

# ICN Due Process Initiatives over the Decades and the CAP's Promise of Accountability

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Beginning in 1980, the number of countries with active competition law enforcement grew dramatically to today encompass more than 130 jurisdictions.<sup>1</sup> While there are shared fundamental principles across established and developing regimes, there are also critical differences in terms of substance, procedure, remedy, institutional framework, and other aspects of competition law enforcement. Fundamental due process rights are unfortunately not universally available, sometimes leaving companies in the crosshairs of a competition law investigation without even a basic written charge, the absence of meaningful access to enforcers' records in a matter, the absence of an opportunity to engage and defend against a charge, or even without a final written decision and a basis or venue for appeal. As a result, companies today can face considerable disruption and difficulty in attempting to defend against competition law charges across several foreign jurisdictions.

Given these challenges, increasingly, a principal focus of the International Competition Network's (ICN) program has been the promotion of global standards of due process in agency investigation and enforcement undertakings. Although some modest steps were taken with regard to due process in the first decade, the ICN's second decade has reflected increased guidance to foment agency recognition of due process principles. The continuation of the ICN's work to make due process rights universally available would be a substantial step towards convergence—and a substantial step in the correct direction. Not only is due process critical for companies navigating global operations, but jurisdictions adhering to these norms benefit from the enhanced likelihood of reaching the correct decision from a competition law perspective, and the confidence of other stakeholders in the give and take of the global sphere, which bolsters open lines of global commerce, and of course principles of international comity and respect.

The current challenge is to determine the extent to which the ICN, as a voluntary organization, can or should establish mechanisms to evaluate implementation of these norms by its members, and even non-members. Ensuring actual implementation (i.e., compliance rather than promises or aspirations) is the critical next step towards true convergence that has long been a focus of the ICN and its mission “to advocate the *adoption* of superior standards and procedures in competition policy around the world.”<sup>2</sup>

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<sup>1</sup> See European Commission, Competition Policy Brief at 1 (May 2016) (“In the past 25 years, the number of competition regimes around the world has increased from around 20 at the beginning of the 1990s to around 130 today.”), [http://ec.europa.eu/competition/publications/cpb/2016/2016\\_002\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf); see also FED. TRADE COMM’N, Competition & Consumer Protection Authorities Worldwide, <https://www.ftc.gov/policy/international/competition-consumer-protection-authorities-worldwide>.

<sup>2</sup> *About the ICN*, INT’L COMPETITION NETWORK, <https://www.internationalcompetitionnetwork.org/> (emphasis added).

## Principal ICN Due Process Undertakings to Date

As the end of the second decade of the ICN's existence approaches, a scan of the landscape reveals major accomplishments in due process initiatives over the past ten years and invites sharper focus on the next initiatives to strengthen further the ICN's contributions to international convergence around accepted antitrust principles with regard to due process norms.

The initiatives of the ICN to promote global convergence toward accepted standards of due process actually predates the body's second decade. As early as 2002, the ICN adopted *Recommended Practices for Merger Notification and Review Procedures*.<sup>3</sup> Paralleling an undertaking by the Competition Committee of the Organisation for Economic Co-operation and Development (OECD),<sup>4</sup> the ICN focused on suggesting common standards of due process covering a broad spectrum of practices. The ICN document sets forth merger review recommendations dealing with jurisdictional and parties' nexus for notification, the content of notification, review period, frequency of consultation, and independent review of staff determinations, as well as other procedural elements. The central themes are transparency and procedural fairness to the party under investigation. The document has been supplemented with subsequent working group comments.<sup>5</sup>

In our view, the most important ICN contribution to the convergence of due process principles is the *ICN Guidance on Investigative Process* developed by an investigative practices subgroup of the Agency Effectiveness Working Group and approved by the ICN at the 2015 conference in Sydney.<sup>6</sup>

This document promotes a broad set of basic principles underlying the affordance of due process to a party in the investigative stage of agency action. The overriding themes are transparency and meaningful engagement in the interface between the agency investigatory staff and the party involved in the inquiry. In particular, the guidance document encourages notification to the party of the legal and factual basis for agency concern, consultation at appropriate intervals (including a discussion of the relevant evidence), and a working description of supporting theory. In addition, the guidance paper endorses the disclosure of evidence to the party at the time the allegations of violation are made and advocates a review of the matter by a source independent of the investigative staff.

The issue of confidential treatment of materials being ruled on by the agency is also addressed. The document includes a suggestion of procedures for making such materials available under appropriate safeguards. This process is set forth, however, only where the agency has made a determination regarding the disclosure of confidential materials. There does not appear to be any recommendation that such disclosure procedures be put in place. Finally, unlike the designation of the merger notification and procedure recommended practices, the extent of the strength of the ICN's advocacy of the initial guidance document was unclear. Additionally, the document

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<sup>3</sup> INT'L COMPETITION NETWORK, ICN RECOMMENDED PRACTICES FOR MERGER NOTIFICATION AND REVIEW PROCEDURES (2018), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf).

<sup>4</sup> The OECD Competition Committee undertook a project in parallel to the ICN's, which resulted in a recommendation of the OECD Council. See OECD, RECOMMENDATION OF THE OECD COUNCIL ON MERGER REVIEW, C(2005)34-C/M(2005)7/PROV (2005), <https://www.oecd.org/daf/competition/mergers/40537528.pdf>.

<sup>5</sup> While the ICN's *Recommended Practices for Merger Notification and Review Procedures* was originally released in September 2002, it continues to be strengthened with the addition of new practices and supplemental commentary to original practices. The most recent revisions were completed in April 2018.

<sup>6</sup> INT'L COMPETITION NETWORK, ICN GUIDANCE ON INVESTIGATIVE PROCESS (2018), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG\\_Guidance\\_InvestigativeProcess.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_Guidance_InvestigativeProcess.pdf). The 2015 document was revised in 2018.

itself seems to acknowledge, perhaps excessively, the fact that each agency may be guided by its own statutory and procedural instruments that could appropriately impair its adherence to the guidance.

The guidance document has received further attention from the working group and the ICN Steering Committee. In March 2018 at the Annual Conference in New Delhi, a set of guiding principles was adopted that, among other elements, strengthened the advocacy of transparency, including timely disclosure of agency concerns, communication on central issues at key points in the process, the opportunity to respond to adverse findings, and independent review.<sup>7</sup> At the same time, the underlying document was supplemented by issue-by-issue commentary designed to further illuminate the specific points.<sup>8</sup>

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Recently, the force of the guidance document was strengthened by it being designated as “recommended practices.”<sup>9</sup> As a result, it now has the mantle of the stronger statement of ICN endorsements. Although the guidance on investigative process is an important contribution to the ICN's second-decade accomplishments, there remains the question of the extent to which the recommendations are followed or any degree of accountability in that regard.

### Learning from the Work of Other Organizations During the ICN's Second Decade

The work of the ICN going forward could be complemented by and draw support from the focus on due process in antitrust enforcement proceedings by other organizations, both governmental and private sector, during the ICN's second decade. Several examples are noteworthy.

The most comprehensive international undertaking relating to due process has been the work of the OECD Competition Committee. Working Party 3 of the Committee conducted three roundtables on the topic in 2010 and 2011. These proceedings resulted in a report, *Procedural Fairness and Transparency—Key Points*, issued by the OECD in April 2012.<sup>10</sup> The report described in detail the roundtable discussions, with contributions by national agency presentations. According to the report, the central theme of the roundtables was a concern acknowledging the need for transparency and procedural fairness in agency enforcement.

National agency contributions are cited across the due process report landscape, including transparency of agency concerns, access to information and documents, right of response, and judicial review. Although not designed to characterize agency efforts, the report does provide a basis for evaluation of contributing agencies' self-described adherence to due process principles. Significantly, the report concludes that “work [on due process] is never done.”<sup>11</sup> Subsequently, the OECD Competition Committee has sponsored several sessions focusing on due process as an aspect of a broader discussion.<sup>12</sup>

<sup>7</sup> INT'L COMPETITION NETWORK, ICN GUIDING PRINCIPLES FOR PROCEDURAL FAIRNESS IN COMPETITION AGENCY ENFORCEMENT (2018), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG\\_GuidingPrinciples\\_ProFairness.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidingPrinciples_ProFairness.pdf).

<sup>8</sup> INT'L COMPETITION NETWORK, ANNOTATED ICN GUIDANCE ON INVESTIGATIVE PROCESS (2018), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG\\_GuidanceAnnotated\\_InvestigativeProcess.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_GuidanceAnnotated_InvestigativeProcess.pdf).

<sup>9</sup> INT'L COMPETITION NETWORK, ICN RECOMMENDED PRACTICES FOR INVESTIGATIVE PROCESS (2019), <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/05/RPs-Investigative-Process.pdf>.

<sup>10</sup> OECD, PROCEDURAL FAIRNESS AND TRANSPARENCY—KEY POINTS (2012), <https://www.oecd.org/daf/competition/mergers/50235955.pdf>.

<sup>11</sup> *Id.* at 7.

<sup>12</sup> See, e.g., *Access to the Case File and Protection of Confidential Information*, OECD, <https://www.oecd.org/daf/competition/access-to-case-file-and-protection-of-confidential-information.htm>; *Treatment of Legally Privileged Information in Competition Proceedings*, OECD, <https://www.oecd.org/daf/competition/treatment-of-legally-privileged-information-in-competition-proceedings.htm>; and *Investigative Powers in Practice*, OECD, <https://www.oecd.org/daf/competition/investigative-powers-in-practice.htm>.

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The U.S. Chamber of Commerce sponsored a private sector study of competition policy and practice in the international context.<sup>13</sup> The group's report, issued in March 2017, covers a wide range of issues relating to antitrust enforcement having international dimensions, including the intersection between trade and competition. Regarding due process, the report recommends that intergovernmental organizations, specifically the OECD, undertake a peer review of national agency adherence to accepted global standards of due process, notably, not necessarily with the consent of the subject agency.<sup>14</sup> The expert group also recommends that OECD adopt a due process code.<sup>15</sup>

In addition, the U.S. Chamber has conducted four practitioner surveys relating to due process.<sup>16</sup> One, in particular, seeks to obtain an assessment of national agency compliance with the ICN's investigatory process guidance document.<sup>17</sup> The International Chamber of Commerce (ICC) Commission on Competition also issued a document, *Effective Procedural Safeguards for Competition Law Enforcement Proceedings*, in June 2017.<sup>18</sup> The submission consists of guiding principles to promote due process with accompanying clarification. The ICC's report calls for procedures that may exceed those contained in the ICN guidance document. Salient among these are a recommendation for nearly unlimited access to a complete case file, including exculpatory materials,<sup>19</sup> and an admonition to balance claims of confidentiality against the rights of the investigated party to the opportunity for an informed defense.<sup>20</sup>

The most direct effort to target agency adherence to due process principles was undertaken most recently by the Antitrust Law Section of the American Bar Association. A task force of the Section, the Procedural Transparency Task Force, assessed the extent to which specific agencies, selected with a new geographic diversity, had implemented procedures in harmony with the Section's International Task Force's 2015 *Best Practices for Antitrust Procedure*.<sup>21</sup> The 2019 procedural transparency report identifies the relative standing of specific national agencies with respect to their adherence to the specific elements of due process set forth in the Section's 2015 *Best Practices*.<sup>22</sup>

The high degree of agency and private sector attention to the topic of due process in competition agency investigations has resulted in a clear framework for international best practices. As the ICN's second decade draws to a close, it would be desirable for the organization to take into

<sup>13</sup> U.S. CHAMBER OF COMMERCE, INTERNATIONAL COMPETITION POLICY EXPERT GROUP—REPORT AND RECOMMENDATIONS (Mar. 2017), [https://www.uschamber.com/sites/default/files/icpeg\\_recommendations\\_and\\_report.pdf](https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf).

<sup>14</sup> *Id.* at 15.

<sup>15</sup> *Id.*

<sup>16</sup> See *Competition Policy and Antitrust*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/international/global-regulatory-cooperation/center-global-regulatory-cooperation/competition-policy>.

<sup>17</sup> U.S. CHAMBER OF COMMERCE, ADHERENCE TO ICN GUIDANCE ON INVESTIGATIVE PROCESS: A PRACTITIONER SURVEY (Apr. 2017), [https://www.uschamber.com/sites/default/files/023172\\_adherencetoicnguidancereportfn.pdf](https://www.uschamber.com/sites/default/files/023172_adherencetoicnguidancereportfn.pdf).

<sup>18</sup> INT'L CHAMBER OF COMMERCE, EFFECTIVE PROCEDURAL SAFEGUARDS FOR COMPETITION LAW ENFORCEMENT PROCEEDINGS (June 2017), <https://iccwbo.org/content/uploads/sites/3/2017/07/ICC-Due-Process-Best-Practices-2017.pdf>.

<sup>19</sup> *Id.* at 5.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> AM. BAR ASS'N, SECTION OF ANTITRUST LAW, BEST PRACTICES FOR ANTITRUST PROCEDURE (May 22, 2015), [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/at\\_comments\\_bestprac\\_20150522.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_bestprac_20150522.pdf).

<sup>22</sup> AM. BAR ASS'N, SECTION OF ANTITRUST LAW, ASSESSMENT OF GLOBAL COMPETITION AGENCY IMPLEMENTATION OF ABA BEST PRACTICES FOR ANTITRUST PROCEDURE (Apr. 29, 2019), [https://www.americanbar.org/content/dam/aba/administrative/antitrust\\_law/sal-procedural-transparency-2019-04-29.pdf](https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/sal-procedural-transparency-2019-04-29.pdf).

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account the work and recommendations of these bodies in designing the next steps toward developing and encouraging acceptance and adoption of sound principles of procedural fairness. Each of them suggests some mechanism to enhance adoption of such principles and accountability of their implementation in practice. The ICN's newest adopted program, *Framework for Competition Agency Procedures* (CAP),<sup>23</sup> may provide a vehicle for this end that can draw on the work of those other bodies.

### **The ICN's Third Decade Spent Fostering the CAP and Leading It To Harness Its Future Potential**

The ICN's CAP grew out of a U.S. Department of Justice's Antitrust Division initiative announced in June 2018: the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP).<sup>24</sup> At the time, then DOJ's Assistant Attorney General for Antitrust, Makan Delrahim, stressed that "[r]ather than simply encourage good behavior, the time is now for us to embrace meaningful mechanisms that encourage *compliance*."<sup>25</sup> Fundamentally, the goal of the MFP is to recognize and incorporate the prior work done by competition regimes and private organizations—especially with respect to due process norms—and go one step further to focus on actual implementation.

Following multiple discussions among international competition stakeholders, the DOJ agreed to submit its MFP to the ICN "to take advantage of existing institutions and to reduce administrative burdens."<sup>26</sup> From there, the ICN announced in early April 2019 that it was creating the CAP, rooted in the MFP and lauding the prior work on which it builds.<sup>27</sup> After agency consideration and approval by the ICN's Steering Group of 20 members, the CAP opened for registration and went into effect in May 2019.<sup>28</sup> The CAP had its inaugural meeting in June 2019 at which the first-term Co-Chairs were confirmed as the Australian Competition and Consumer Commission, the German Bundeskartellamt, and, fittingly given the CAP's origins, the DOJ.<sup>29</sup> We understand the CAP currently has over 70 signatories, signaling widespread support.<sup>30</sup>

The challenge now is how to ensure that the CAP's signatories follow those fundamental pillars of due process in practice. To be sure, the CAP's somewhat unique structure and envisioned

<sup>23</sup> INT'L COMPETITION NETWORK, ICN FRAMEWORK ON COMPETITION AGENCY PROCEDURES (2019), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN\\_CAP.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf) [hereinafter CAP FRAMEWORK].

<sup>24</sup> Makan Delrahim, Fresh Thinking on Procedural Fairness: A Multilateral Framework on Procedures in Antitrust Enforcement, Address Before the Council on Foreign Relations (June 1, 2018), <https://www.justice.gov/opa/speech/file/1067582/download> [hereinafter MFP Announcement].

<sup>25</sup> *Id.* at 3 (emphasis added).

<sup>26</sup> Press Release, U.S. Dep't of Justice, New Multilateral Framework on Procedures Approved by the International Competition Network (Apr. 5, 2019), <https://www.justice.gov/opa/pr/new-multilateral-framework-procedures-approved-international-competition-network> [hereinafter DOJ MFP Press Release].

<sup>27</sup> Press Release, Int'l Competition Network, New ICN-led Framework to Promote Fair and Effective Agency Process (Apr. 3, 2019), [https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/CAP\\_PR.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/CAP_PR.pdf).

<sup>28</sup> Press Release, Int'l Competition Network, ICN's 18th Annual Conference Concluded Today in Cartagena Colombia (May 17, 2019), <https://www.internationalcompetitionnetwork.org/featured/2019-annual-conference-press-release/>.

<sup>29</sup> Press Release, Int'l Competition Network, Participants of the ICN Framework for Competition Agency Procedures Hold Inaugural Meeting (June 7, 2019), <https://www.internationalcompetitionnetwork.org/news/icn-framework-for-competition-agency-procedures-update/>.

<sup>30</sup> Int'l Competition Network, ICN CAP Participants (as of Aug. 2019), <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/08/CAPparticipants.pdf>.

mechanisms enable it to bring about such compliance if its signatories take full advantage, work cooperatively and transparently, and consider some further advancements down the line.

First, the CAP is set up as one of only three opt-in frameworks within the ICN. The ICN functions as an administrative host, or as one commentator has described it, a “sponsor,”<sup>31</sup> rather than an “owner” of the CAP. Additionally, CAP participation is open to both ICN members and non-members.<sup>32</sup> In other words, the CAP is an active choice for each competition regime. An agency’s being a signatory signals that agency’s intention to adhere to the principles laid out in the CAP;<sup>33</sup> participants are publicly listed<sup>34</sup> and must submit a template,<sup>35</sup> which is also publicly posted by the ICN, demonstrating endorsement of the CAP program.

Second, the CAP has two major components: (1) an annex of fundamental, consensus principles for sound agency procedures,<sup>36</sup> and (2) dedicated implementation tools—a “cooperation process” and a “review process”<sup>37</sup>—to help promote use of the principles.

Unsurprisingly, the consensus principles are rooted in experience gathered to date and reflect the critical nature of due process in any type of proceeding. By way of example, in the United States, due process protections are deeply ingrained in U.S. jurisprudence. They originate in the Fifth Amendment to the U.S. Constitution, which guarantees that “[n]o person shall be . . . deprived of life, liberty, or property, without due process of law.”<sup>38</sup> Due process is meant to protect against abusive, arbitrary action by the government.<sup>39</sup> Thus, procedural due process requirements in the U.S. include notice of the charges brought and an opportunity to be heard,<sup>40</sup> a timely hearing,<sup>41</sup> that the hearing be conducted before an impartial arbiter,<sup>42</sup> an opportunity to confront and cross

<sup>31</sup> Paul O’Brien, *ICN’s Framework for Competition Agency Procedures, Part 1: What Does the CAP Mean for the ICN Today?* 3 (Apr. 17, 2019), [https://www.ftc.gov/system/files/attachments/key-speeches-presentations/obrien\\_-\\_icn\\_column\\_4-19.pdf](https://www.ftc.gov/system/files/attachments/key-speeches-presentations/obrien_-_icn_column_4-19.pdf).

<sup>32</sup> CAP FRAMEWORK, *supra* note 23, § 1(b).

<sup>33</sup> *Id.* § 1(i).

<sup>34</sup> *Id.* § 1(h).

<sup>35</sup> *Id.* §§ 3(a–b).

<sup>36</sup> *Id.* at 4–7.

<sup>37</sup> *Id.* at 2–3.

<sup>38</sup> U.S. CONST., amend. V.

<sup>39</sup> *Carey v. Phipus*, 435 U.S. 247, 259 (1978). *See also Mathews v. Eldridge*, 424 U.S. 319, 344 (1976) (“[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases.”).

<sup>40</sup> *See Mullane v. Cent. Hanover Bank Tr. Co.*, 339 U.S. 306, 314 (1950) (“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.”).

<sup>41</sup> *See Mathews*, 424 U.S. at 333 (“[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest.”); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (explaining that notice and a hearing “must be granted at a meaningful time and in a meaningful manner”); *Baldwin v. Hale*, 68 U.S. 223, 233 (1863) (“Parties whose rights are to be affected are entitled to be heard.”).

<sup>42</sup> *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970) (“an impartial decision maker is essential”); *Marshall v. Jerrico*, 446 U.S. 238, 242 (1980) (“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.”) (internal citations omitted).

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examine witnesses,<sup>43</sup> access to the evidence in the case,<sup>44</sup> and a decision on the record.<sup>45</sup> Similarly, the CAP's provisions call for non-discrimination, transparency and predictability, timely investigative notice, timely resolution, confidentiality, impartiality, access to information and opportunity to defend, representation by legal counsel, written decisions, and independent review.<sup>46</sup>

A major challenge to the CAP going forward is whether signatories will avail themselves of the agency-by-agency limitations the CAP allows and if so, to what degree. Rather than requiring all or nothing from its members, the CAP is non-binding and flexible to a degree. Members can elect limitations on the CAP due process provisions, which must be outlined in the competition regime's template.<sup>47</sup> This provision perhaps aims to attract CAP member signatories who are interested in participating but not yet fully compliant. Alternatively, perhaps it allows for some modifications to account for cultural relativism so that differences in various competition regimes' structures, proceedings, or legal systems in which they operate are respected.

Notably, to date, 64 competition agencies have provided templates for public review.<sup>48</sup> This is an area where signatories can do more in the future to foster cooperation toward full compliance; they could consider mandating a timeframe in which signatories must certify full compliance after joining or a process that requires active discussion and a joint membership decision allowing the rare exception if a competition regime insists on any permanent limitations.

With respect to the CAP's "cooperation process" and "review process," we are encouraged by the more prominent and on-demand accountability mechanisms. In this manner, the CAP embodies the approach of the MFP that it is critical that the institution not only provide guidance but also provide a mechanism by which to measure and evaluate the extent to which nations implement due process norms.

The cooperation process calls for ad hoc agency-to-agency dialogue "regarding any issue of Competition Law procedure that is material" to the CAP.<sup>49</sup> A point of clarification from which the CAP could benefit involves the inherent tension between its mandate that "[p]articipants will discuss the issues raised in *general terms*" and the suggestion that "[t]o facilitate the dialogue, Participants are encouraged to discuss procedural issues related to a *relevant* Investigation or Enforcement Proceeding."<sup>50</sup> We are hopeful that participants will avail themselves of opportunities to discuss specific proceedings and potential questions raised in conjunction with these proceedings to drive progress through concrete examples and applications of due process norms. And while the CAP makes dialogue between participants confidential unless otherwise agreed by the parties themselves, we are hopeful that the CAP will progress to require public disclosure of such dialogue or at the very least any takeaways or outcome. Peer review is a critically important factor

<sup>43</sup> *Goldberg*, 397 U.S. at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

<sup>44</sup> The Supreme Court has suggested such access must be granted as a matter of course. *See* *Greene v. McElroy*, 360 U.S. 474, 496 (1959) ("[W]here governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.").

<sup>45</sup> *Goldberg*, 397 U.S. at 271 ("[T]he decision maker should state the reasons for his determination and indicate the evidence he relied on.").

<sup>46</sup> CAP FRAMEWORK, *supra* note 23, at 4–7.

<sup>47</sup> *Id.* §§ 1(j), 3(a).

<sup>48</sup> CAP Templates, INT'L COMPETITION NETWORK, <https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/cap-templates/>. The Federal Trade Commission and DOJ submitted separate templates.

<sup>49</sup> CAP FRAMEWORK, *supra* note 23, § 2(d).

<sup>50</sup> *Id.* § 2(f) (emphasis added).

in bringing about change. It “create[s] the opportunity for reflecting on decisions that may help enhance reputational standings among peers.”<sup>51</sup>

This type of interaction is already envisioned by the Federal Trade Commission and DOJ’s joint 2017 Antitrust Guidelines for International Enforcement and Cooperation, which calls for more active U.S. agency guidance to foment crucial convergence in the international antitrust arena on due process: “An Agency may continue that cooperation when either it or the foreign authority has closed its investigation. The Agencies may also engage in *general discussions* with foreign authorities on matters in which only one authority has an open investigation.”<sup>52</sup>

The “review process” itself calls on the CAP participants, in addition to submitting the previously discussed templates, to engage in a process of self-assessment and policing. This provision is laudable but could also benefit from future modification. Currently, it calls for a session for review of implementation and functioning of the CAP Framework “at least every four years” and envisions that “[t]he Framework may report on general trends, but will not identify individual Participants without consent.”<sup>53</sup> What the competition law forum needs to promote real convergence is a mechanism that can shine light on the extent to which nations implement due process norms. In the future the review process should consider introducing a measure of public accountability, which could take the international antitrust community further along the path of this important and promising direction.

## Conclusion

The MFP’s major promise—the distinguishing feature that took the proposal beyond what has been accomplished to date—was its envisioned more prominent and regular accountability mechanisms. Then AAG Delrahim lauded the CAP as carrying on this legacy, being “equivalent in all respects to the principles of the MFP that was originally proposed by the Antitrust Division. By combining strong substantive principles with meaningful review mechanisms, it goes well beyond anything competition agencies have ever done before.”<sup>54</sup> We urge the ICN and the CAP’s signatories to heed these words as the program is tested and evolves over the ICN’s next decade. The ICN has a timely opportunity to cement its role as a leadership forum for a much-welcomed step forward in cementing due process in competition proceedings. The crux of actual rather than aspirational convergence, as emphasized by then Deputy AAG Roger Alford, is that “[t]o retain the confidence of both the business community governed by [a competition regime’s] laws and the public [that competition enforcers] protect, [agencies] must be willing to expose [their] policies and practices to aggressive scrutiny and challenge.”<sup>55</sup> It bears repeating: sunlight (i.e., external transparency) is the best disinfectant. ●

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<sup>51</sup> MFP Announcement, *supra* note 24, at 4.

<sup>52</sup> Fed. Trade Comm’n & Dep’t of Justice, Antitrust Guidelines for International Enforcement and Cooperation § 5 n.138 (2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1049863/international\\_guidelines\\_2017.pdf](https://www.ftc.gov/system/files/documents/public_statements/1049863/international_guidelines_2017.pdf) (emphasis added).

<sup>53</sup> CAP FRAMEWORK, *supra* note 23, § 3(c).

<sup>54</sup> DOJ MFP Press Release, *supra* note 26.

<sup>55</sup> Roger Alford, Charting a Straight Course: Promoting Transparency and Procedural Fairness in Competition Enforcement, Address Before the 6th China Competition Policy Forum 8 (Aug. 30, 2017), <https://www.justice.gov/opa/speech/file/994671/download>.