



ICN's Framework for Competition Agency Procedures, Part 1: What does the CAP mean for the ICN today?

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On April 5, 2019, the ICN announced that it was creating a “Framework for Competition Agency Procedures,” referred to as the CAP.² Announcements by the ICN outside of its regular annual conferences are rare,³ hinting at the importance of the CAP.

The CAP contains two aspects: 1) an annex of fundamental, consensus principles for sound agency procedures, and 2) dedicated 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 borrow from previous instruments within the ICN, their combination represents an innovative step in ICN efforts to promote agency accountability and implementation of its work.

In Part 1 of 2, this article will describe the provisions of the CAP, its substantive principles and working procedures. Part 2 will explore the possible future impact of the CAP and ways in which the ICN could consider the model going forward in this area and others.

The CAP Principles

The ICN has been active with respect to promulgating consensus procedural fairness principles for many years. Its work has made it the leading international forum for agency discussion of procedural fairness during competition agency enforcement.

Long before the current dialogue on procedural fairness, in 2003 and 2004 the ICN produced Recommended Practices on procedural fairness and transparency in merger review.⁴ These practices cover notice of competitive concerns and opportunity to respond, judicial review, transparency of rules and laws, and avoidance of undue delay and unnecessary burdens. They remain some of the most far-reaching, detailed guidance available on agency practices in merger enforcement. The ICN’s 2008 Recommended Practices on Dominance/Substantial Market Power Analysis also notably contain provisions on enforcement transparency in single-firm conduct enforcement.⁵

From 2010-2012, the OECD pursued a project on procedural fairness, consisting of three roundtable discussions on transparency and procedural fairness and a summary “Key Points” Report.⁶ While the report was not positioned as specific guidance or recommendations, it cites examples of common practices in OECD jurisdictions. The OECD report identified “a broad consensus on the need and importance of transparency and procedural fairness in competition enforcement despite the many differences amongst jurisdictions.”⁷

In 2012, the ICN picked up the topic and advanced the “broad consensus” with its investigative process project that addressed all enforcement areas. The project canvassed the practices of over 60 competition agencies via surveys and reports, and ultimately crafted the ICN’s 2015 Guidance on Investigative Process and its 2018 Guiding Principles for Procedural Fairness in Competition Agency Enforcement.⁸ The ICN Guidance provides agency recommendations on use of investigative tools, transparency, engagement, internal agency safeguards, and confidentiality that promote fair and informed enforcement. The ICN Guiding Principles articulate a common set of high-level procedural fairness ideals that ICN members agreed should inform and guide enforcement processes.⁹

The similar CAP principles continue this legacy of consensus procedural fairness work among ICN agencies. The CAP adopted the draft principles, and adapted other operational provisions to the ICN context, from the 2018 initiative for a multilateral framework on procedures.¹⁰ The principles are derived from ICN, OECD, and other international work. The CAP principles address the topics of non-discrimination, transparency, notice of investigations, timely

resolution, confidentiality protections, conflicts of interest, opportunity to defend, representation, written decisions, and judicial review.¹¹ These are widely accepted principles that reflect fundamental due process norms, written in an active, “Each Participant will. . .” voice to establish clear implementation expectations.

The CAP Working Procedures

As a consensus-based, informal network without rule-making authority, the ICN has always paid close attention to promoting the implementation of its non-binding work product. The active verbs found in the ICN’s Operational Framework include ‘encourages,’ ‘promotes,’ and ‘facilitates’ – you will not find any ‘requires’ or ‘commits’ in the charter for the voluntary network. This makes the commitment to promoting awareness and encouraging use of ICN work critical if the ICN is to have practical impact. Indeed, ICN Chair Andreas Mundt has identified implementation as one of three key factors to ICN’s success.¹²

Consistent with the operational framework of the ICN and the ICN’s traditional working procedures, the CAP is also non-binding. CAP Section 1i states, “The Framework is non-binding. Participation in the Framework does not create any legally binding rights or obligations upon the participants nor upon the legal subjects of their proceedings.” It even embraces a degree of non-conformity, allowing its participants to take “limitations” on their application of the Principles (Section 1j) rather than force an all-or-nothing choice by potential participants.

However, the model of an opt-in framework on a specific topic also differs from the ICN’s traditional working procedures. Once approved by the membership, the specific use of ICN work product is left to the consideration of each member. This soft-law approach has seen success, as ICN work is widely accepted by its membership and has inspired many changes to agency rules and practices, but implementation depends on members making individual decisions on whether and how to follow ICN recommendations. There is no explicit registration or act of consent asked of ICN members. There is no compliance obligation that attaches to ICN membership nor is there a regular, formal network review or consistency check of all members’ practices. Instead, the ICN has developed many informal ways to promote awareness and use of its work product: through informational teleseminars and conference sessions dedicated to specific work product; through encouraging transparency from members, for example via public “templates” about agency-specific merger and cartel practices; and through encouraging introspection or self-help via “self-assessment” tools developed for agencies to benchmark their own rules and practices to ICN recommendations.¹³

An opt-in framework works differently. ICN members are free to choose whether to join a framework, and do so by affirmatively “registering” their assent via designating a point of contact or liaison for their participation in the framework. The choice to join a framework adds a degree of agency accountability that is not present in traditional working procedures. ICN membership does not mean that an agency is automatically part of an ICN-sponsored framework. Indeed, for this reason, it may be more precise to describe the CAP as an “ICN-sponsored” framework as opposed to an ICN framework. The ICN is setting the scene by establishing the framework and providing its resources to support the administration of the CAP (e.g., hosting CAP templates on the ICN’s website and providing conference time and space for periodic CAP meetings) but the choice to participate in the CAP is independent of ICN membership, and likewise CAP participation does not convey ICN membership.¹⁴

Two ICN frameworks provided inspiration for the CAP: the Framework for Merger Review Cooperation and the Framework for the Promotion of the Sharing of Non-Confidential Information (focused on cartel investigations).¹⁵ Both establish an opt-in point of contact or liaison list for member agencies to facilitate enforcement cooperation along with basic principles and parameters on contacts and the type of information involved.

The CAP refines the framework model in two notable ways. First, unlike the other ICN sponsored frameworks, the CAP explicitly recognizes the separation between framework participation and ICN membership, not only requiring affirmative registration like the others, but also taking the next step and explicitly welcoming *all* competition agencies – whether or not they are ICN members – as participants.¹⁶ Second, the CAP incorporates specific, tailored implementation tools aimed at promoting discussion and use of CAP principles.

The CAP's true innovation lies in its administration, specifically its dedicated implementation tools aimed at promoting adherence to the principles. By laying out specific tools to prompt implementation perhaps this represents a 'sharpened' or 'steered' soft-law approach. The CAP contains two tangible ways to promote and steer its own implementation: a "cooperation process" (Section 2) and a "review process" (Section 3).

The cooperation process relies on peer interaction by allowing participants to request "dialogues" (Section 2d) with each other "regarding any issue of Competition Law procedure that is material to this Framework." This idea draws from the many bilateral international cooperation agreements that are common among the world's competition agencies. Such agreements often contain "consultations" provisions allowing for discussions between the parties on matters relating to the agreements.

CAP dialogues discussions are intended to promote better understanding of agency procedures, address possible concerns, and facilitate cooperation on adherence to the CAP principles. This cooperation process goes beyond the traditional model of ICN self-assessment tools to allow peers to discuss each other's practices and implementation of the principles. CAP dialogues will take place between agencies in line with the nature of the ICN as a network of peer agencies.¹⁷ Furthermore, dialogues are confidential and aim for "full and sympathetic consideration to the issues raised, in a mutually convenient manner."¹⁸ Reflecting the overall non-binding, voluntary nature of the ICN, Section 3g maintains that "[a]ny measures taken by the requested Participant as a result of the dialogue are within the discretion of that Participant."

The basic idea behind the review process is that agency transparency about procedures will help increase agency compliance with the principles. Borrowing an idea used by the ICN's merger and cartel working groups, Section 3a requests that CAP participants fill out a template "with information regarding its Competition Law investigation and enforcement procedures." The template requests that participants explain how their procedures meet each of the CAP principles and explain any limitations. The CAP also includes the ability to "review the implementation and functioning of the Framework," to "make proposals to modify the Principles," and to "report on general trends" with respect to its implementation.¹⁹

What does the CAP mean for ICN today?

Many, if not all, of the aspects of the CAP – identifying a set of basic procedural norms, an 'opt-in' model for willing agencies, transparency through member templates, and encouraging

experience sharing and dialogue among members – are familiar in substance and form to the ICN. However, this sells short the innovation of the CAP.

First, the CAP, complementing ICN's other recent procedural fairness work, positions the ICN as the preeminent international voice on procedural fairness in competition law enforcement. Together with the Guidance on Investigative Process and Guiding Principles for Procedural Fairness, the ICN's agency-led body of work on procedural fairness principles, practices, and purpose offers unmatched guidance for competition agencies. The ICN has created a robust package related to procedural fairness covering detailed, aspirational guidance on specific agency practices as well as basic, norm-setting principles supported by implementation tools in the CAP.

Second, the ICN's decision to sponsor the CAP is indicative of a maturing network that has earned the confidence of its membership to support closer cooperation and shared responsibility for implementation. In announcing the CAP, ICN Chair Andreas Mundt said, "The creation of the CAP, bringing together prior consensus principles and new implementation tools, illustrates the close collaboration within the international competition community and the level of support, confidence and trust placed in the ICN."²⁰ There were other options for the CAP framework, for example as a standalone multilateral framework or housed in another international entity. Based upon the ICN's prior extensive work on procedural fairness and a comfort level with the existing structure and resources dedicated to the ICN, agencies chose an ICN-sponsored model. This is a sign that ICN members view their network as a forum of choice for innovative agency cooperation initiatives, perhaps particularly so for ones that enable peer-to-peer dialogue and accountability.²¹

Conclusion

The CAP is compatible with the ICN's practical, non-binding context. It seeks to promote more transparency and agency interaction on procedural fairness principles in the hope of promoting more convergence, and thus advance the aim enshrined in the ICN's mission: "to advocate the adoption of superior standards and procedures in competition policy around the world." The CAP's inclusion of tailored transparency and cooperation tools also represents a creative and evolutionary extension of peer-to-peer cooperation and implementation within the ICN context.

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- ¹ Paul O'Brien is Counsel for International Antitrust at the U.S. Federal Trade Commission and co-chair of the ICN's Promotion and Implementation group. The views expressed are his and do not necessarily reflect those of the FTC or any individual Commissioner.
- ² See announcement at: <https://www.internationalcompetitionnetwork.org/featured/framework-for-competition-agency-procedures>. The CAP document is available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf.
- ³ Setting aside ICN's active twitter account, [@IntCompNetwork](#).
- ⁴ ICN Recommended Practices for Merger Notification and Review Procedures, RP VII (2004) and RP VIII (2003); <https://www.internationalcompetitionnetwork.org/portfolio/merger-np-recommended-practices>.
- ⁵ ICN Recommended Practices for Dominance/Substantial Market Power Analysis Pursuant to Unilateral Conduct Laws, RP IV. Transparency (2008), <https://www.internationalcompetitionnetwork.org/portfolio/dominance-substantial-market-power-analysis-pursuant-to-unilateral-conduct-laws>.
- ⁶ OECD Competition Committee, *Key Points* (2012), <http://www.oecd.org/daf/competition/mergers/50235955.pdf>.
- ⁷ OECD Competition Committee, Procedural Fairness and Transparency, <http://www.oecd.org/competition/abuse/proceduralfairnessandtransparency-2012.htm>.
- ⁸ ICN Guidance on Investigative Process, <https://www.internationalcompetitionnetwork.org/portfolio/guidance-on-investigative-process> and ICN Guiding Principles for Procedural Fairness in Competition Agency Enforcement, <https://www.internationalcompetitionnetwork.org/portfolio/guiding-principles-for-procedural-fairness>. The ICN has ongoing work to convert the Guidance on Investigative Process into "Recommended Practices," ICN's highest level of work product. This is expected to be approved at the ICN's 2019 annual conference.
- ⁹ For more on ICN's procedural fairness work, see Paul O'Brien, *Procedural Fairness: Convergence in Process*, CPI Chronicle, November 14, 2018.
- ¹⁰ See, Makan Delrahim, *Remarks on Global Antitrust Enforcement at the Council on Foreign Relations*, Washington, DC, June 1, 2018. The CAP principles were drafted and tested in a standalone parallel initiative for a multilateral framework for procedures, itself derived from OECD and ICN work.
- ¹¹ The CAP substantive principles are set out in ten sections, from 3b-k. They mirror ICN's 2018 Guiding Principles for Procedural Fairness that similarly identify conflicts of interests, non-discrimination, transparency of laws and rules, notice of investigations, transparent decisions, meaningful engagement, opportunities to respond, judicial review, confidentiality protections, and timely investigation.
- ¹² "If we want to ensure that the ICN and its work products matter, we need to make our high-quality products available to everyone and continue our efforts to promote their implementation." Statement by Andreas Mundt, ICN Chair, *Focus, inclusiveness and implementation - The ICN as a key factor for global convergence in competition law at*: <https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/steering-group>.
- ¹³ For example, to promote transparency and encourage convergence, the ICN's Merger Working Group has conducted several assessments of member agency conformity with its recommendations. See, for example, a 2017 Report on the Merger Notification and Review, available at: <https://www.internationalcompetitionnetwork.org/portfolio/np-rps-assessment-2017>.
- ¹⁴ The ICN's Operational Framework contemplates this type of 'extra-ICN' or ICN-sponsored relationship. ICN Operational Framework Section 1(vi) states: "Where the ICN reaches consensus on recommendations arising from a project, it is left to its members to decide whether and how to implement the recommendations, for example, through unilateral, bilateral or multilateral arrangements."
- ¹⁵ Both are available at: <https://www.internationalcompetitionnetwork.org/frameworks>.
- ¹⁶ CAP, Section 1d. "All ICN members and other competition agencies that are willing to adhere to the Principles and to participate in the Cooperation Process and in the Review Process are welcome and encouraged to participate and contribute."
- ¹⁷ CAP Section 2d. "Requests for dialogues are limited to Participants; participation in the Framework does not create rights in third parties to obligate or require a Participant to request a dialogue."
- ¹⁸ Id.
- ¹⁹ CAP, Section 3c.
- ²⁰ ICN Press Release, *New ICN-led Framework to Promote Fair and Effective Agency Process*, April 3, 2019, https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/CAP_PR.pdf.
- ²¹ The ICN is an agency-run, voluntary network, without a standalone secretariat nor oversight within a formal international organization. There might be a unique comfort level for such a forum when members are considering initiatives that raise implementation expectations. In the ICN, member agencies are the primary actors as well as their own oversight. The introduction to the CAP does cite the desirability of "making use of the ICN infrastructure to maximize visibility and impact while minimizing the administrative burden. . ."