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Asia-Pacific Antitrust Review 2022

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Preface

Global Competition Review is a leading source of news and insight on national and cross-border competition law and practice, with a readership that includes top international lawyers, corporate counsel, academics, economists and government agencies. GCR delivers daily news, surveys and features for its subscribers, enabling them to stay apprised of the most important developments in competition law worldwide.

Complementing our news coverage, the *Asia-Pacific Antitrust Review 2021* provides an in-depth and exclusive look at the region. Pre-eminent practitioners have written about antitrust issues in five key jurisdictions, with this edition including new chapters on merger control in China, leniency proceedings in India and a broad take on the intersection of data privacy and antitrust throughout the region. In addition, we have expanded the scope of the country overviews to encompass cartels and abuse, and pharmaceuticals.

This annual review expands its remit each year, especially as the Asia-Pacific region gains even more significance in the global antitrust landscape. It has some of the world's most developed enforcers – in Australia and Japan, for example – as well as some of the world's newest competition regimes.

The authors are, unquestionably, among the experts in their field within both their own jurisdictions and the region as a whole. Their knowledge and experience, and, in particular, their ability to contextualise both law and policy, give this report special value.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

GCR thanks all of the contributors for their time and efforts.

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China: Merger Control

Susan Ning, Zhifeng Chai and Weimin Wu
King & Wood Mallesons

IN SUMMARY

China's Anti-Monopoly Law (AML) was enacted in August 2008. With the world still mired in the pandemic and downward pressure on global economic growth in 2021, there have been unprecedented developments in the merger review regime in China under the AML through legislative proposals and enforcement practices from the enforcement authority. Many have even dubbed 2021 'the year of antitrust'. We lay out in this article major breakthroughs in the merger review regime in China in 2021 and provide our insights, which we hope will help you develop a better grasp of merger review in China for the years to come.

DISCUSSION POINTS

- Institutional reform of the Antitrust Enforcement Agency
- Key Points on merger review in the Anti-Monopoly Law (Draft Amendment)
- Big hammer on failure to notify
- Breakthrough in quantitative analysis in the merger review

REFERENCED IN THIS ARTICLE

- Huang Huishi, 'Annual Anti-monopoly Inventory of Platforms: The Target of 92 Cases and Fines of More than RMB 21.7 Billion?' Posted on the WeChat official account 'Anti-monopoly Frontier' on 17 December 2021.

Institutional reform of the Antitrust Enforcement Agency

Since the Central Economic Work Conference at the end of 2020 clearly stated that 'strengthening anti-monopoly and preventing disorderly expansion of capital' was a key national task, antitrust enforcement, and particularly merger review, in China has seen a dramatic ramp-up. On 15 November 2021, Gan Lin was appointed as the head of the newly established National Antimonopoly Administration, which signalled the start of the authority reshuffling that aims to enhance the efficiency of antitrust enforcement. Previously, China's antitrust enforcement unit, the Antimonopoly Bureau of the State Administration for Market Regulation (SAMR), was a bureau-level agency. The National Antimonopoly Administration is currently a vice-ministerial level body remaining under the SAMR. The National Antimonopoly Administration is further split into three bureaus, engaging in merger control, antitrust investigation and competition policy respectively.

The creation of a separate merger control bureau within the National Antimonopoly Administration clearly signals that merger control will continue to be a key antitrust enforcement area in China for the years to come.

Key Points on merger review in the Anti-Monopoly Law (Draft Amendment)

On 23 October 2021, the Standing Committee of the National People's Congress published the Anti-Monopoly Law of the People's Republic of China (Draft Amendment) (the Anti-Monopoly Law (Draft Amendment)) for public comment. The Anti-Monopoly Law (Draft Amendment) puts forward a series of new rules in the merger control area, such as enhancing the penalties for failure to notify a concentration of undertakings, which will have far-reaching implications.

Enhancing legal liabilities for failure to notify

A major revision of the Anti-Monopoly Law (Draft Amendment) is to improve the legal liability system for merger review. It significantly increases the amount of fines for failure to notify. Specifically:

Enhance the existing upper limit of fines	For illegal concentration that does not have the effect of eliminating or restricting competition, the upper limit of fines is increased from 500,000 yuan to 5 million yuan; For illegal concentration that has the effect of eliminating or restricting competition, the upper limit of fines is increased from 500,000 yuan to less than 10 per cent of the sales amount in the preceding year.

Add credit punishments	Where a business operator is subject to administrative penalties due to violation of the AML, such penalties shall be recorded in the credit record in accordance with the relevant provisions of the state, and credit punishments shall be imposed on serious illegal and dishonest acts, which shall be disclosed to the public.

Focusing on killer acquisition

The Anti-monopoly Law (Draft Amendment) specifies that:

> *where the notification threshold stipulated by the state council are not met, but there is evidence that the concentration of undertakings has or may have the effect of eliminating or restricting competition, the antitrust enforcement authority under the state council shall conduct an investigation in accordance with the law.*

This provision is aimed at 'killer acquisitions' that have occurred frequently at home and abroad in recent years. Some internet giants, leveraging their huge capital advantages, carry out large-scale 'killer acquisitions', leading to a winner-takes-all situation. Under this provision, the antitrust enforcement authority may strengthen ex ante regulation to prevent distorting the competitive structure of the market through concentration. It is worth noting that major jurisdictions such as the European Union and the United States are also highly concerned about 'killer acquisitions' and are actively exploring updates of their merger review systems to allow law enforcement authorities to intervene in advance. The lessons learnt therein will also be of reference significance to future law enforcement in China.

The addition of a 'stop the clock' mechanism

The Anti-monopoly Law (Draft Amendment) also adds a 'stop the clock' mechanism for the review of concentration of undertakings, which is designed to deal with three common circumstances in the notification process: (1) the undertaking concerned fails to submit documents and materials as required, as a result of which the review cannot be conducted; (2) new situations or facts that have a significant impact on the review; (3) the restrictive conditions imposed on the concentration of undertakings need to be further evaluated and agreed by the undertaking concerned.

With regard to (1), the 'stop the clock' mechanism is less likely to be applied to the simplified review procedure, as in general, the substantive review of simple cases is commenced before the acceptance of the case. If no objections are received after the formal acceptance and public review, the SAMR is unlikely to request additional documents and information. If there are no competition concerns, the current deadlines are

generally sufficient even without the 'stop-the-clock' mechanism. This provision is most likely applicable when, after the initial notification is submitted, there is a long delay due to unanticipated issues arising from the transaction, or the notifying parties cannot provide the documents and materials required within a short period of time. In such cases, the antitrust enforcement authority may initiate the 'stop the clock' mechanism to 'urge' the notifying parties to provide documents and materials as required.

With regard to (2), the 'stop the clock' mechanism will make it unnecessary that undertakings concerned need to withdraw the notification. The review period will commence after the transaction resumes normal, and the predictability of the review period will be enhanced. Compared with the mechanism of re-notification and restarting, the uncertainty of the transaction will be reduced to some extent.

Finally, regarding (3), in cases of concentration of undertakings that may eliminate or restrict competition, the undertakings concerned need to repeatedly negotiate with the antitrust enforcement authority about remedies or commitments. If the undertakings concerned cannot agree with the enforcement authority on remedies, in many previous cases, the undertakings concerned must withdraw the original notifications. The 'stop the clock' mechanism is expected to improve the efficiency of the review of complex cases and reduce unnecessary procedural work.

Big hammer on failure to notify

Significant increase in the number of penalty cases

In 2021, the antitrust enforcement authority investigated and publicly punished 94 cases of failure to notify, reaching the highest point in history. According to our statistics, the antitrust enforcement authority has made public 156 cases of failure to notify

since 2014, and the number of cases in 2021 would account for 60 per cent of the total number of cases released. Compared with the previous year, the number of cases of failure to notify released in 2021 is seven times that in 2020. From this data, it can be seen that the antitrust enforcement authority continues to strengthen the investigation and punishment of failure to notify.

With regard to the cases of failure to notify by platform enterprises, from the end of 2020 to the end of 2021, the SAMR in total released five batches of cases, of which the number of cases reached 84. In addition, in the case of the equity acquisition of a music company by a large domestic internet platform enterprise, the SAMR not only imposed penalty for failure to notify, but also found that the transaction had the effect of eliminating or restricting competition in the relevant market, subsequently ordering the enterprise to take remedy measures to reinstate the competition status in the relevant market.

Maximum fine imposed

In 2021, in most of cases of failure to notify, a maximum fine of 500,000 yuan was applied. Of the 94 cases released by the antitrust enforcement authority in 2021, only eight cases were subject to a fine of less than 500,000 yuan and the remaining 86 cases were subject to a maximum fine of 500,000 yuan.

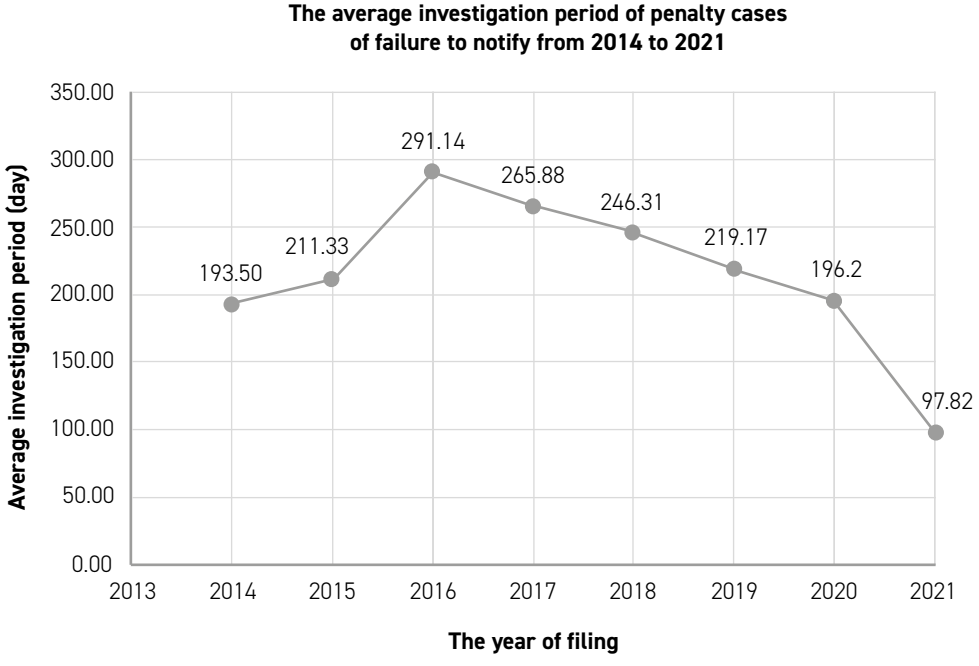
The 'reinstate' remedy

In a penalty decision on the failure to notify an equity acquisition of an internet platform released in July 2021, the antitrust enforcement authority determined that the transaction had the effect of eliminating or restricting competition in the relevant market of online music playing platform market within the territory of China. Based on this, in addition to imposing a maximum fine for failure to notify, the antitrust enforcement authority for the first time applied article 48 of the AML in mandating the concerned parties to take necessary measures to restore the pre-concentration status.

This case, to a certain extent, is consistent with where Anti-Monopoly Law (Draft Amendment) is headed. According to the Anti-Monopoly Law (Draft Amendment), penalties for failure to notify are further distinguished between those that have the effect of eliminating or restricting competition and those that do not – for the former, penalties include both reinstating the pre-concentration status and an increase in the amount of fines to less than 10 per cent of the previous year's sales amount; and for the latter, only a fine will be imposed, but the upper limit of the fine will be increased to 5 million yuan.

Shortened case closing cycle

The investigation process for a case of failure to notify includes supplementary filing, preliminary investigation, further investigation, and making an administrative penalty



decision. When the case enters the further investigation stage, the enterprise involved is required to submit the same set of material as in a normal merger filing. Compared with the normal merger filing, the enterprise involved is required to submit some additional statements and documents in a supplementary filing, and the investigation process often takes longer. Nevertheless, in recent years, the antitrust enforcement authority has accumulated rich experiences in investigating and punishing cases of failure to notify, and the average investigation time tends to be significantly shortened. According to our statistics, the average investigation time for failure to notify cases announced in 2021 is less than 100 days, of which 21 cases take less than 50 days from case filing to penalty. Compared with previous years, the case closing cycle is significantly shorter, which increases the predictability of the investigation process for the enterprises involved.

Sharp sword hanging over key fields

Industries closely related to people's livelihood, such as automobile, medicine and public utilities, still receive significant regulatory attention. In 2021, financial enterprises such as banking and insurance also began to enter the regulatory radar, and the antitrust enforcement authority announced several penalty cases against the financial industry. This also echoes the content of article 37 of the Anti-Monopoly Law (Draft Amendment), which clearly states that people's livelihood, finance, technology, media, etc, are the key areas of focus in the review of concentration of undertakings.

Minority equity investments requesting for caution

Among the failure to notify cases in 2021, many transactions involved minority equity investments. For example, there were 22 cases in which the proportion of equity acquired (including increased shareholding) or joint venture was less than 15 per cent. In some cases, the proportion of equity acquisition was less than 5 per cent, or one of the joint venture parties only held less than 5 per cent of the equity of the joint venture.

This once again reminds enterprises that they should pay enough attention and prudently assess whether a transaction triggers the filing obligation. In particular, when a minority equity transaction is involved, the transaction parties need to assess whether they will obtain control (including joint control) after the transaction. The determination of control under the AML is different from that under the Securities Law. No control under the Securities Law does not mean no control under the AML. Control under the AML needs to be analysed case by case, taking into account whether the shareholders have the right to decide or veto the daily operation and management matters of the target company, whether they appoint senior management, and whether they enter into specific business arrangements with the target company, etc.

Breakthrough in quantitative analysis in the merger review

Summary of cases with conditional approval

In 2021, the antitrust enforcement authority conditionally approved four notifications, and prohibited one notification. The average review time for these five cases was 10.8 months. Of the four conditionally approved notifications, three were subject to behavioural remedies and one was subject to structural remedies. In the review of the above notifications, the antitrust enforcement authority continued to focus on the market structure analysis. In terms of designing remedies, the antitrust enforcement authority's main concern was whether the transaction would increase the possibility of unilateral price increase by the merged entity, and in particular, whether the merged entity would have the incentive and market power to provide Chinese customers

with relatively worse treatment in terms of the product price, the product quality, the transaction conditions and so on after the transaction. We also note that the antitrust enforcement authority delivered more refined competition analysis, using more quantitative criteria and introducing some innovative remedy conditions.

The following is a summary of the basic fact of cases subject to conditional approval or prohibition in 2021.

The name of the transaction	Field	Review timeline (from initial submission to publication of decision)	Main relevant markets	Competition analysis (abstract)	Restrictive conditions (abstract)
The acquisition of Intel SSD businesses by SK Hynix	Semiconductors	About 12 months	Horizontal overlap: global SATA enterprise level SSD market Horizontal overlap: global PCIe enterprise level SSD market Upstream: Global NAND flash market Adjacent: global DRAM market	In global SATA enterprise level SSD market, post-transaction HHI is 2851 with an increase of 307 In global PCIe enterprise level SSD market, post-transaction HHI is 3456 with an increase of 681	Behavioural remedies mainly include: • shall not supply PCIe enterprise level SSD products and SATA enterprise level SSD products to the market within the territory of China at unreasonable prices. • shall continuously expand production volume of PCIe enterprise level SSD products and SATA enterprise level SSD products within five years from the effective date of the decision • shall not take advantage of the superior position for bundling sale or requiring exclusive procurement • shall assist a third party competitor to enter into PCIe enterprise level SSD market and SATA enterprise level SSD market

The name of the transaction	Field	Review timeline (from initial submission to publication of decision)	Main relevant markets	Competition analysis (abstract)	Restrictive conditions (abstract)
The acquisition of MTS Systems Corporation by Illinois Tool Works Inc	Industrial machinery	About eight months	High end electro-hydraulic servo material testing equipment market within the territory of China	Post-transaction HHI is 4946.23 with an increase of 2286.36	Behavioural remedies conditions mainly include: • shall continue to perform all existing business contracts with Chinese customers covering relevant goods and services • shall keep service levels to Chinese customers • shall not sell relevant goods and services to Chinese customers at a price higher than the average price under the same conditions during the 24 months prior to the effective date of the decision between the transaction parties • shall not impose any unreasonable conditions, unless with justified reason or following past business practice
The acquisition of Eaton's hydraulics business by Danfoss	Industrial machinery	About 12 months	Chinese cycloid motor market	Post-transaction HHI is 3259.4 with an increase of 1476	Structural remedies mainly include: • divesting part of the cycloid motor business of a party, including all tangible and intangible assets (including intellectual property rights), agreements, leases, commitments, customer orders as well as personnel, etc, of the divestment assets

The name of the transaction	Field	Review timeline (from initial submission to publication of decision)	Main relevant markets	Competition analysis (abstract)	Restrictive conditions (abstract)
The acquisition of Acadia Communications by Cisco	Photovoltaic equipment	About 14 months	Upstream: Global coherent digital signal processors market, global coherent photonic integrated circuits market, Chinese coherent optical transceiver modules market Downstream: optical transmission system market within the territory of China Adjacent: global routers market	The post-concentration entity has the ability and motive to implement raw material lock-in	Behavioural remedies mainly include: • the transaction parties and the post-concentration entity shall continue to perform existing customer contracts • the transaction parties and the post-concentration entity shall continue to supply coherent digital signal processors to customers in China based on the principles of fairness, reasonableness and non-discrimination • the transaction parties and the post-concentration entity shall not impose bundling conditions or attach other unreasonable trading conditions
The acquisition of Huya by Douyu	Internet	About eight months	Horizontal overlap: games live streaming market within the territory of China Upstream: Online game operation service market within the territory of China	Shares of the transaction parties exceed 40 per cent and 30 per cent respectively, and exceed 70 per cent in aggregate	The transaction is prohibited

More refined competition analysis and applying more quantitative criteria

We note that the antitrust enforcement authority is making greater use of quantitative analysis. In the acquisition of MTS Systems Corporation by Illinois Tool Works Inc above, the antitrust enforcement authority analysed the closeness in competition relationship between the two parties to the transaction. In addition to paying attention to the qualitative relationship between the products of both parties in terms of

performance and quality, the authority calculated the diversion ratio between the products of both parties based on the bidding data submitted by the parties. Although the degree of closeness in competition relationship between the parties has been mentioned in previous cases, according to public information, the acquisition of MTS Systems Corporation by Illinois Tool Works Inc is the first case in which the diversion ratio was published in an official decision.

To analyse the possibility of unilateral price increase after the transaction, in the acquisition of MTS Systems Corporation by Illinois Tool Works Inc, the authority also calculated the gross upward pricing pressure index (GUPPI) to illustrate the possibility of price increase after the transaction. According to public information, this is the first time that the authority provided the calculation data of the GUPPI in a formal decision.

Setting assisting a third-party competitor to enter relevant market as a remedy

The antitrust enforcement authority will usually focus on market entry barriers when analysing market structure. High entry barrier is an important prerequisite for the post-transaction entities' ability to unilaterally raise product prices. Based on previous cases, the authority tends to impose behavioural remedies for the post-transaction entities to prevent it from raising prices by leveraging favourable market position. However, such behavioural remedies cannot fundamentally change the market structure. In the acquisition of Intel SSD businesses by SK Hynix above, the authority required the post-transaction entity to help a third-party competitor enter the relevant market. According to public information, this is the first time that the post-transaction entities are required to help a third party competitor enter the relevant market as a remedy in a formal decision.

Looking ahead

From the announcement of the Antitrust Guidelines for Platform Economy at the beginning of the year to the issuance of the Anti-Monopoly Law (Draft Amendment) at the end of the year, and further to the recent establishment of the National Antimonopoly Administration, 2021 is undoubtedly a milestone year in the merger control regime in China.

Firstly, the Anti-Monopoly Law (Draft Amendment) proposes a series of new rules in the merger control area with the aim of improving the procedural efficiency of merger review and enhance the legal liabilities for failure to notify.

Second, in 2021, the antitrust enforcement authority paid unprecedented attention to cases of failure to notify at both the law enforcement and legislative levels. From the beginning of 2022, the antitrust enforcement authority has already announced 13 penalty cases of failure to notify. We expect that the antitrust enforcement authority will continue to investigate rigorously cases of failure to notify in 2022.

Third, since developing a healthy and competitive digital economy has been a focal point in China's industrial policy, we believe that the antitrust enforcement authority will be empowered to continue to closely scrutinise transactions by platform enterprises in the digital economy.

In this context, we recommend that enterprises strengthen internal merger control compliance management. On the one hand, it can prevent a company's reputational or financial losses caused by regulatory penalties. On the other hand, it can enhance a company's reputation and increase the company's brand value. We hope that through our joint efforts, we have provided readers with a deeper understanding of the complexity of Chinese merger control regime in 2022.

SUSAN NING
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Ms Ning is a partner and the head of the compliance group. Ms Ning's main areas of practice include antitrust and competition law, and cybersecurity and data compliance. In addition, Ms Ning also practices international trade and investment law.

Since 2003, Ms Ning and her team have undertaken hundreds of merger control filings on behalf of clients, mostly consisting of multinational corporations from industries such as chemicals, semiconductors, luxury goods, transportation, hotels, automobiles, high technology, finance, trade, telecommunications, energy and the internet. Ms Ning has also assisted a number of clients on confidential investigations of cartel conducts, resale price maintenance and abuse of dominance and represented several landmark litigation cases in relation to monopoly agreements and abuse of dominance. Ms Ning has advised a number of clients regarding establishing and improving their antitrust and competition compliance systems and conducting internal audits.

Ms Ning joined King & Wood Mallesons in 1995. Ms Ning holds a Bachelor of Law from Peking University and a Master in Law from McGill University. She was admitted as a Chinese lawyer in 1988.

ZHIFENG CHAI
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Mr Zhifeng Chai is a partner in the antitrust and competition division at King & Wood Mallesons.

Mr Chai's main practices include: representing clients in obtaining merger clearance by the State Administration for Market Regulation; assisting clients in conducting multi-jurisdictional merger filing assessment and coordinating multi-jurisdictional merger filings; providing strategic advices on transaction structures and implementation plans from the antitrust perspective; advising clients with respect to antitrust compliance on a variety of antitrust issues in connection with clients' business models, distribution systems, pricing policies, etc; providing antitrust training, internal audit; assisting clients with mock dawn raids; helping clients respond to administrative investigations; assisting clients in private antitrust litigations.

Mr Chai joined King & Wood Mallesons in 2008. Mr Chai has a brief stint in King & Wood Mallesons' Sydney office in 2013.

Mr Chai holds a Master of Law degree from the University of International Business and Economics in Beijing. Mr Chai was admitted as a Chinese lawyer.

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Mr Wu is an associate in the antitrust and competition division at King & Wood Mallesons.

After joining King & Wood Mallesons, Mr Wu has participated in related work including merger filing, antitrust litigation, antitrust administrative investigations, and corporate antitrust compliance. The clients he has served include transportation, petrochemical, automotive parts and other industries.

Mr Wu joined King & Wood Mallesons in October 2018. Mr Wu got his bachelor's degree from Tongji University in mechanical engineering and a master's degree in mechanical engineering from the University of Southern California. Mr Wu received Juris Doctor and Doctor of Juridical Science degrees from Iowa Law School.

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The *Asia-Pacific Antitrust Review 2022* edition of Global Competition Review Insight is one of a series of publications that also covers the Americas and Europe, Africa and the Middle East. Each one delivers specialist intelligence and research designed to help readers – general counsel, government agencies and private practitioners – successfully navigate the world's increasingly complex competition regimes. GCR has worked exclusively with the region's leading competition practitioners, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also put it into context – that makes this review particularly valuable to anyone doing business in the Asia-Pacific region today.

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