Agency Procedures, Part 2: What does the CAP mean for the ICN tomorrow?

By

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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] 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

principles, and more importantly has included tools to address this. Participant-to-participant dialogues many 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 genera" – 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 template[7] 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 entiespioS336icing tie

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 –

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 le itse9 (etu 4 (lanat itsin4 (ou (im)-48e)-67 (of 4-69 (diau 4 (lanat itsin(al)-220 (fl itsll)-8 (57 (o-id