



The ICN Framework for Competition Agency Procedures (CAP) Report 2021

Presented at the ICN Steering Group

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International Competition Network (ICN) Framework for Competition Agency Procedures (CAP)

2021 Report

Introduction

Since its introduction in 2019, the International Competition Network (ICN) Framework for Competition Agency Procedures (CAP) has provided members with a framework of key principles and best practices that strengthen procedural fairness in competition law enforcement.

The CAP template is a useful tool for members to review when updating their own procedures, as well as a good resource for the private bar and members of the public seeking to understand competition enforcement in any particular jurisdiction. There are currently 73 CAP members, including the three Co-chairs tasked by the ICN Steering Group with implementing the initiative - the Australian Competition and Consumer Commission (ACCC), Germany's Bundeskartellamt, and the United States Department of Justice (DoJ), Antitrust Division.

The benefits of the CAP are numerous and include:

- building credibility and trust with business stakeholders
- creating opportunities for capacity building
- improving interactions with the public
- enhancing Guidelines and tools to promote fairer investigative processes
- developing new procedures and providing clarity for new regulations

This report highlights the high-level themes observed through analysis of completed CAP templates and reflects on the individual experiences of a sample of CAP members about the benefits of adhering to the framework.

Our analysis of the templates shows similarity between agencies on a number of the CAP principles. In particular, agencies most often had accessible and clear guidelines on:

- treatment of confidential information
- guidelines to prevent conflict of interest for decision-makers
- legal privilege
- procedures for proceedings or investigations, particularly for cartels
- merger control process
- leniency

The templates give insight into the many ways that competition agencies are driving transparency and public awareness of their activities – with several agencies identifying “next generation” procedures and guidance that exceed the basic CAP principles.

This report also highlights interviews that took place during the ICN CAP Participant Meeting in October 2020 with fellow ICN CAP participants and provides more detail about the benefits of being part of the ICN CAP.

Agencies wishing to become ICN CAP members can do so by talking to the ICN CAP Co-chairs, completing the [CAP registration form](#), and completing an [ICN CAP template](#).

CAP Overview

What is the ICN Framework on Competition Agency Procedures (ICN CAP)?

The ICN CAP is a non-binding, opt-in framework. It makes use of the ICN infrastructure to maximize visibility and impact while minimizing the administrative burden for participants that operate in different legal regimes and enforcement systems with different resource constraints. The ICN CAP promotes agreement among competition agencies worldwide on fundamental procedural norms. The Multilateral Framework for Procedures project, launched by the US Department of Justice in 2018, was the starting point for what is now the ICN CAP.

The ICN CAP rests on two pillars: the first pillar is a catalogue of fundamental, consensus principles for fair and effective agency procedures that reflect the broad consensus within the global competition community. The principles address: non-discrimination, transparency, notice of investigations, timely resolution, confidentiality protections, conflicts of interest, opportunity to defend, representation, written decisions, and judicial review.¹

The second pillar of the ICN CAP consists of two processes: the “CAP Cooperation Process,” which facilitates a dialogue between participating agencies, and the “CAP Review Process,” which enhances transparency about the rules governing participants’ investigation and enforcement procedures.

The ICN CAP template is the practical implementation tool for the CAP. Participants each submit CAP templates, outlining how their agencies adhere to each of the CAP principles. The templates allow participants to share and explain important features of their systems, including links and other references to related materials such as legislation, rules, regulations, and guidelines. The CAP templates are a useful resource for agencies to consult when they would like to gain a quick overview of other agencies’ procedures, benchmark with peer agencies, and develop new processes and procedures.

Through the two pillars and the template, the CAP provides a framework for agencies to affirm the importance of the CAP principles, to confer with other jurisdictions, and to illustrate how their regulations and guidelines adhere to those principles.

The ICN Steering Group approved the ICN CAP on 3 April 2019. It was then presented to ICN members at the 2019 ICN Annual Conference in Cartagena with a plenary session involving:

- ICN Steering Group Chair and the two Vice Chairs at the time
- European Commission DG Competition
- Germany’s Bundeskartellamt
- Japan Fair Trade Commission
- Federal Economic Competition Commission of Mexico
- Federal Antimonopoly Service of the Russian Federation
- Competition Commission of South Africa
- United States Department of Justice.

¹ https://www.internationalcompetitionnetwork.org/wp-content/uploads/2019/04/ICN_CAP.pdf

Who can be part of the ICN CAP?

The ICN CAP is open to all national, multinational, or customs territory competition agencies – regardless of status as ICN members – that are willing to adhere to the substantive Principles on procedural fairness set forth in the ICN CAP and to participate in the Cooperation Process and the Review Process. Participants join the ICN CAP by registering their assent via designating a point of contact or liaison and submitting an ICN CAP Template no later than six months from adherence to the framework.

The utility of the CAP as a tool to drive transparency grows with each additional member, as each new member's template increases the amount of information available to governments, businesses, and the broader public regarding the fundamentals of competition enforcement. The ICN CAP Co-chairs will continue to focus on increasing the CAP's already promising membership.

What is the ICN CAP governance structure?

The CAP is led by three Co-chairs. The inaugural and current ICN CAP Co-chairs are:

- Australian Competition and Consumer Commission
- Bundeskartellamt (Germany)
- United States Department of Justice, Antitrust Division.

The CAP Co-chairs are expected to serve three-year terms.

Work to Date

Since the inception of the ICN CAP, the Co-chairs actively engaged with agencies, both in group discussions and individually, and discussed the CAP principles and promoted the benefits of the CAP. Recent work includes:

- Sessions at ICN events such as the ICN Cartel Workshop 2019 CAP session. This session focused on building cartel investigative practices on fundamental principles of fair and effective procedures, as well as the relevance of the ICN CAP for international cartel investigations.
- The ICN CAP Participant Meeting on 20 October 2020, which illustrated "Participant Perspectives" on the CAP. The webinar featured highlights from the templates submitted by participants and shared perspectives on how the CAP agreement and completion of templates have provided opportunities for self-assessment, regional dialogue, and more productive engagement with private parties. Speakers included representatives from the Australian Competition and Consumer Commission, the Japan Fair Trade Commission, the Icelandic Competition Authority, the Competition Authority of Kenya, the Federal Economic Competition Commission of Mexico and an NGA and former agency head from Canada.
- The dedicated [ICN CAP webpage](#) on the ICN website, which includes information about the CAP Framework, lists all CAP participants, and includes all completed CAP templates, and the CAP work plan, the latter of which provides further details regarding different work streams of the CAP and the CAP's strategic mission.
- The ICN CAP Co-chairs also analysed CAP templates from all 73 current CAP members to identify the common themes of the templates and to better understand how different agencies implemented the CAP principles in their own regulatory frameworks.

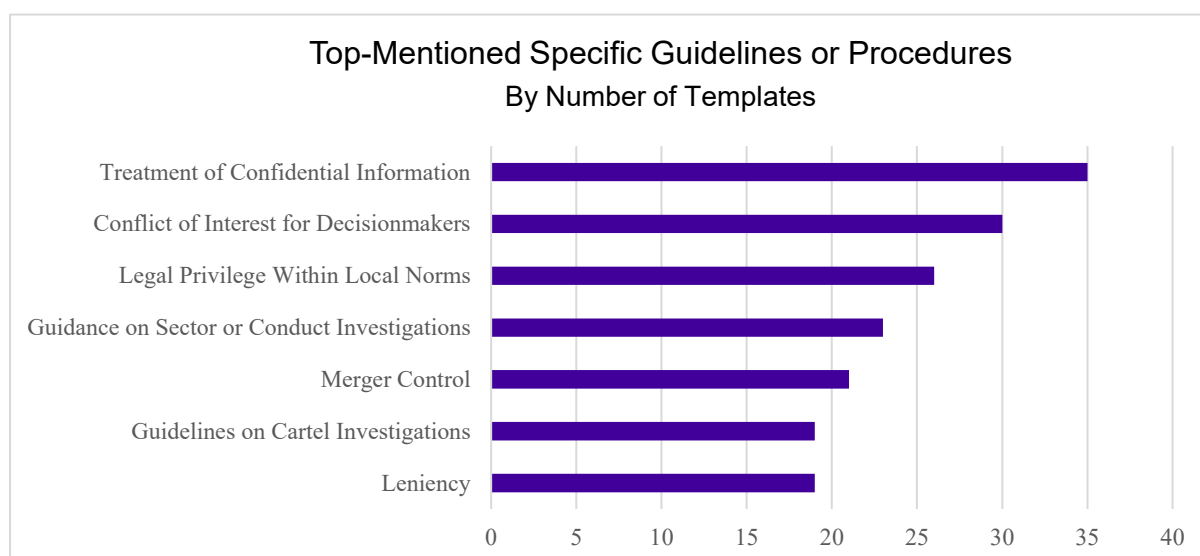
Common themes of CAP templates

In the first year of CAP, there was a strong response from participating agencies submitting templates. To date, approximately 65 participant agencies have completed templates, which are published on the ICN website.² These templates highlight the important features of each participating agency's procedures and include useful information on the agencies' legislation, regulations, and practices.

CAP Co-chairs analysed the templates and observed that agencies identified specific procedures and guidelines (as opposed to addressing the principle more generally) most often in the following areas:

- treatment of confidential information
- guidelines to prevent conflict of interest for decision-makers
- legal privilege within local norms
- guidance on sector or conduct investigations
- merger control
- guidelines on cartel investigations
- leniency.

These results indicate a high level of similarity between agencies across several CAP principles.³ The Co-chairs also observed that no agency completing a template took reservations on any CAP principle.



Several agencies' templates identified "next generation" procedures and guidance that exceeded the basic CAP principles laid out in the framework and in the template. They included agency guidance or procedures relating to competitor collaborations, expanding

² <https://www.internationalcompetitionnetwork.org/frameworks/competition-agency-procedures/cap-templates/>.

³ Because of variation in the level of specificity among completed templates, this data should be viewed as directional only. There likely are more agencies who have specific guidelines or procedures in these areas.

recognition of privilege, compliance, gun jumping, merger remedies, vertical restraints, and vertical merger guidelines.

In addition, the templates give insight to the many ways that competition agencies are driving transparency and public awareness of their activities. Agencies reported a variety of ways by which they engaged the public, including by issuing case summaries on their websites, publishing annual agency reports, using agency social media accounts, developing searchable databases of public decisions, and posting key documents to their websites in multiple languages.

Finally, the CAP Co-chairs noted that the template responses on some CAP principles varied widely across agencies with regard to the specificity of the responses (i.e. whether the response cited specific agency policies, procedures, or guidelines with respect to a CAP principle). These areas of wide variation may suggest points of focus for future CAP-related programming to explore the ways that agencies approach these CAP principles and promote productive discussion among CAP members. These areas relate to the scope of investigatory requests, the opportunity of parties to present views via counsel, and guidelines on privilege.

Benefits of the ICN CAP template for agencies

The increasing number of agencies signing onto the CAP illustrates that participants recognise a number of benefits that the CAP provides to agencies to improve transparency and ensure procedural fairness in competition law enforcement.

Discussions with different panel members during the CAP session at the 2020 ICN Annual Conference revealed a number of different benefits that the CAP provides agencies and non-government advisors.

The hosts of the CAP Participant Meeting at the 2020 Annual Conference ran a live survey for the audience to collect views on their use of the CAP

Benefit: Credibility and trust with business stakeholders

John Pecman, former Commissioner of Competition in Canada, provided his thoughts on how the CAP Framework can enhance the quality of agency transparency and interactions between private parties and agencies.

John, given your experience in both the public and private spheres, how can the CAP framework benefit private parties and agencies in their interactions during investigations and contribute to enhancing robust information exchange?

The CAP Framework enhances the quality of agency transparency and fairness by making it a more trusted institution in the eyes of its peers and stakeholders. The CAP Framework helps to increase predictability between private parties and agencies by providing due process principles for private parties and agencies to follow, which means private parties and agencies interact in good faith.

What do you view as the value and drawbacks of procedural fairness and transparency measures from a competition agency perspective, contrasted with views from the business community?

To comply with competition laws, businesses need to understand and accept their objectives and the processes by which the laws will be applied. Agency commitments to transparency and predictability will provide businesses greater assurances about fairness in the application of the laws.

How does the CAP help the business community?

Businesses seek certainty. Companies may choose to fight the agency rather than cooperate with it if they believe they are not being treated justly on either process or the substance of an investigation.

The robust information exchange framework contained in the CAP outlines procedures for information exchange between private parties and agencies, providing comfort to businesses involved in investigations.

How does the CAP assist legal practitioners and non-government advisors?

The CAP Framework templates provide legal practitioners with a unique overview of most of the laws and guidance pertaining to procedural safeguards for each of the signatory agencies.

Templates from ICN CAP members can save practitioners hours of research in identifying the applicable laws and rules on procedure, which in turn enables them to better counsel their clients and improve compliance.

Cross-border cooperation between agencies is a particular area of concern in the business community due to the perceived risk of unauthorized disclosure of confidential information during investigations or merger reviews.

Benefit: Capacity building

Sergio López Rodríguez, former Head of Investigative Authority at Mexico's Federal Economic Competition Commission (COFECE), spoke about how the CAP helped with young agency capacity building through the ICN Bridging Project.

Sergio, can you tell us a bit about COFECE's involvement in the ICN Bridging Project?

The ICN Bridging Project is the most recent ICN initiative aimed at encouraging the further involvement of Young and Small agencies in the network. The Project began in December 2019 and seeks to facilitate partnerships between Young and Small agencies and more experienced members for peer-to-peer learning and experience sharing regarding the ICN.

How are partnerships between Young and Small agencies and more experienced agencies chosen?

Partnerships are tailored to the Young and Small agency's needs and their previous engagement with the ICN. There are diverse goals and expectations, which can range from getting to know the basics of the ICN to the understanding of more specific work products and frameworks, like the ICN CAP.

As part of the ICN Bridging Project, COFECE is working with Costa Rica's Commission to Promote Competition (COPROCOM), Ecuador's Superintendent for the Control of Market Power, and the Dominican Republic's National Commission for the Defense of Competition

to help them get more out of their engagement with the ICN. One of the aspects we reviewed with these agencies was the ICN CAP from a general perspective. This meant explaining the purpose of the Framework, as well as its relevance and usefulness for ICN members.

How has COFECE tailored its advice to different Young and Small agencies?

Since Costa Rica and Ecuador were already CAP members, the assistance given by COFECE focused on explaining to them how they can apply its principles for the benefit of their agencies.

In the case of the Dominican Republic, which has yet to join the CAP, COFECE focused on explaining the basics of the Framework and how to adhere to its principles. It also encouraged them to participate in working group calls and reviewing ICN work products in order to learn more about the ICN.

In your experience, how have Young and Small agencies used the CAP principles?

In our view, the CAP has been highly influential in shaping Young and Small agency approaches to procedural fairness and transparency. For example, COPROCOM found the CAP principles and templates relevant for improving its processes and, as a result, considered the CAP principles when drafting a new by-law.

When COFECE worked with COPROCOM, it suggested using the CAP to align the draft document with its principles, as well as consider reviewing other ICN resources for incorporation into its best international practices.

What are some of the next steps of the ICN Bridging Project for the Young and Small agencies?

One of the next steps for the ICN Bridging Project is to promote more spaces where participants can discuss experiences and general impressions regarding it – we hope that the experience of COPROCOM and the use of the CAP promotes the greater use of this framework amongst Young and Small agencies.

At this stage of the implementation of the project, assistance provided by COFECE has focused on explaining general aspects of the CAP Framework.

A second stage of the Project could be to share more practical experiences COFECE has had with the CAP Framework so that Young and Small Agencies have examples illustrating how to move from theory to practice. The second stage could invite other ICN Bridging Project Steering Group members to promote the use of the ICN CAP with their respective partners.

Benefit: improving interactions with the public

Gudmundur Haukur Gudmundsson, Division Manager and International Coordinator from the Icelandic Competition Authority (ICA), spoke about how the CAP template has helped in dealing with the public and business community.

Gudmundur, could you please give us a bit of context about the ICA – how old is it and is Iceland a member of any regional networks?

The ICA, in its current form, was founded in 2005 and enforces the Competition Act 2005. The role of the ICA is to promote effective competition in economic activities and increase the efficiency of the productive factors of society.

Iceland is also a member of the Nordic Council, which is the official body for formal inter-parliamentary Nordic cooperation between Denmark, Finland, Iceland, Norway and Sweden. The Nordic Competition Authorities have also signed a cooperation agreement, which allows for closer cooperation between those authorities and investigative assistance. As Iceland is geographically isolated, there is a need for regional cooperation between countries where businesses are required understand how Iceland's competition laws function in order to carry out business across borders. Utilising the CAP principles of transparency and predictability when dealing with businesses has ensured businesses have been proactive in approaching the ICA with any queries or questions they may have about conducting business across borders.

Gudmundur, how has the ICA found its completed CAP template useful when dealing with the public and business community?

The CAP template provides a unique overview of the competition regime in Iceland. The CAP template provides the Authority with the opportunity to create an overview of how the Principles found in the Framework are achieved and how the CAP Framework principles create obligations and interplay with many Icelandic laws. The Authority has used the CAP template to interact with parties that sought advice on how the Icelandic competition regime works and what guidelines and procedures are in place.

The Authority's completed CAP template has become the basis for the Authority's new dedicated website, which will launch soon. It is intended to be a site where interested parties can easily find all the necessary and practical information on one page and all in English.

Benefit: enhancing leniency programs

Fast fact: 39% of respondents to the survey used the CAP templates for benchmarking or an overview of other agencies' processes

Commissioner Reiko Aoki from the Japan Fair Trade Commission (JFTC) spoke about how the CAP has helped to strengthen protections for legal professional privilege of subjects of JFTC investigations, and thereby enhance the efficacy of Japan's leniency program.

Commissioner, could you please tell us about the origins of Japan's leniency program?

Japan's leniency program has been successfully functioning as a tool for cartel detection and investigation since its introduction in 2006. The JFTC has received successful leniency applications in more than 80 percent of the cartel cases where the JFTC took legal measures from 2006 to 2016.⁴ However, over the years, we've recognised there are areas where the leniency program could be improved, such as how surcharges were calculated. A surcharge is an administrative fine imposed by the JFTC, and currently it can be reduced depending on the level of cooperation the JFTC receives from subjects of an investigation, based on the amendment of the Anti-Monopoly Act (AMA) in 2019.

Commissioner, could you please tell us how Japan's previous leniency program operated?

⁴ [https://one.oecd.org/document/DAF/COMP/WP3/WD\(2018\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2018)6/en/pdf)

Under the former leniency program, immunity and reduction rates concerning the surcharge were fixed by the Anti-Monopoly Act (AMA) and related regulations and decided based entirely on the order of leniency applications, without regard to the value of information they submitted or the degree of cooperation with the JFTC investigation.

Although this system helped to ensure the transparency and predictability of the leniency program, the JFTC also experienced difficulties in securing incentives for cartelists to further cooperate with its investigation.

What amendments did the JFTC make to the leniency program?

Against this backdrop, in 2019, the JFTC amended the Anti-Monopoly Act (AMA) to renew its leniency program and also established a new rule concerning the investigative procedure, which is aimed at ensuring the effectiveness of the revised leniency program. The revised leniency program and the new procedural rule came into effect in December 2020.

The JFTC amended the leniency program to introduce a new system that increases incentives for enterprises to cooperate in the JFTC's investigation, which would promote efficient and effective fact findings by enhancing the cooperative relationship between the JFTC and enterprises.

More specifically, in addition to the order of applications, reduction rates are now flexibly calculated according to the value of information submitted and the degree of the cooperation by the enterprises and a mechanism, where the JFTC and enterprises discuss the contents of the cooperation in the investigation and the reduction rates that could be applied to the enterprises, was introduced. The limit on the number of leniency applicants was also eliminated, so that many enterprises can apply for the leniency program. Finally, the calculation period for surcharges was extended from three years to 10 years so that enterprises committing violations for a long term will face the higher amount of surcharges.

In 2020, the JFTC also introduced a new 'Determination Procedure' – could you please tell us more about this rule?

The JFTC also introduced the new "Determination Procedure" in 2020. This is a new rule, which was introduced in conjunction with the revision of the leniency program. The new rule substantially protects confidential communications between attorneys and enterprises, such as legal advice on investigations of alleged cartel and bid-rigging offenses – the Anti Monopoly Act (AMA) violations that are subject to the leniency program.

Why was this new rule introduced?

The new rule was introduced in order to effectively operate the new leniency program, taking into account that the needs for enterprises to consult with their attorneys are expected to increase with the revision of the leniency program.

Under the new rule, case investigators' access to the communications between attorneys and enterprises is limited during the investigative procedure if the communications satisfy certain requirements stipulated in the rule.

How do these amendments align with the CAP principles?

The Amendment of the leniency program and the new Determination Procedure further align with the CAP principles of transparency and predictability, and confidentiality of communications between attorneys and enterprises.

Benefit: developing new procedures

Fast fact: 76% of respondents to the survey recognised the benefits of reviewing other agencies' completed CAP templates when developing new procedures and guidelines

Francis Kariuki, Director-General of the Competition Authority of Kenya (CAK) illustrated how the CAP template has helped to improve transparency of investigations and procedures by providing a clear framework for agencies to follow when creating procedures and guidelines.

Francis, we're aware that Kenya is part of COMESA. What is COMESA?

COMESA is the Common Market for Eastern and Southern Africa and is a free-trade area made up of 21 member states. It was established in December 1994 and is an organisation of free independent sovereign states which have agreed to cooperate in developing and promoting objectives, such as a harmonised and competitive market; greater industrial productivity and competitiveness; increased agricultural production and food security; and more harmonised monetary, banking and financial policies.

Being part of the COMESA common market, CAK has regular interactions with competition agencies in neighbouring jurisdictions. What potential does the CAP have for building trust and cooperation between regional neighbours and specifically between the businesses and agencies within COMESA?

The Constitution in Kenya has principles of basic service, such as: everyone has right to be heard; every stakeholder is treated equally; everyone has right for representation. The principles outlined in the CAP template are in line with the Constitution of Kenya's principles of basic service and can be seen in the CAP principles of notice and the opportunity to defend; representation by counsel and privilege and non-discrimination.

Although you're speaking to us in your capacity as Director-General of CAK, what do you see as the role of COMESA in relation to the CAP?

I believe there is potential for COMESA to focus on advocating on the fundamentals of the CAP Framework. In doing so, such advocacy puts the focus on creating procedures and guidelines that support and provide efficiencies for different agencies in COMESA. It also promotes the CAP to agencies who are introduced to the benefits of signing up to the CAP Framework and become CAP participants.

Benefit: providing clarity for new regulations

Sergio López Rodríguez, former Head of COFECE's Investigative Authority, also discussed how the CAP template provided a clear framework for COFECE to implement new regulations surrounding the handling of documents protected by attorney-client privilege.

Sergio, tell us a little bit about Mexico's attorney-client privilege.

Attorney-client privilege is a critical aspect of due process in competition proceedings. Mexican law has long contained a limited attorney-client privilege. However, there is no general law to regulate the legal privilege principle in Mexico. Mexican law prohibits attorneys, as well as other professionals, from disclosing client secrets. It also recognizes a

privilege for communications between a “detained” person and his or her attorney. However, the privilege only restricts the ability of the government to listen in, not the government’s ability to use privileged communications when they fall into its hands.

When was attorney-client privilege established in Mexico?

A legal precedent established in 2016 deemed that attorney-client communications in an antitrust investigation must be protected by the human rights of privacy, inviolability of communications, and professional secrecy. The precedent established that this protection covered clients and lawyers. Only when possible violations result in an irreparable act can this precedent be challenged through a constitutional court. This is the case when COFECE may use information and/or documents protected under the principle of professional secrecy for an investigation.

When did COFECE introduce new guidelines for the treatment of attorney-client communications and how do these guidelines promote attorney-client privilege?

COFECE issued new Guidelines for the treatment of attorney-client communications in 2019. These new Guidelines align with the principles of Confidentiality and Representation by Counsel and Privilege of the CAP Framework, which COFECE considered when developing these new Guidelines. These Guidelines ensure due process rights of firms operating in Mexico, by establishing COFECE's actions when, in the exercise of its functions, it obtains communications between a lawyer and a firm; and safeguarding the rights of firms, carrying out impartial investigations, and respecting procedural guarantees.

The process established in COFECE’s Guidelines for the treatment of attorney-client communications ensures the protection of the recognized rights in the Court’s legal precedent: rights of privacy, inviolability of communications, and professional secrecy. In order to safeguard the rights of firms, the Guidelines outline that the economic agent must make a request that the information be deemed qualified for the privilege within 20 days of COFECE obtaining the information.

Final observations and what’s next?

Fast fact: 48% of survey respondents said they would like to learn how to use the CAP templates as a self-assessment tool in future programming

The CAP empowers agencies by providing a framework for agencies to follow when creating procedures and guidelines and provides templates completed by other participants for identifying best practices.

Agencies **that are not yet part of the CAP** can become involved by:

Completing the CAP participant form in the ICN website's CAP section

Agencies **that are already CAP participants** should:

- Add any new rules, regulations, or laws to CAP templates

Talking to the Co-chairs

Agencies **that are already CAP participants** should:

- Add hyperlinks to your agency's template for accessibility of information

Talking to another agency in your region who has completed the CAP

Agencies **that are already CAP participants** should:

- Keep CAP contact lists updated

Keeping the ICN CAP templates updated

For current participants, **please keep your CAP contact lists updated**, as this always helps us ensure the ICN CAP Co-chairs are contacting the correct people. Keeping the CAP templates updated ensures agencies have access to the most up-to-date information about rules and regulations, which is often a helpful source of information, especially for Young and Small agencies. Up-to-date templates can provide good examples of how to complete the template and what information should be included.

If your agency introduces new rules, regulations or laws, **you should add these to your CAP templates**, and at the same time, reflect on what is already there and whether it can be clearer or more informative.

Adding active hyperlinks to your agency's template whenever possible also helps to ensure further information is easily accessible.

We also recommend **reviewing the templates of other agencies** to get ideas on how to communicate agency practices and procedures to the public.

Upcoming programming for 2021

The ICN CAP Co-chairs plan on running a webinar in late 2021 on confidentiality. We would also like to invite suggestions on initiatives that we can undertake to enhance the utility of the CAP for all agencies. Please see below for dates:

- Late 2021/early 2022: ICN CAP webinar on confidentiality
- Late 2021/early 2022: call for suggestions for initiatives to enhance utility of the CAP

Information for the webinar and for initiatives to enhance the utility of the CAP will be made available to all interested parties and CAP participants.

The CAP Co-chairs are considering additional programming, and welcome any ideas for activities that would further members' understanding of the CAP Framework and promote more agencies becoming members of the CAP.

