Organisation for Economic Co-operation and Development

DAF/COMP/WP3/WD(2025)28

Unclassified

English - Or. English

3 December 2025

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

Co-operative Antitrust in Remedy Design – Note by Mexico

3 December 2025

This document reproduces a written contribution from Mexico submitted for Item 3 of the 142nd meeting of Working Party 3 on 3 December 2025.

More documentation related to this discussion can be found at: oe.cd/card.

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1. Introduction

1. The Mexican Federal Economic Competition Law (Competition Law or LFCE) contemplates different mechanisms to design remedies depending on the type of enforcement procedure.

2. For mergers, measures such as conditional approvals or divestitures may be imposed to prevent anticompetitive effects. Market investigations allow the National Antitrust Commission (CNA or Commission)[1] to implement regulatory adjustments or recommend legislative changes aimed at removing barriers and promoting market efficiency.

3. This contribution presents how remedy design in market investigations combines independent analysis with collaboration from parties, with limited early engagement, and regulators to ensure feasibility and effectiveness, while in merger reviews, collaboration with the parties begins at the outset to identify and shape effective remedies.

2. Remedies under market investigation procedures

4. Article 94 of the Competition Law has the purpose of identifying and remedying barriers to competition[2] and essential facilities[3]. Under this provision, the CNA is empowered to analyze a specific market when there are indications of distortions affecting the competition process that do not necessarily stem from the conduct of a particular economic agent, but rather from structures, market conditions, or regulations. Thus, this procedure is not intended to sanction anticompetitive conducts, but to identify structural problems through an investigation of a specific market, and order corrective measures through various remedies.

5. Market investigations are considered a "hybrid regulatory" tool that, on the one hand, has the rigor of an investigation and comply with the essential formalities of this proceeding, and on the other hand, may lead to regulatory remedies.

[1] The CNA was formally established on October 16, 2025, replacing the former Federal Economic Competition Commission (Cofece). The CNA officially began operations on October 17, 2025. However, given its recent creation, information from Cofece has been used as a basis for this contribution.

[2] Barriers to competition are defined by law as any structural characteristic, fact, or act by economic agents that prevents access to competitors, limits their ability to compete in the markets or prevents or distorts competition, as well as legal provisions that unduly produce such adverse effects to the competition process.

[3] Essential facilities are considered to be the set of elements (such as goods, infrastructure, rights, among others) that lack close substitutes and cannot be feasibly reproduced from a technical, legal, or economic standpoint by another economic agent. These facilities are controlled by one or more agents with substantial market power, and access to them is indispensable for the provision of goods or services in one or more markets. Through the procedure established in Article 94, the CNA may determine the existence of essential facilities and set the rules governing their access and use by other economic agents.

6. These investigations can be initiated either ex officio or at the request of the Federal Executive Branch when there is evidence suggesting a lack of effective competition conditions. During the process, the Investigative Authority, an independent body within the CNA, collects evidence to determine whether market conditions, participants' conduct, or regulatory provisions restrict competition. Regarding essential facilities, the Investigative Authority must verify whether the requirements set forth in Article 60 are met to classify the facility as essential and, if so, regulate access accordingly.

7. The procedural architecture under Article 94 follows a sequential structure that significantly shapes how remedies are designed and implemented. After concluding its investigation, the Investigative Authority issues a preliminary investigative opinion that includes proposed corrective measures. These measures may consist of orders directed at economic agents or recommendations addressed to other governmental entities, including legislative and executive bodies. When the investigated market under review is subject to sector-specific regulation, the Competition Law explicitly contemplates that the Investigative Authority may request a non-binding technical opinion from the relevant coordinating public entity or sectoral authority regarding the proposed remedies.

8. What distinguishes this framework from other jurisdictions is the clear temporal separation between remedy design and party engagement. The preliminary investigative opinion, complete with proposed corrective measures, is developed by the Investigative Authority based on its market investigation and analysis before economic agents have any opportunity to comment on the specific remedies proposed.

9. Once the trial-like procedure begins, the economic agents that could be affected by the proposed remedies and corresponding authorities may submit arguments, evidence, and alternative perspectives for the Board's consideration. This procedural design reflects a deliberate effort to preserve the independence and technical rigor of the Investigative Authority's market-based analysis, while ensuring strong due process protections through subsequent adversarial proceedings.

10. In this stage, the involved economic agents have the opportunity to propose suitable and economically viable measures to address the identified competition issues. The Commission evaluates such proposals and may request clarifications, if necessary, after which the Board of Commissioners decides whether to accept or reject them, providing justification in case of rejection. If the proposal is not accepted, the procedure resumes. Finally, once the case file is complete, the Board of Commissioners issues a final resolution.

11. The final resolution may include recommendations to public authorities when legal provisions improperly restrict competition, requiring notification to competent authorities and public disclosure; orders for economic agents to remove barriers that affect competition; a determination on the existence of essential facilities with guidelines to regulate access, prices or fees, technical and quality conditions, and implementation timelines; and, when other measures are insufficient, the divestiture of assets, rights, or shares to eliminate anticompetitive effects.

2.1. Cooperation with parties and third parties

2.1.1. Limited ex-ante engagement with market participants

12. The procedural framework for Article 94 investigations, as previously stated, does not contemplate direct cooperation with the parties regarding remedy design. This approach reflects the investigative nature of the proceedings and the need to preserve analytical independence when assessing market conditions and formulating corrective measures.

13. Economic agents are informed of the Investigative Authority's findings regarding the lack of effective competition conditions and the existence of barriers to competition, only upon notification of the preliminary investigative opinion. Consequently, their first substantive opportunity to engage with the proposed remedies occurs during the trial-like procedure that will eventually lead to a decision by the Board of Commissioners.

14. This sequential structure serves key purposes. First, it safeguards the integrity of the Investigative Authority's independent market assessment, ensuring that remedy design is driven primarily by competitive concerns identified through rigorous economic and legal analysis rather than by negotiated outcomes. Second, it clearly separates investigative and adjudicative functions: the Investigative Authority develops the evidentiary record and proposes remedies, while the Board evaluates these proposals considering arguments and evidence from all interested parties. Third, it promotes transparency and equal treatment amongst market participants, as all relevant economic agents receive the preliminary opinion simultaneously and have equivalent opportunities to respond.

15. While this approach limits ex-ante cooperation with parties in remedy design, it does not exclude party input. Instead, it channels such input into a structured adversarial process allowing economic agents to challenge the Investigative Authority's market definition, competitive assessment, and proposed remedies with full knowledge of the case against them. This allows parties to present alternative remedies, identify implementation challenges, or demonstrate why certain remedies may be unnecessary or disproportionate.

2.2. Consultation with sectoral authorities

16. In contrast to the limited engagement with market participants regarding remedy design, the Investigative Authority actively consults sector regulators and relevant public authorities when the investigated market falls under specific regulatory oversight. Article 94, as mentioned above, expressly provides for this mechanism, allowing the Investigative Authority to request non-binding technical opinions from coordinating public entities or corresponding sectoral authorities regarding proposed corrective measures. This practice acknowledges that effective remedy design in regulated markets demands understanding not only of competitive dynamics but also of the technical, operational, and regulatory constraints within which market participants operate.

17. Experience with sectoral authority engagement has consistently proven valuable across multiple investigations. Regulatory bodies possess deep institutional knowledge of their markets, including technical specifications, operational requirements, safety standards, and infrastructure constraints that may not be evident from a purely competition-focused analysis. When consulted during remedy design, these authorities provide non-binding opinions that complement the Investigative Authority's work and strengthen preliminary findings by ensuring proposed measures are technically feasible, aligned with existing regulatory frameworks, and capable of achieving their intended competitive effects without unintended consequences.

18. The quality of engagement with sectoral regulators has been high, as authorities demonstrate a strong willingness to share technical expertise and market-specific knowledge. These contributions enhance the Investigative Authority's understanding of implementation challenges, help identify potential conflicts between competition remedies and sector-specific regulations, and occasionally suggest alternative approaches that achieve similar competitive outcomes through different mechanisms. Although these opinions are non-binding, they inform the formulation of remedies in the preliminary opinion and provide valuable context for the Board of Commissioners when assessing the appropriateness and proportionality of proposed measures. This cooperation ultimately

strengthens the Investigative Authority ability to evaluate the effectiveness of corrective actions.

19. Building on this experience, collaborations have extended across transportation, agricultural, financial, and energy markets, each characterized by unique regulatory complexities and requiring tailored engagement with the relevant governmental entities.

3. Remedies for mergers

20. When a merger is likely to pose risks to the competition process, its authorization may be subject to specific conditions or remedies in accordance with Article 91 of the Competition Law. The Commission may only accept or impose conditions that are directly linked to remedying the effects of the merger, and such conditions must be proportionate to the intended corrective measures.

21. Remedies may be imposed by the Commission or voluntarily proposed by the parties. In practice, it is generally preferable for the parties to offer conditions, as they have greater insight into how these measures can be implemented effectively, minimizing their impact, facilitating verification, and ensuring that competition and market access are not adversely affected.

22. Among the remedies that the Commission may accept or impose under Article 91 are measures such as requiring or prohibiting a specific conduct, divesting certain assets or shares, modifying contractual terms, granting market access to competitors, or any other actions aimed at preventing the merger from reducing or harming competition. Economic agents may submit proposed conditions from the moment the written notification is filed and until one day after the matter is scheduled to be discussed by the Board of Commissioners.

3.1. Cooperation with parties and third parties

23. In all merger review processes, particularly those where a theory of harm is likely to materialize as a result of the transaction, the Commission through the General Directorate of Mergers engages in constant dialogue with the economic agents involved in the operation and, where appropriate, with market participants.

24. When a transaction is deemed likely to pose competition risks, these interactions aim to raise awareness among the parties regarding potential market impacts and to begin outlining possible remedies to mitigate such risks, prior to formal written notification.

25. Based on the Commission's experience, notifying parties generally respond positively to these discussions. In certain cases, legal representatives proactively approach the authority to review the terms of their proposed remedies and assess whether they adequately address the Commission's concerns. Conversely, it is also common for parties to submit written proposals without prior engagement with the technical team. If such proposals fail to resolve previously identified concerns, the Commission provides feedback highlighting unclear aspects, residual risks, and gaps in coverage. While the parties' input is valuable, remedies that do not effectively address competition concerns will be discarded.

3.1.1. Alignment of Incentives

26. To ensure that parties submit proposals consistent with prior discussions, the Competition Law provides that the statutory review period is suspended and restarts upon

the submission of a remedy proposal or any subsequent modification. This mechanism creates a strong incentive for notifying parties to avoid repeated resets of the review timeline, as they are typically under significant time pressure to obtain merger clearance. Consequently, both the Commission and the parties share an interest in determining whether the proposed remedies are sufficient, allowing the Mergers Directorate to issue a recommendation to its Board.

3.2. Third-Party Consultations

27. In a merger review, the Commission is not legally required to conduct public consultations with third parties regarding remedy design. However, in certain cases, the Commission has sought input to better understand potential solutions or risks associated with the transaction. Such feedback is carefully evaluated, considering possible strategic incentives, such as competitors seeking undue advantages or attempting to block the merger.

28. Remedy design and implementation mechanisms are typically classified as confidential information. The Commission is therefore obligated to safeguard this confidentiality and prevent disclosure to third parties. This is critical because remedies often involve sensitive details, including asset structures, operational processes, production capacity (both utilized and idle), commercial relationships, and contractual arrangements.

3.3. Consultation with other competition agencies

29. The Commission has experience in merger cases involving the assessment of remedies in coordination with authorities from other jurisdictions. International cooperation plays a key role for the Commission, particularly in cross-border or global mergers that pose potential competition risks in the national territory, as these risks may be similar to those identified by other authorities.

30. In such cases, the Commission engages in frequent discussions with counterpart teams to understand their theories of harm and potential remedies to mitigate these risks. It is also essential for the Commission to be aware of the timelines within which other authorities issue their decisions, ensuring consistent and coherent outcomes and avoiding contradictory results.

31. Although less common, the Commission has also participated in designing remedies jointly with foreign authorities.

4. Final remarks

32. In Mexico, the design of remedies under these two different approaches show the handling of different priorities. Market investigations emphasize technical independence, limiting early engagement with parties and relying on consultations with sectoral regulators to ensure feasibility and regulatory alignment. Conversely, merger reviews foster cooperation from the outset, encouraging notifying parties to propose remedies and engage in dialogue to address potential risks. Despite these procedural differences, both frameworks demonstrate that structured collaboration, whether with regulators or parties is essential for implementing proportionate and effective measures that guarantee effective competition conditions in Mexican markets.