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Overview

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The European Commission (Commission) – specifically its Directorate General for Competition (DG Comp) – is responsible for the enforcement of EU competition rules (ie, articles 101 to 109 of the TFEU).

Last year was marked by great political upheaval as a result of the election of the new EU Parliament, followed by the nomination of a new Commission composed of 28 commissioners (one from each member state). Headed by President Jean-Claude Juncker, former right-wing Minister for the Treasury and Finances of Luxemburg, the new Commission has been appointed for a five-year term (until 31 October 2019).

In the realm of competition policy, Margrethe Vestager, a former social-liberal deputy prime minister and Minister of the Economy of Denmark, has been appointed as the new Commissioner for competition. Vestager is known as having a thorough understanding of economic and financial issues, but also as being a tough negotiator whose judgment 'will not be swayed by anyone', as asserted in her opening statement to the EU Parliament.

Vestager has appointed Ditte Juul-Jørgensen as her chef de cabinet, a Brussels insider with over 20 years of experience. Jørgensen is a newcomer at DG Comp, but was lastly appointed as director at DG Trade. Linsey McCallum has been promoted internally to deputy head of cabinet from her former position as director at DG Comp in charge of information, communication and media, which may show Vestager's engagement in scrutinising issues in the digital sector.

In terms of policy areas, Vestager's cabinet will also be composed of Søren Schønberg (state aid in energy, media and health), Astrid Cousin (state aid in finance, R&D and regional aids), Friedrich Wenzel Bulst (antitrust and mergers in finance, information and media), and Claes Bengtsson (antitrust and mergers in energy, pharmaceuticals and transport).

President Juncker formally asked Vestager in her mission letter to 'support the jobs and growth agenda' and to focus on issues such as energy, the digital economy and the financial sector.

Vestager has repeatedly stressed that competition should not be a 'lonely portfolio' and that R&D, investment and capital, in addition to a well-educated workforce, should coexist with a strong competition policy. Vestager has already underlined that she will make great use of the sector inquiry tool, which enables the Commission to subject an entire industry to antitrust scrutiny.

After three unfruitful attempts to settle the case, Vestager will also be judged on her handling of the four-year-old *Google* probe, which will be a key case in the context of the Commission's Single Digital Market initiative. The US President Obama put further pressure when he declared, in February 2015, that the EU's scrutiny of Silicon Valley companies was a form a protectionism, driven by the 'commercial interests' of Europe's tech companies which struggle to compete.

Procedures and legislation under article 101 TFEU

Major trends in 2014

The leniency programme continued to be heavily used in 2014, with eight out of 10 cases providing for a fine reduction under the 2006 Leniency Notice (from 10 per cent to 100 per cent depending on the company's 'contribution' to the case).

The settlement procedure has also been heavily used, often in conjunction with the leniency programme, leading to an additional 10 per cent fine reduction. From the cartel cases cited below, only the *Smart Card Chips* (although the possibility of settlement was initially explored), the *Power Cables* and the *YIRD/ICAP* cases were issued without settlement. The 'standard' procedure seems to have become the exception if we consider that, over the past two years, a majority of cases has been resolved under the settlement procedure.

It can be noted that, in the *Steel Abrasives* case, which was partly settled in April 2014 with four undertakings, a statement of objections was addressed in December 2014 to a fifth producer, Pometon, which had chosen not to settle. This raises the question of what are the odds, for a company, to succeed in a non-settlement strategy when other companies admit their involvement in a cartel?

Sector-wise, we can note that the Commission intends to maintain a careful monitoring of the automotive industry. In spite of a near billion-euro fine imposed in *Automotive Bearings*, the Commission continues to have concerns regarding this sector, as former-Commissioner Almunia underlined:

> *Today's decision is a further milestone in the Commission's ongoing effort to bust cartels in the markets for car parts.*

As a matter of fact, in March 2014, the Commission launched unannounced inspections targeting producers of automotive exhaust systems. In November 2014, further pressure was exerted on this sector when the Commission addressed a statement of objections to a number of heavy and medium-duty truck producers suspected of price-fixing.

The Commission announced that it will continue to monitor the financial sector closely and that the last Euro and Yen Interest Rate Derivatives (EIRD/YIRD) developments, as Commissioner Vestager warned, will not be 'the end to [her] efforts to fight anti-competitive practices in financial markets'.

No sector inquiry has been launched during this transitional year marked by the end of the Almunia's mandate.

Overview of cartel case law

In 2014, the Commission fined cartel participants for an overall amount of €1.7 billion (against €1.9 billion in 2013) issuing decisions in 10 cases (against four in 2013).

On 19 March 2014, the *Automotive Bearings* cartel incurred the highest fine of €953 million. In this case, several European and Japanese producers of automotive bearings, a €2-billion sector in the EEA, coordinated, for over seven years, the passing-on of steel price increases to customers, colluded on requests for quotations and annual price reductions, and exchanged commercially sensitive information. A Japanese producer escaped the fine, under the Leniency Notice, for having revealed the existence of the cartel; the other cartellists settled (this decision was the twelfth settlement decision since the advent of the procedure in June 2008).

Three other cases were issued with fines above €100 million. In the *Power Cables* case (2 April 2014), 11 producers of underground and submarine high-voltage power cables were fined €302 million for a worldwide market-sharing and price-fixing cartel that lasted 10 years. In the *Smart Card Chips* case (3 September 2014), three producers of smart card chips – used, for example, in mobile SIM cards – were fined €138 million for having coordinated, for over two years, their market behaviour in the EEA, and in particular their responses to customers' requests to lower prices. In the *Polyurethane Foam* case (29 January 2014), four major producers of flexible polyurethane foam were fined €114 million, after settlement, for having fixed prices of foams, for nearly five years, in 10 EU member states.

Further, as a sequel to the €1.7 billion settlement fine imposed in December 2013 on several banks for their participation in the *EIRD/YIRD* cartels, the Commission fined ICAP €15 million, in early 2015, for having facilitated, as a UK-based broker, six of the seven cartels in the YIRD case; ICAP had refused to settle the case in 2013. Commissioner Vestager warned that:

> *Today's decision [...] sends a strong signal that assisting companies in their cartel activities has severe consequences.*

Also related, the Commission announced in May 2014 that statements of objections were addressed to Crédit Agricole, HSBC and JP Morgan, three banks that had refused to settle in the 2013 *EIRD* case. (Deutsche Bank, RBS and Société Générale had agreed to a settlement fine of €1.04 billion, while Barclays received full immunity for revealing the cartel, thereby avoiding a fine of around €690 million.)

Still in the financial realm, the Commission issued, on 21 October 2014, two sister decisions, handed down under the settlement procedure, in the *Swiss Franc Interest Rate Derivatives* case:

- RBS and JP Morgan were fined €62 million for setting up a cartel to influence the Swiss Franc Libor benchmark interest rate and exchange information on their trading positions and intended prices for over one year; and
- RBS, JP Morgan, UBS and Crédit Suisse were fined €32 million for having agreed on an element of pricing (fixed bid-ask spreads) of certain Swiss Franc interest rate derivatives.

Finally, we can note that four other settlement cases were handed down in 2014 in the *Power Exchanges*, *Steel Abrasives*, *Canned Mushrooms* and *Paper Envelopes* cases, with fines ranging from €6 to €32 million.

Non-cartel horizontal infringements

Outside the cartel realm, the Commission has been actively monitoring pay-for-delay agreements in the pharmaceutical sector. In its 5th Report on the Monitoring of Patent Settlements, published in January 2014, the Commission continued to stigmatise patent settlement agreements that provide for a limitation of generic entry and a significant value transfer to generic companies. In this line, the Commission handed down, on 9 July 2014, its *Perindopril* decision, imposing a €428 million fine on Servier and five generic producers. In fact, the infringement was characterised under both articles 101 and 102 TFEU, targeting multimillion-euro settlement agreements that protected Servier's bestselling blood pressure medicine (Perindopril), along with Servier's systematic acquisition of competing technologies.

It can also be noted that the 2013 *Lundbeck* case, discussed at length in last year's chapter, was finally published by the Commission on 19 January 2015.

The banking sector has also been under close scrutiny in 2014. In effect, the Commission released a commitments decision in the *Visa MIF* case, on 26 February 2014, in which it rendered legally binding commitments offered by Visa Europe to significantly level down its multilateral interchange fees (MIF) for credit card payments to 0.3 per cent and facilitate cross-border competition. In this regard, two past decisions – the 2007 *CB* and *MasterCard* cases – were still under judicial review. On 11 September 2014, the European Court of Justice (ECJ) confirmed the infringement decision in the *MasterCard* case (C-382/12P). Conversely, on the same day, the ECJ quashed the General Court's judgment that had upheld the Commission's prohibition decision against *Groupement des Cartes Bancaires* which had found certain pricing measures to be anti-competitive 'by object' (C-67/13 P). In essence, this seminal case confirmed that the Commission cannot adopt a too simplistic 'by object' analytical framework, in consideration of past experience.

On this subject, the Parliament and Council announced, at the end of 2014, that a political agreement had been reached on the Commission's regulation proposal regarding interchange fees for card-based payment transactions.

Abuse of dominance

With three infringement decisions and one commitments decision adopted since the beginning of 2014, the Commission has been more active in terms of article 102 TFEU enforcement than in 2013 (no infringement decision adopted). The Commission seemed to focus its scrutiny on IP and IT issues.

Google has been at the forefront of antitrust investigations, with the Commission probing its search-engine activities for the past four years. Google is suspected of distorting competition and discriminating against competitors in the way they appear in its search engine. Since former Commissioner Almunia's repeated attempts to settle the case, the Parliament voted, in November 2014, a non-binding report to unbundle search engines in Europe (in fact, dismantle Google) and has called, in January 2015, for an urgent resolution of this case. Against this backdrop, the new Commissioner Vestager, asking for a little time to make up her mind, has met with the complainants and sent out new questionnaires in December 2014. In parallel, no formal procedure has yet been opened in the *Android* case over concerns that Google is promoting its own services (maps, applications) to shut out rivals.

In the realm of standardisation, the Commission has issued, on 29 April 2014, two first 'patent hold-up' decisions (*Motorola Mobility* and *Samsung*), on the subject of standard essential patents (SEPs). The two sister-cases involved the use of injunction procedures against Apple for infringement of SEPs related to the 3G UMTS standard (Samsung) and the GPRS standard (Motorola). The Commission explained that seeking an injunction based on SEPs may constitute an abuse of dominance if a SEP holder has given a voluntary commitment to license its SEPs on fair, reasonable and non-discriminatory (FRAND) terms and where the potential licensee is willing to enter into such a licence.

Motorola was the addressee of an infringement decision but, as a 'first offence' case, was not fined by the Commission. On its side, Samsung submitted commitments, for a period of five years, whereby it would not seek any injunction in the EEA on the basis of technologies implemented in smartphones and tablets against any company agreeing to a particular licensing framework (ie, a 12-month negotiation period and, in case of deadlock, determination by a court or arbitrator). Interestingly, in a pending case before the ECJ (*Huawei Technologies v ZTE*), Advocate General Wathelet issued an opinion questioning whether the mere 'willingness' of a prospective licensee to negotiate is too vague a notion to limit the SEP holder's right to bring an injunction.

Also noteworthy is the €70 million fine imposed by the Commission in the *Slovak Telekom* case for foreclosure practices implemented by Slovak Telecom in its domestic broadband market. The Slovakian incumbent had refused, for over five years, to supply unbundled access to its local loop to competitors, imposing a margin squeeze on alternative operators. In setting the fine, the Commission took into account the ultimate parent company's (Deutsche Telekom) very significant turnover, and the repeated nature of the infringement.

Finally, in the ECJ's review of the *Intel* case, a €1 billion fine was imposed on Intel by the Commission, and the subsequent appeal before the

General Court was dismissed in June 2014 in a decision which set a 'by-nature' approach for exclusivity rebates (indeed, a 'by-object' approach). This will impact the Commission's prosecution policy, and may lead to modifying the Commission's 2009 Guidance on its enforcement priorities under article 102 TFEU insofar as the Guidance pleaded for a more effects-based approach.

Mergers

Case law

At her hearing before the EU Parliament, Vestager emphasised the importance of deeply understanding the reviewed markets and communicating with the notifying parties, especially in complex commitment cases. Echoing this statement, there has been a recent upsurge of Phase I decisions with commitments (13 in 2014). This trend can be construed as a result of companies getting more experienced at anticipating DG Comp's expectations, including by submitting early remedies. As such, it is clear that the pre-notification phase has become a crucial part of merger control.

Illustrative of this is the *Holcim/Lafarge* transaction (M.7252), which was cleared as a Phase I decision with commitments, albeit being one of the most significant deals in 2014. Substantial remedies were submitted early on in the process, enabling the parties to promptly obtain clearance seven weeks after notification despite the creation of the world's largest cement producer. The transaction was nonetheless cleared following the parties' commitment to divest 15 per cent of their activities. This case is also illustrative of another trend, namely the increasing reliance on upfront-buyer commitments. Here, the parties were prohibited from closing the deal until the Commission's subsequent approval of buyer CHR, an Irish company, as revealed in February 2015 (two months after the clearance decision).

In 2014, two mergers were cleared in Phase II decisions without conditions: the *Holcim/Cemex West* deal (M.7009) and the *Cemex/Holcim Assets* deal (M.7054), while five mergers obtained clearance in Phase II decisions with conditions. The absence of any prohibition decision since 2013 does not mean, as Vestager pointed out, that the 'prohibition era' is over:

> *For me it's very important to have a case-by-case approach because markets are different, mergers are different, and I would think it would be [...] at least a very bad idea to start working with quotas.*

Among these Phase II decisions with commitments, the *Hutchinson 3G UK/Telefónica Ireland* (M.6992) and *Telefónica Deutschland/E-Plus* (M.7018) cases both concerned '4-to-3' telecom deals in 2014. To address its competitive concerns, the Commission tended to favour the emergence of new competitive forces.

In effect, in *Hutchinson 3G UK*, the Commission was particularly concerned that the acquisition of Telefónica Ireland by Hutchison 3G (being a small but still important competitive force on the market for retail mobile in Ireland) would create a larger player competing with the only two other mobile network operators (MNO) left (ie, Vodafone and Eircom). The remedy package therefore aimed at securing the entry of two mobile virtual network operators (MVNO) in the near future, with an option for one of them to become a full MNO. Likewise, in *Telefónica Deutschland*, the Commission was concerned that the acquisition of E-Plus would have led to a market structure with three MNOs of a similar size in Germany (ie, Deutsche Telekom, Vodafone and the merged entity), bringing together the third and fourth operators. The Commission rendered binding a remedy package that secured the entry or expansion of several MVNOs in the short term, and the commitment to resell up to 30 per cent of the merged entity's network capacity.

To justify the substantial remedies in these telecom cases, Commissioner Vestager stressed that competition cannot be enhanced in a situation where very few but large companies are present, especially where the market is still national.

The unequivocal interest of the Commission to keep its hands over telecom mergers was recently illustrated by the ongoing Phase II *Orange/Jazztel* case, and the Commission's refusal to refer the case to the Spanish Competition Authority.

What is more, on 24 February 2015, the Commission cleared, subject to commitments, the acquisition by Liberty Global, an international cable operator, of a controlling stake in De Vijver, a Belgian media company. The Commission was concerned that De Vijver would refuse to license its channels to TV distributors other than Telenet, another cable company controlled by Liberty Global. The commitments therefore ensured that De Vijver would license its channels to competitors under FRAND terms. This case is the first Phase II decision with commitments issued in 2015. Eight other Phase II investigations are officially ongoing: M.7421 – *Orange/Jazztel*, M.7265 – *Zimmer/Biomet*, M.7292 – *Douwe Egberts/Mondelez*, M.6800 – *PRSfM/STIM/GEMA*, M.7429 – *Siemens/Dresser-Rand*, M.7408 – *Cargill/ADM*, M.7278 – *GE/Alstom* and M.7095 – *SOCAR/DESFA*. Although not official yet (at the time of print), an in-depth investigation is also poised to be launched in *Hutchison/O2*.

Finally, 2014 was also marked by some procedural developments. First, the Commission imposed a €20 million fine on Marine Harvest for acquiring de facto sole control of its competitor Morpol prior to notifying the transaction. This new 'gun-jumping' case (after *Electrabel* in 2008) sends a clear signal that the Commission intends to take action seriously against companies countervailing their notification obligations. Second, the Commission closed its investigation regarding allegedly misleading information provided by Munksjö and Ahlstrom in the course of their merger cleared in 2012, which could have led to a fine up to 1 per cent of their aggregate turnover. The investigation related to 'significant discrepancies' between the companies' market share estimates, as submitted in their Form CO, and pre-existing internal documents. According to the Commission, the parties' responses to the statement of objections eventually demonstrated that they had 'valid reasons' to reassess their internal estimates for the notification. While the Commission did not impose a fine, it nonetheless warned that 'any discrepancies between the parties' best estimates in a merger notification and the parties' estimates in their internal documents should always be justified in a timely manner by the parties'.

These two cases show once again, if necessary, that companies must assess their notification obligations in a timely and careful manner, and prepare accordingly.

Legislative developments

The trend towards merger control of minority shareholdings continues with the Commission's publication of a White Paper on 9 July 2014 outlining the approach it intends to adopt, along with a public consultation closed on 3 October 2014. The Commission's proposals include the launch of a 'targeted transparency system' pursuant to which the acquisition of non-controlling minority shares with an EU dimension would be subject to the filing of a mandatory 'information notice' when the acquisition qualifies as a 'competitively significant link'. According to the White Paper, only a transaction meeting the following cumulative criteria would fall within that definition:

- acquisitions of a minority shareholding in a competitor or vertically-related company (ie, need of a competitive link between the acquirer and the target); and
- the acquired shareholding is of 20 per cent, or between 5 per cent and 20 per cent but accompanied by additional factors (eg, rights granting a de facto blocking minority, seat on the Board of Directors and access to commercially-sensitive information).

The parties would be required to self-assess whether a transaction creates such a 'competitively significant link' and, if so, to submit an information notice used by the Commission to decide whether to investigate the transaction (or to refer the case at national level).

It is anticipated that, should the Commission's proposal succeed, it will likely raise the administrative burden on companies due to the parties' new self-assessment obligations and filing requirements. In light of the comments received in response to the recent public consultation which outlined some shortcomings of the White Paper (eg, legal uncertainty, administrative burden, additional costs for companies, coordination with national competition authorities, etc), the Commission will now have to decide whether to amend its original proposal.

State aid

At her hearing before the EU Parliament, the new Commissioner Vestager made it clear that state aid will be a priority throughout her mandate, emphasising her intent to focus inter alia on the question of tax avoidance.

Also very important on her agenda is the wrapping-up of the State Aid Modernization (SAM) overhaul, launched in 2012. In effect, the end of former Commissioner Almunia's mandate was marked by the adoption of major pieces of regulation such as the new Guidelines for Rescue and Restructuring Aid and the new Framework for State Aid for Research, Development and Innovation. Of major importance, the new General Block Exemption Regulation (GBER) was adopted on 17 June 2014, extending the scope of aid exempted from prior notification. Conversely, the eagerly awaited Communication on the Notion of State Aid is not due to be released swiftly. Indeed, given the importance of this remaining piece of regulation under the SAM overhaul, Vestager decided not to rush into any unconsidered decision.

It is expected that the banking sector will come under close scrutiny during Vestager's term, as she promised to assess whether the crisis regime for the banking sector should be terminated, allowing a return to general state aid rules. On this particular point, the Commission has recently conducted an analysis on the effectiveness of state aid rules in the banking sector during the financial crisis. This assessment was based on three pillars: the restoration of long-term viability;

the minimisation of the use of taxpayers' money; and the limitation of distortions of competition through proportionate remedies. The Commission concluded that 25 per cent of the entire banking sector has been recently restructured and that the aided banks are now showing significant improvements in terms of solvency.

In terms of case law, 2014 has also been marked by the *Hinkley Point* decision which concerned the financing of a nuclear plant in the UK. This decision is remarkable by the sensitive nature of the sector concerned and by the amounts at stake (ie, £34 billion). The reviewed measures concerned a 35-year price support scheme to the benefit of the plant operator, and a state guarantee granted for the construction of the plant. The Commission had expressed doubts as to the compatibility of these measures with the common market. Nevertheless, further to an in-depth investigation, the Commission deemed the project as compatible aid, recognising a 'genuine' market failure, while imposing to the UK some measures aimed at minimising the distortive effects on competition.

In line with Commission's goal for fair tax competition, Vestager will remain in the spotlight with the ongoing probes in the tax ruling cases concerning Apple in Ireland, Starbucks in the Netherlands, and Fiat and Amazon in Luxembourg. The new Commissioner stated that she 'will be vigilant to enforce state aid control in fair and justified manner'. To achieve this goal, Vestager recently extended information inquiry on tax ruling practices to all member states and held that the Commission must close these ongoing cases before opening new probes (eg, *Luxleaks*, which broke on the news recently). Despite this statement, Vestager opened a new probe into the Belgian excess profit ruling system on 3 February 2015.

Although Ms Vestager expressed strong commitment to the path drawn by Almunia in tax cases, she now has the opportunity, in coordination with other commissioners, to pave the way for a new legal landscape in that field, consistent with her statement that DG Comp should not be a 'lonely portfolio'.

Other developments

After much legislative struggle, the Damages Directive was finally adopted and published on 5 December 2014, with member states required to implement it by 27 December 2016. The Damages Directive seeks to facilitate compensation claims by victims of antitrust violations, and to fine-tune the interplay between private claims and public enforcement while preserving the attractiveness of tools used by competition authorities, such as leniency and settlement programmes, which play a key role in detecting infringements.

The main improvements of the Damages Directive include that:

- national courts can now order companies to disclose evidence to victims;
- courts will ensure that such disclosure orders are proportionate and do not tamper with confidential information;
- a final infringement decision of a national competition authority will now automatically constitute proof of that infringement before courts of the same member state;
- victims will have at least one year to claim damages once an infringement decision has become final; and
- if an infringement has caused price increases to be 'passed on' along the distribution chain, ultimate consumers will be entitled to claim compensation. The Commission has also invited member states to introduce collective actions in their national legal systems by July 2015.

What is more, the revised competition regime for technology transfer agreements has been released. New versions of the Technology Transfer Block Exemption Regulation, under article 101(3) TFEU, and its accompanying Technology Transfer Guidelines were published on 21 March 2014. With this revised regime, the Commission intends to facilitate the sharing of IP through means such as patent pools and licensing of patents, know-how or software. Patent pools, which can be used in a standardisation context, benefit from a safe harbour in the Guidelines.

The Commission has also provided, on 24 June 2014, for the extension, by another five years (ie, until 2020), of the Consortia Block Exemption Regulation which exempts certain agreements concluded between liner shipping carriers to rationalise their trade.

Finally, on 25 June 2014, a new version of the De Minimis Notice was released. The thresholds remain unchanged: agreements between undertakings whose market shares do not exceed a certain threshold (10 per cent for competitors; 15 per cent for non-competitors) are considered de minimis. The main novelty resides in the new guidance on 'by-object' restrictions following which, in line with new case law developments (ie, *Expedia*), agreements containing such restrictions cannot benefit from the De Minimis Notice.

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Jacques-Philippe Gunther heads the firm's European competition and antitrust practice. He is widely recognised as one of Europe's leading competition law specialists by French and European antitrust authorities.

Jacques-Philippe is known for his expertise advising clients on complex disputes before the EC and French competition authorities, as well as the European Court of Justice and French courts, on cartel and abuse of dominant position cases. Jacques-Philippe is also well known for his expertise on complex Phase I and Phase II European and national merger filings. He is also one of the most recognised experts in the field of state aid. Mr Gunther has particular experience in the telecom, transport (shipping and airlines), energy, media, defense, sports and financial sectors.

Consistently ranked for the past 10 years in the Band 1 category by *Chambers*, the 2014 edition describes Jacques-Philippe as 'an excellent lawyer'. He is also recognised in several other professional guides, including *Legal 500*, which states that he is 'a bright and creative adviser who has built a team with strong expertise'; and *Global Competition Review*, which notes that Jacques-Philippe's team (ranked as 'Elite') 'continues to draw praise for being one of France's leading competition practices'.

Jacques-Philippe joined Willkie Farr & Gallagher LLP as partner in 2006 having been a partner of Gide Loyrette Nouel (Paris and Brussels) and Freshfields Bruckhaus Deringer.

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Mr de l'Estang has collaborated in a number of articles, particularly in the field of merger control.

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