detail on the nature of dialogues, their default confidential nature, or the potential long gaps between framework review may reveal themselves as weakness over time, the CAP appears to have integrated sufficient initial flexibility and transparency to enable itself to adapt to future challenges, if it so chooses.

Conclusion

In the months and years to come, there will be several metrics for study to judge the success of the ICN’s CAP experiment. Participants also will have many choices in building out how the framework functions – and these choices will affect the metrics. This is understandable for a new framework, particularly one on the sensitive and diverse topic of internal rules and practices. Details and comfort level with the specific workings of the cooperation and review processes should develop over time. One of the dynamics that may influence the success of the CAP is the inherent tension between the transparency of its participants and their explanatory templates on one side and the insular nature of the initial language on dialogues and the review process on the other side. For the CAP to grow credibility and demonstrate value, its participants should consider the value of siding with transparency – within the framework and externally – in its choices about how the CAP should function.

The ICN has always pursued its mission through inclusiveness and member engagement. The evolution of new, opt-in frameworks for merger and cartel enforcement cooperation, and now agency procedures, is a byproduct of internal consultations, member trust in ICN-sponsored cooperation initiatives, and a desire to support the implementation of ICN recommendations in creative ways. If implementation frameworks like the CAP remain consistent with ICN work built on cross-network participation, they have the potential to help drive implementation, complementing, rather than disrupting, ICN’s consensus-building approach.

-
- ¹ Paul O'Brien is Counsel for International Antitrust at the U.S. Federal Trade Commission and co-chairs the ICN's Promotion and Implementation group. The views expressed are his and do not necessarily reflect those of the ICN, FTC, or any individual Commissioner.
- ² See announcement at: <https://www.internationalcompetitionnetwork.org/featured/framework-for-competition-agency-procedures>. The CAP document itself is available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf.
- ³ One interesting aspect of tracking participants will be whether non-ICN agencies join the CAP. The CAP is open to all competition agencies. See Section 1d.
- ⁴ Some have self-publicized their decision to join the CAP. See, Canadian Competition Bureau at <https://www.canada.ca/en/competition-bureau/news/2019/04/international-community-creates-new-framework-for-fair-and-effective-competition-law-enforcement.html>; US FTC at <https://www.ftc.gov/news-events/blogs/competition-matters/2019/05/ftc-becomes-founding-member-icn-framework-promote>; and French Autorite at http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=697&id_article=3408&lang=en.
- ⁵ Note that Section 3a gives Participants six months to publish a template. Section 3b states that Participant templates will be publicly available on the ICN website.
- ⁶ Section 3c only states that "The Framework may report on general trends. . ."
- ⁷ CAP Participant Template at: <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/CAP-Template.docx>.
- ⁸ Section 3c goes on to note that any such reporting "will not identify individual Participants without consent" suggesting that the Framework may be able to report on individual success stories with amenable participants.
- ⁹ Notably, the OECD Competition Commission has an ongoing project on procedural fairness that may lead to guidance or recommendations.