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REMEDIES IN THE BRAZILIAN ANTITRUST EXPERIENCE: ISSUES IN STRUCTURE AND INCENTIVES

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Introduction

The Brazilian merger control system is peculiarly complex, involving up to five different authorities in the review of every single case. This convoluted system, as well as the structure of the decision-making body itself, have a direct and – this paper will argue – negative impact on the outcome of the analysis of complex transactions, making the negotiation of remedies cumbersome and inefficient. These circumstances limit the opportunities and the incentives for merging parties to take the initiative to come forward and propose alternatives which could improve the quality of the intervention by the authorities. It is true that the authorities have made significant improvements in the way remedies are determined, within the constraints of the current law. However, the structural limitations of the system impose restrictions which must be taken into account by parties when planning a deal that is likely to raise competition concerns in Brazil.

This paper proposes first to briefly describe what that Brazilian system is like in its current format, explaining the roles and responsibilities of the different agencies involved. Then, it will go over some specific cases, to provide a brief overview of the kinds of transactions that have led to the imposition of remedies and what kinds of remedies have been preferred and adopted by the Brazilian authorities. Finally, it will conclude with an analysis of the incentives and disincentives for the negotiation of remedies provided by the merger control system previously described.

A Byzantine system of merger review

The main statute is Law 8,884, from 1994 1, commonly referred to as "the Competition Law." Enacted in 1994, it set out the institutional structure of the administrative competition system in Brazil, defining roles for the different government authorities involved in antitrust enforcement (collectively called the Brazilian System of Competition Defense - SBDC in its Portuguese acronym), introduced a merger review regime, and provided for the prosecution and punishment of anticompetitive behavior. Subsequent amendments added new discovery powers and the leniency program.

1. Law 8,884, of June 11, 1994, published in the Brazilian Official Gazette (D.O.U.) on June 13, 1994.

As part of a political compromise during the legislative process, the competition law provided for the involvement of a multiplicity of agencies, distributing morsels of power and responsibility to different government areas, such as the Ministry of Justice, the Ministry of Finance and the Federal Prosecutor's Office, apparently without much regard for the efficacy of the end result.

As of June 2010, a draft bill2 which would dramatically change the current legislation was still under discussion in the Federal Congress. If approved in its current format, it would radically simplify the institutional set-up, cutting out and merging authorities so as to stream-line the merger review procedures. It would alter the dynamics and logic of remedies negotiation in Brazilian merger control, potentially improving it in a substantive way. However, as the future of the new bill is still very uncertain, this paper will deal with and focus on the current system only.

The SBDC created by the Competition Law of 1994 is composed of the Secretariat of Economic Monitoring of the Ministry of Finance [*Secretaria de Acompanhamento Econômico do Ministério da Fazenda* – SEAE], the Secretariat of Economic Law of the Ministry of Justice [*Secretaria de Direito Econômico do Ministério da Justiça* – SDE] and the Administrative Council of Economic Defense [*Conselho Administrativo de Defesa Econômica* – CADE]. CADE is the decision-making commission responsible for adjudicating investigations and merger reviews.

Law 8,884/94 requires that the review of all transactions go through all of these three authorities successively. SEAE and SDE are responsible for the first analysis and investigation of mergers3 and other notifiable transactions, from the economic and legal points of view respectively. Each issues an opinion recommending either the approval, the approval subject to restrictions or the non-approval of the referred transaction. After SEAE and SDE have concluded their investigations and given their opinions, two other authorities may also weigh in and provide their own opinions when they feel the case so warrants: the CADE Attorney General and the Federal Prosecutor's Office.

All of these opinions are non-binding, which means that CADE can – and sometimes does – disagree with some or all of them. SEAE, SDE and CADE all have investigative powers, such as the issuance of subpoena-like requests for additional information4. CADE can therefore decide to complement the investigation carried out by its predecessors in the proceedings or even to restart the whole process if, for instance, it decides in favor of a different market definition and thus requires a whole new set of data to analyze the effects of the transaction.

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2. Projeto de Lei da Câmara 6, of February 9, 2009.

3. Except for mergers in the telecommunication industry, in which SEAE and SDE are replaced by the Telecommunication Regulatory Agency *[Agência Nacional de Telecomunicações – ANATEL]* in accordance with ANATEL's Internal Regulation 195, of December 7, 1999.

4. Law No. 8,884, supra note 3, Art. 54, §8.

One additional important feature of the system is that CADE is composed of six commissioners and one chair, all of whom act without any hierarchical relation to anyone. In a merger review, each case is assigned to a reporting commissioner by lot, and that commissioner decides when the investigation is concluded and presents the case to the full CADE Commission, which decides by majority voting. This means that the reporting commissioner, the one the parties had most access to and the one who chose which information needed to be gathered and included in the case report, may be outvoted by the rest of his peers up to the very final stage of the process. As will be explored later, this has direct effects to the incentives and the final results of remedies negotiation.

Since there is no mandatory waiting period, there is no sanction for closing prior to clearance. However, CADE has the discretionary power to impose whatever measures it may deem necessary to remedy impacts of an anti-competitive transaction, from behavioral restrictions to partial or total divestiture orders. Therefore, if the merging parties decide to close and implement the transaction before clearance, they assume the risk of any subsequent restriction that may be imposed by CADE, should it determine that the transaction is harmful on the merits. Since the parties no longer have the option of not accepting the remedy and simply giving up on the deal, the decision becomes an order. As the majority of transactions do not wait for Brazilian clearance to close, remedies end up being imposed as orders on the buyer.

Both SEAE and SDE have 30 days each to prepare their opinions on a transaction. CADE then has 60 days upon receiving these opinions to issue a decision, bringing the total period to 120 days.5 The clock however stops every time SEAE, SDE or CADE sends out a request for additional information.6 This means that, though simple transactions have been cleared in shorter and shorter periods (often four to six weeks), complex cases may take much longer, often reaching more than one year. Parties can speed up the process by trying to provide required information as quickly and clearly as possible and arranging meetings to try to anticipate additional questioning by the case handlers, but that has limited results, especially given the very scarce human resources of the authorities.

Taking into account that transactions that result in remedies are of the more complex type, the consequence of the current system of merger control in Brazil is that remedies will be considered by the authority and imposed six, nine or even more than twelve months after the buyer has legally acquired and taken over the target business.

As a partial response to this problem, CADE has over time adopted the practice of imposing injunctions to or negotiating agreements with the merging parties in more complex cases, with hold-separate obligations regarding the affected assets. These injunctions or agreements are typically adopted upfront, in the beginning of the review, and last until the final decision. They have not prevented parties from closing the deal, however, and inevitably still allow a large measure of scrambling of the eggs to take

5 Law No. 8,884, supra note 3, Art. 54, § 6,

6 Law No. 8,884, supra note 3, Art. 54, § 8,

place. Their goal in any case is to ensure that it will at least be possible for CADE to impose a remedy such as a divestment in the end, as the assets will still exist. These hold-separate arrangements may represent a heavy burden on the parties, especially as the review of a complex case can easily last 12 months or longer.

CADE has very broad enforcement powers with regard to remedies. The law expressly allows it to take whatever measures are deemed necessary to remedy damages caused by a transaction, including behavioral obligations and/or partial or full divestments or even the dissolution or break-up of a company.7 CADE may order partial divestitures, such as of brands, production facilities or distribution networks, or full divestiture of all the assets acquired.8 As an administrative authority, CADE is empowered to request judicial backing to enforce its decisions, such as the collection of fines or the performance of a specific obligation.

Originally, and for many years after the enactment of the Competition Law in 1994, such undertakings were unilaterally imposed by CADE and the parties would only be informed of the obligations imposed at the date of the decision – taken in a public court-like setting. However, in the last few years, there seems to be progressively more room to discuss and negotiate undertakings with commissioners prior to the final decision being taken, though the initiative to seek out the authorities for such negotiation usually depends on the parties themselves.

Third parties can, and sometimes do, actively oppose mergers. They have the right to access non-confidential parts of the file, to present arguments and evidence and hold meetings with the authorities to present their case throughout the proceedings. Once a decision is taken, there is no possibility for a third party to appeal in the administrative sphere, but they can resort to the courts to challenge a CADE decision. As the system stands, third party input is received and analyzed throughout the review, but not at the remedy-crafting phase.

CADE traditionally tries to solve the competition issues raised by a deal by way of remedies, rather than applying a full block, which is always seen as a last resort when no partial measures are deemed sufficient. Structural and behavioral commitments have been adopted, tailored to the characteristics of the affected markets, targeting, for instance, specific brands, production facilities and distribution networks. As is the case with authorities around the world, CADE usually favors structural remedies over behavioral ones, creating permanent conditions for competition, rather then determining behavioral conditions which have to be monitored over time. However, as will be seen below, behavioral remedies have also been adopted whenever considered appropriate. In either case, CADE is usually more concerned with the effects of the remedies to consumers rather than to competitors.

7 Law No. 8,884, supra note 3, Art. 54, §9.

8 Act of Concentration #08012.001697/2002-89 (Nestlé/Garoto) and Act of Concentration #08012.001885/2007-11 (SaintGobain/Owens Corning).

So far there has never been a case in which CADE considered necessary or tried to reach assets located abroad as part of a decision, though that is theoretically possible. CADE would likely be very cautions in considering such an action, and it has in the past taken into account the decisions of other authorities before taking its own decision in the case of geographic markets with an international dimension, in which remedies adopted in different jurisdictions could have a worldwide effect and potentially cumulate or clash with each other.

The timing of implementation of remedies depends on the specific remedy being adopted by the authorities. Divestiture orders, for instance, usually will define a period of months within which they must be implemented. Some specific cases have varied from two to nine months, for instance.9 In at least one case recent case, however, CADE decided to keep the period a secret to third parties, so as to avoid the depreciation of the assets to be divested that would tend to occur towards the end of the deadline.10 Failure to comply with the decisions on time usually carries daily fines, and CADE also has the power to institute a trustee to mandate execution of the decisions.

Relevant precedents involving remedies

The remedies adopted by CADE tend to be specific, in that they aim to address the precise competition problems raised by the deal and to be appropriate to the market. If specific barriers to entry are identified, for instance, the remedies will aim at addressing them. In this sense, for example, in the Colgate Palmolive/Kolynos transaction, CADE identified brand loyalty and cost of building production facilities as the main barriers to entry in the toothpaste market. Therefore, the decision in that case was directed at these two factors. Likewise, CADE has in other cases determined, separately or jointly, the divestment of plants, the sale of brands, the sale of stores in specific geographic areas, the sharing of production facilities, or the granting of access to exclusive distribution networks as remedies tailored to the specific circumstances of the market. In other words, CADE attempts to identify what are the main issues to address in order to solve the competition problems raised in each particular case. If it considers that brands are an important element, it may order the divestment of a brand. If it considers that production facilities are important for entry, it may determine that the sale of the brand should be

9 According to CADE's decision in the Act of Concentration No. 08012.006976/2001-58, involving G. Barbosa e Cia and others, the assets to be divested should be sold to a third party within 2 months from the date this decision was published in the Official Gazette (January 16, 2004). In the Act of Concentration No. 08012.001697/2002-89, involving Nestlé Brasil Ltda. and Chocolates Garoto S/A, CADE determined that the assets should be divested within 90 days from the date of publication of the decision in the Official Gazette (February 20, 2004).

10 Act of Concentration #08012.001885/2007-11 (SaintGobain/Owens Corning).

coupled with the sale of a plant or, depending on the actual physical assets available, with toll-production for competitors. If distribution is seen as a barrier to entry, CADE may impose the sale or sharing of a distribution network (though the latter would be a last resort choice for the authority, as it demands close communication between competitors).

In the crafting of packages of remedies, CADE has been influenced by the trend prevailing in competition authorities around the world, based on the acknowledgement that it is more effective to divest a functioning on-going business unit rather than gathering bits and pieces that will have to be made to work together in a mix-and-match approach. Also, as mentioned, the actual physical circumstances of the assets may limit or determine the shape of the divestment, such as the number and location of facilities involved in the transaction.

Furthermore, it should be noted that CADE often imposes specific behavioral restrictions targeted at specific issues, either by themselves or combined with structural measures. In this sense, CADE may for instance determine the withdrawal of exclusivity obligations by suppliers if those were to be considered as restricting entry. Likewise, contractual obligations with distributors and retailers could also be scrutinized and - if found to restrict access by competitors to points of sale in competitive conditions, for instance - could be subjected to annulment. Behavioral remedies, for example, have been imposed to deal with vertical issues arising out of the progressive consolidation in Brazil of cable TV operators and local content providers.

The Nestlé/Garoto case11 is one example of a classic structural remedy, with Nestlé being ordered by CADE to sell the whole Garoto entity it had acquired. This would be the equivalent of a full block in a suspensive system in which the parties had to wait for a decision before closing. The final result of this case however is still uncertain due to a lengthy appeal process in the courts.

An example of structural remedies involving partial divestments was the AmBev case. It dealt with the merger between Brahma and Antarctica, which created AmBev, which later merged with the Belgian Interbrew to form InBev and then bought Anheuser Busch to become the largest beer manufacturer in the world.

CADE found the Brahma / Antarctica deal to be anticompetitive in relation to beer, but not to soft drinks - another affected market. It therefore looked for a surgical alternative that could correct the specific competition problem without wholly barring a deal that - it acknowledged - generated significant efficiencies. CADE determined the sale of a package of assets considered capable of allowing for the immediate entry of a new player into the market, composed of five production plants around the country, a mid-sized brand and access to the distribution network of the new merged company. The package was bought by the Canadian producer Molson, which had not been physically present in the Brazilian market before.

11 See footnote 9 above

Other examples of classic structural remedies can be found in retail cases, such as the Petrobras / Agip (gas stations) and Bompreço / Royal Ahold / G. Barbosa (supermarkets). In both, CADE identified high concentrations limited to some of the geographic markets affected and decided to impose partial divestment orders targeted at those markets rather than to unwind the whole transaction. In the first one, Petrobras was ordered to choose and divest gas stations in 14 local markets within five months. In the second case, out of the several local relevant markets affected, CADE found that in three the level of concentration was anticompetitive and ordered the sale of 16 stores in those towns plus a distribution center. In this case, different from the Petrobras, Bompreço was not allowed to choose which stores to sell (such as mixing stores originally from the buyer and from the target) so as to maximize the effectiveness of the sale as an on-going and connected set of stores with its own distribution center.

An interesting example of behavioral remedies imposed by CADE was the decision on the DirecTV / Sky transaction, involving News Corp and Hughes. A global deal with important impact around the world, it led to the creation of a single player in satellite TV in Brazil, besides causing significant vertical effects, and ended up being approved with a series of conditions. These included, for instance, the obligation to adopt no discriminatory or exclusivity provisions in the sale of content to other paid TV operators and no exclusivity on the acquisition of transmission rights related to the most important sports events, as well as the obligation to submit certain types of relevant new contracts to CADE for prior analysis.

Besides the vertical issues, CADE also had concerns regarding the horizontal effects of that deal. While in certain areas of Brazil (the most populous ones) at least one cable operator was available to provide a competitive constraint to the merged entity, in others consumers had neither access nor perspective of access to cable TV, and were therefore faced with a monopoly provider of paid TV. CADE then determined that, in the areas with no cable TV supply, Sky would have to offer consumers the same prices and conditions it offered in the areas where competition with cable was available, within certain rules. This way, CADE reasoned, the possibility of abuse by the monopolist in certain areas would be prevented by using Sky's own freely determined price levels from the competitive areas. As most consumers are located in the latter areas, where there is active competition, it would not make economic sense for Sky to artificially raise its prices in the competitive areas in order to reap monopoly profits in the monopoly areas, as the losses would be greater than the gains. Evidently, this more elaborate and perhaps interventionist solution was considered necessary since the analysis both of physical and technical circumstances and of market conditions did not allow for the crafting of an appropriate structural remedy.

The cases above involved either little or no open discussion about remedies between the parties and the authorities prior to the decision, or only a very unstructured type of negotiation, carried out mostly with one commissioner with the propositions by the parties but little feed-back or follow up from the authority. That was indeed the common practice, as will be further explained below. Two more recent cases however provide evidence that CADE is willing to try a different approach to merger settlements, one more similar to other jurisdictions though still heavily constrained by the current legal set-up.

The Coca-Cola/Matte Leão12 and the Telefónica/Telecom Italia13 merger reviews are in fact almost ground-breaking examples of cases that resulted in remedies being imposed that were actually tailored during negotiations with the parties, with a back-and-forth discussion of arguments and proposed solutions by both sides that went procedurally and substantively beyond what had been done in the past.

In the case involving the acquisition of Matte Leão - a major player in the tea industry in Brazil - by Coca-Cola, CADE had to face a deal that nearly resulted in a duopoly, as the main players in the Brazilian market for ready-to-drink iced teas were basically three: Coca-Cola in a joint venture with Nestlé (with the brand *Nestea*), Pepsi (with the brand *Lipton*), and Matte Leão with its own brand. Dealing with a highly concentrated market with high barriers to entry and lack of rivalry, CADE invited the parties to negotiate remedies so that they could jointly find a way out of the duopoly scenario.

In that specific case, besides other considerations, a prohibition of the deal as whole could have represented an over-enforcement, as there were parts of the deal14 that did not raise any competition concerns, and efficiencies resulting from the deal had also been evidenced by the parties. In that context, CADE aimed at finding a solution that would maintain the three brands in the market, and decided to adopt the remedy suggested by the merging parties themselves during the negotiations with CADE, in which Coca-Cola agreed to cease the production and distribution of the *Nestea* ice tea in Brazil, allowing Nestlé to find an alternative way to produce and distribute the *Nestea* brand in Brazil.

Another example of such new approach was the Telefónica/Telecom Italia deal. Each of the parties controls a major mobile telephone services provider in Brazil15, and the case involved the acquisition of minority shares of Telecom Italia by Telefónica on a worldwide basis.

As Brazil was only a minor part of the deal as a whole but the transaction had the potential to significantly affect competition in the Brazilian market for mobile telephone services, the risk of over-enforcement was considerable. Although CADE considered it imperative to intervene in the deal to ensure the passive nature of the investment being made and to limit the exchange of information between the parties regarding activities in Brazil, a full prohibition was seen as disproportionate. In this scenario, negotiations between CADE and the parties ensued to explore possible solutions to the dilemma. Through such discussions, CADE was able to come up with a mix of both structural and behavioral remedies that addressed CADE's concerns and allowed the deal to be approved with restrictions. The structural remedies in this case consisted in eliminating participation

12 Merger Review n.º 08012.001383/2007-91.

13 Merger Review n.º 53500.012487/2007.

14 The deal also involved the market for other types of tea such as tea bags and resulted in a number of efficiencies.

15 Telecom Italia is the controller of TIM; while Telefónica controls VIVO.

and voting rights of interlocking officers, while behavioral ones comprised those aimed at avoiding the exchange of competitive sensitive information.

Both of these cases are considered by CADE as successful examples of a new trend of openly discussing remedies with the parties prior to adopting a decision. However, they still illustrate the considerable difficulties that such approach faces in the Brazilian system.

Incentives and disincentives to negotiate

All of the above-mentioned cases, and many others like them, had to go through the byzantine system of review described above. With all its different authorities and with all of its successive opinions, what this model does not systematically offer the parties is a moment in which they are told in no uncertain terms that their deal will not be approved without some kind of remedy. If the opinions by SEAE and SDE recommend a divestment, for instance, parties may and often do in fact think that CADE may not agree with those preceding authorities and still decide to give an unconditional approval. The parties are therefore incentivized to continue to argue for a full approval even after negative opinions, as proposing specific remedies could – and possibly would - be seen by CADE as conceding that the deal is indeed anticompetitive. As CADE has in the past disagreed with SEAE and SDE, this is not an unreasonable stance.

The same situation and the same reasoning continue also to apply within CADE though. If the reporting commissioner starts to show signs that the deal is problematic and would not be approved without remedies, the parties may try to convince the other commissioners otherwise, approaching them individually, given that the reporting commissioner may and sometimes is outvoted by the others. Again, coming forward with a proposal would likely be seen as an admission of the problems of the deal and could eliminate all possibility – which always seems to be there – of a full approval by at least a majority of the Commission. Even if the parties know that, given the nature of the case, some kind of remedy will likely be imposed, they may try to play the differences among the individual commissioners in order to try to get the least interventionist decision and neither offer nor negotiate a specific remedy with the full commission.

In fact, it used to happen in many cases that, even in those circumstances in which each commissioner favored some kind of intervention, they would discuss and decide on the final remedy only during the decision-making session itself (which takes place completely in the public eye, with an open audience). Different proposals may be raised by different commissioners, not necessarily composing the most efficient package of remedies available. In fact, the alternatives regarding the crafting of remedies can be so varied that the system in theory allows for a deadlock in which each commissioner proposes a different set of measures and no position wins a majority. Although that extreme case has not happened yet, one in which three different packages of divestment were put forth, altered and defended during the session has taken place, with a final vote of three commissioners to two to one deciding the case.

In the above-referenced AmBev case, for instance, the magnitude of the package of assets to be divested was decided during the session, with proposals to include other brands or different production facilities being brought forward, discussed and put together or refused right there during the decision-making session. In the end different commissioners partially dissented on different issues.

It is not hard to recognize that this is not the most efficient way of taking a complex decision in which one requirement may affect, render unnecessary or simply clash with others, with the risk of over-enforcement, under-enforcement or simply wrong-enforcement hanging on the balance and sometimes depending on the order that certain issues are put to a vote.

This situation is made even more difficult by the fact that many commissioners consider themselves and the authority as performing a quasi-judicial function, and believe that as such they should not express their opinions or anticipate how they will vote on a specific case when meeting with the parties – much like a judge or a justice in a collegiate court would not.

As mentioned, this perception has been changing more recently and the acknowledgement of the importance of negotiating *en bloc* with the parties has been steadily increasing. In this sense, more and more complex cases are in fact dealt with the whole CADE commission from the start, either directly or through the reporting commissioner in charge of the case. This does not ensure that all commissioners will in the end agree, but it certainly increases the chances of a consistent resolution of the case which will take into account the preoccupations and positions at least of the majority of the commissioners in a coordinated fashion.

The Coca Cola and Telefónica cases mentioned above had to contend with these hurdles. And one of the reasons why they were successful certainly was that the reporting commissioner took on the role of negotiator, presenting himself as representing the full Commission, discussing every step of the process with his peers and offering a united position to the parties. As discussed above, the perception that the negotiator from the authority is indeed speaking for the whole Commission is crucial to ensure that the parties will have the incentive to actually propose remedies rather than try to play out the different commissioners' positions. Evidently, under the current system another way that greater certainty could be achieved would be to hold the remedy negotiation directly with the full CADE Commission throughout the process. That has taken place in the past, but it is logistically and practically an extremely difficult situation to maintain for the duration of the process.

The way forward?

The method of using the reporting commissioner as a speaker for the whole Commission, testing every idea and proposal with the full Commission and presenting a united front before the parties is certainly an ingenious way to alter the incentive structure created by the current unfavorable legal set-up. However, it also presents its own difficulties, and is inherently potentially unstable. In fact, given that there is no legislative or regulatory

framework for this procedure, it depends wholly on the goodwill and perception of the commissioners that it is indeed useful and beneficial. If but a few of the seven CADE members decide to opt out and take their own approach to the case, opening parallel channels with the parties, the incentive for effective remedies negotiation is significantly reduced due to the increased uncertainty that the process will actually lead to agreed results.

It is CADE's job now to try to create ways to preserve and replicate the good results of the procedures adopted in these recent cases. Attempting to regulate and formalize this new approach to the negotiation process would be a possible way to reduce the uncertainties and preserve the stimulus for merging parties to enter into remedies negotiations whole-heartedly.

In fact, such negotiations not only make the process smoother and more efficient, but they also allow for crucial improvements to the quality of the final remedy adopted by incentivizing and taking into account the contribution of the parties themselves. As active players in their specific markets, they may have invaluable comments and information regarding the effectiveness and risks of certain measures and orders under consideration by the Commission – even if their positions are taken with all the necessary cautions and caveats. Adding such information to the decision-making process can significantly improve the quality of the final results, which should be the goal of the authority.

The Brazilian antitrust community continues to wait for the change in the legislation that would improve the institutional setting and dynamics which today hinder and burden efficient remedy negotiation. In the meantime, however, and even under the system in place today (or especially in this situation), it is crucial that the authorities follow on and advance further in the current trend of stimulating parties to come forward and adopt a negotiated approach to remedies. That is after all the best way for CADE to ensure that it will be able to consistently fulfill its obligation of protecting competition by crafting the most effective remedies possible.

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