CHINA

MOFCOM clears Microsoft's acquisition of Nokia's devices and services business with conditions

On April 8, the Ministry of Commerce ("MOFCOM") conditionally cleared Microsoft's $7.4 billion purchase of Nokia's devices and services business. The decision's unique handling of patent concerns serves to heighten awareness of MOFCOM's approach to this difficult issue, as well as its willingness to impose behavioral remedies to resolve competition concerns.

MOFCOM first concluded that neither Microsoft nor Nokia has a dominant position in the upstream market for operating systems for smart mobile devices nor in the downstream market for smartphones. However, MOFCOM determined that Microsoft's Android operating system patents are important to the production of Android smartphones and speculated that any refusal by Microsoft to license its patents would significantly impede competitors from entering the relevant market. MOFCOM also was of the view that as a result of the transaction and Microsoft's entry into the smartphone manufacturing market, Microsoft would have the incentive to increase its competitors' costs by increasing licensing fees.

Furthermore, in light of the fact that Nokia will exit the downstream mobile device market but planned to retain all patents relating to communication devices and smartphones, MOFCOM perceived a risk that Nokia might unreasonably alter its existing licensing fees, particularly for its standard-essential patents ("SEPs"), which would increase entry barriers and the cost of intellectual property for smartphone manufacturers in China.

Therefore, MOFCOM imposed on the parties a number of patent licensing commitments. With respect to smartphone SEPs, Microsoft must (i) continue to offer licenses on fair, reasonable, and non-discriminatory ("FRAND") terms; (ii) not seek an injunction against alleged infringers of such SEPs that are manufacturing smartphones in China; (iii) not require the licensees to cross-license their own patents to Microsoft, unless such patents are also smartphone SEPs; and (iv) not transfer those SEPs to any other entity unless such entity agrees to adhere to these commitments.

With respect to non-SEPs, Microsoft will (i) continue to make available to smartphone manufacturers in China non-exclusive licenses under its existing Android Licensing Program and certain other patent licensing programs; (ii) offer these licenses at rates and with terms similar to those previously offered by Microsoft; (iii) not transfer any such patents for five years, and after that, only transfer such patents to a buyer that agrees to all licensing commitments made by Microsoft prior to entry of this order; and (iv) only seek injunctions against infringement of such patents after a potential licensee fails to negotiate in good faith.

Nokia must continue to license its SEPs pursuant to terms agreed with relevant standard setting organizations. For any such SEP subject to a FRAND commitment, it may not seek an injunction against infringement unless the potential licensee fails to negotiate in good faith. Nokia may not license its SEPs only on the condition that the licensee also take a license for Nokia patents not subject to FRAND conditions. Nokia cannot transfer its SEPs to any other entity unless that entity agrees to abide by Nokia's FRAND commitments made to standard setting organizations.

MOFCOM issues Guidelines Regarding Filing Procedures for Simple Transactions

On April 18, MOFCOM issued tentative guidelines on new filing procedures for simple concentrations (the "Simple Filing Guidelines"). The Simple Filing Guidelines complement MOFCOM's recently issued interim rules regarding the definition of a "simple" concentration (the "Interim Rules"), which took effect on February 12, 2014.

Notifying parties can apply for simplified review treatment by filing on a new short form. The short form eliminates a few sections contained in the standard form – information on affiliates unrelated to the transaction, information about major customers and suppliers, details regarding market entry, a description of horizontal or vertical agreements between the parties, and the analysis of potential efficiencies – but still requires the provision of detailed information about the relevant products, markets, competitors, and competition.

After receiving the short form, MOFCOM will conduct a preliminary review of the materials submitted and will formally "accept" the case once it is satisfied that the transaction qualifies as "simple" and that all required information has been provided. MOFCOM also may request additional information during this pre-acceptance period. The Simple Filing Guidelines do not establish any particular timeline applicable to the pre-acceptance period. If MOFCOM determines that a case does not meet the criteria for simplified review, it will advise the parties to re-notify under the normal review process.

In addition to the form itself, the parties must prepare a short description of the transaction for publication on MOFCOM's website (the "Public Consultation Form"). The description must contain information regarding the notifying parties, a description of the transaction, the applicable "simple" category from Article 2 of the Interim Rules, and general information in support of the claim for simplified treatment. If MOFCOM determines that a filing qualifies for its simple procedure, after accepting the case, MOFCOM will publish the Public Consultation Form on its website for ten days. During this time, any third party may submit comments on the application along with supporting evidence as to whether the transaction should in fact be treated as a "simple" case.

In the event that MOFCOM receives sufficient evidence from a third party or otherwise determines that a transaction does not qualify for simple treatment, it may overturn its earlier determination that the transaction qualifies for simple treatment, and the parties must re-file using the normal review procedure.

As of the end of June, MOFCOM has published the Public Consultation Forms for five transactions for which the parties have sought review under MOFCOM's new simplified merger review procedure. They are Rolls-Royce Holding's proposed acquisition of the remaining 50% stake in its joint venture, Rolls-Royce Power Systems, Toyota's acquisition of a 39.9% share of Scholz AG, EDF China Investing's acquisition of 49% of Jianxi Datang Guoji Wuzhou Power Generation, Sichuan Yiadong Cement's acquisition of 100% of Sichuan Lanfeng Cement, and the proposed joint venture of Shanghai Baogang Gas Limited, Warburg Pincus, and Henan Jinkai Chemicals.

MOFCOM's rules on simplified merger review procedures have been criticized for not providing certainty as to the approval timeframe. That said, the first simplified merger case (Rolls-Royce Holding/Rolls-Royce Power Systems) was posted on MOFCOM's website on May 22, and on June 9, shortly after the 10 day window for public comment closed, the transaction was unconditionally cleared. While all transactions may not proceed this quickly, this is an encouraging example.

MOFCOM clears Merck's acquisition of AZ Electronics with conditions

On April 30, MOFCOM approved Merck KGaA's ("Merck") acquisition of AZ Electronic Materials S.A. ("AZ") with conditions. Merck is the world's largest maker of liquid crystals used in TVs, tablets, and smartphone screens. AZ makes high-purity specialty chemicals for the electronics industry, including photoresists.

MOFCOM defined relevant markets for liquid display crystals and photoresists and found that the markets are adjacent because both are raw materials used to manufacture flat panel displays. It defined a global geographic market, but as it frequently does, focused its analysis on the transaction's impact in China.

MOFCOM found that Merck would become the largest supplier of both liquid display crystals and photoresist post-merger. Merck's market share of liquid display crystals was more than 60% world-wide and more than 70%

in China, and AZ's market share of photoresists was about 35% globally and more than 50% in China. As a result, MOFCOM concluded that Merck would be able to tie or bundle sales and that the transaction, therefore, might eliminate or restrict competition in both markets. Furthermore, MOFCOM explained that Merck's ownership of approximately 3,500 patents in the liquid display crystals market might further limit competition and heighten entry barriers. Unfortunately, the decision did not fully explain the rationale supporting MOFCOM's conclusions.

MOFCOM imposed three conditions that are binding for three years from the announcement date: (i) Merck may not engage in any tie-in sales that would force Chinese customers to buy products from both Merck and AZ at the same time or offer cross-subsidiaries between the two products; (ii) Merck must license its liquid display crystal patents on non-exclusive, commercially reasonable, and non-discriminatory terms; and (iii) Merck must report to MOFCOM regarding its licensing of liquid display crystals patents in China.

NDRC suspends investigation of InterDigital

On May 22, the National Development and Reform Commission ("NDRC") suspended its investigation of InterDigital Inc. ("IDC") after IDC made several commitments to the agency. This is only the second time that NDRC has suspended an investigation based on a company's making certain commitments. NDRC previously suspended an abuse of dominance investigation into China Telecom and China Unicom after the companies made certain commitments.

IDC is a U.S. wireless technology patent development company. NDRC found that IDC discriminated against Chinese companies by requiring patent licensing fees several times higher than those charged to non-Chinese companies. In particular, NDRC determined that IDC quoted unreasonably high royalty rates to Huawei Technologies and ZTE Corp. and attempted to force the companies to accept the rates by suing them for patent infringement.

IDC committed not to discriminate against Chinese companies by requiring payment of unfair licensing fees. It also promised that it would not (i) require that potential licensees accept a bundled license for both SEPs and non-SEPs; (ii) require that licensees provide a cross-license; and (iii) resort to litigation in an effort to impose unreasonable terms.

Because IDC had not yet collected licensing fees in China, it had not generated any illegal gains. Hence, NDRC concluded that IDC's specific and workable commitments were an effective remedy for its allegedly illegal conduct.

Relatedly, on May 27, NDRC Director-General Xu Kunlin disclosed that the agency drafted a procedural rule regarding the suspension of antitrust investigations. Mr. Xu also disclosed that NDRC aimed to issue other procedural rules regarding leniency applications and the calculation of antitrust fines in the second half of the year.

SAIC announces focus on competition issues in several industries

On May 26, the State Administration for Industry and Commerce ("SAIC") announced a three year program to restore fair competition in various industries. The first phase of the program (from May to November) focuses on antitrust issues in internet related sectors, the automobile (maintenance and parts) sector, home furnishings, the construction and renovation sector, and public utilities.

NDRC fines five optical lens makers for RPM

On May 29, NDRC concluded its ten-month investigation of the optical lens industry. It found that four frame lenses producers (Essilor, Zeiss, Hoya, and Nikon) and three contact lenses companies (Bausch & Lomb, Johnson & Johnson, and Weicon) engaged in various forms of resale price maintenance ("RPM") by restricting resale prices and using punitive measures (such as deducting money from deposits, halting supply, and cancelling sales commissions) to ensure compliance with the suggested retail prices. NDRC also found that the producers required that retailers commit to a “buy three get one free” promotional effort in order to stabilize retail prices.

Five of the companies were fined a total of RMB 19.6 million (~$3 million; €2.3 million), equivalent to 1-2% of their relevant revenue in China from the previous year. Consistent with NDRC’s past practice, more than one company received immunity from fines. Both Hoya and Weicon were exempted from the fines for bringing the violation to NDRC’s attention, providing important evidence to the NDRC, and actively rectifying their behavior.

MOFCOM publishes New Guidelines on Notification of Undertakings’ Concentrations

On June 6, MOFCOM announced its New Guidelines on Notification of Undertakings’ Concentrations (“Notification Guidelines”), which revise the previous version published in 2009. The Notification Guidelines elaborate on various concepts relevant to MOFCOM’s merger control notification and review process and contain a number of important developments.

The Notification Guidelines list out factors that MOFCOM may take into account when assessing whether a transaction leads to the acquisition of control. The Notification Guidelines make clear that control may be single or joint and will be determined based on a number of factors, including:

- The transaction agreement
- The constitutional documents of the target company
- The underlying aim or rationale of the transaction
- Future plans of the parties
- Shareholdings before and after the transaction
- Decision making and voting patterns and mechanisms at both the shareholder and board level
- Powers relating to the appointment and resignation of senior management of the target
- The relationship between the shareholders and directors of the target
- Any existing business relationship or cooperation agreement between the acquiring undertaking and the target.

This is the first time MOFCOM has provided official guidance regarding the concept of control. The list is somewhat general and is not exhaustive, so it remains to be seen how the guidance will be applied in practice.

Interestingly, the Notification Guidelines also state that establishment of a joint venture is notifiable if two or more parties will jointly control the venture. As with the assessment of control, this is the first time that MOFCOM has explicitly stated that joint venture formation is notifiable.

SAIC seeks comments on draft rules for antitrust IP enforcement

On June 10, SAIC released a new draft of its administrative Rules on Prohibiting Abuse of Intellectual Property Rights to Eliminate or Restrict Competition.

The new draft helpfully states that antitrust law and intellectual property protection share the common goal of promoting innovation and competition and protecting the rights of consumers and social and public welfare. The draft also states in Article 2 that the Anti-Monopoly Law (“AML”) applies only to conduct that abuses intellectual property rights (“IPR”) and that eliminates or restricts competition.

The draft provides useful guidance on SAIC’s approach to this complicated area of the law. However, there are a number of areas where further work or clarification would be helpful.

The draft rules continue to allow the broad use of the “essential facilities” doctrine. Pursuant to Article 7, a dominant undertaking that holds an “essential facility for production and operating activities” must not refuse to license it to any undertaking that offers reasonable compensation. This essential facility doctrine is defined broadly and the following non-exhaustive factors will be considered: “the intellectual property right has no reasonable substitute in the relevant market and is necessary for other undertakings to compete in the relevant market; refusal to license the intellectual property right would adversely affect competition and innovation in the relevant market; licensing the intellectual property right would not cause unreasonable damage to the undertaking, etc.” In other jurisdictions with established antitrust regimes, the essential facilities doctrine is rarely used. Moreover, its application may have particularly negative consequences when applied to IPR by creating disincentives for innovation.

In addition, for many potential violations (i.e. engaging in various forms of “exclusive dealing”), SAIC would permit a party to establish that its conduct was reasonably justified, which suggests that SAIC understands that certain conduct may have procompetitive benefits. However, it is not clear from the draft rules whether SAIC has an obligation to establish that any of the prohibited abuses of IPR actually results in the elimination or restriction of competition before concluding that it is a violation of the AML.

Finally, in the context of standard setting and standard setting organizations (“SSOs”), the draft rules may be read to prohibit a holder of a SEP from refusing to license its IPR on FRAND terms regardless of whether it has committed to do so or whether the applicable SSO requires licensing on FRAND terms.

MOFCOM prohibits P3 shipping alliance

On June 19, MOFCOM prohibited its second transaction since the implementation of the AML in 2008. The other prohibited transaction was Coca-Cola/Huiyuan. The decision prohibited a proposed long-term vessel-sharing alliance between Maersk, MSC, and CGM for shipments between various ports along the Asia-Europe, trans-Pacific, and trans-Atlantic routes (the “P3 Network”).

The merger control filing was made with MOFCOM on September 18, 2013, but was not officially accepted for review until December 19, 2013.

MOFCOM defined the relevant market as international container liner shipping services. It defined separate relevant geographic markets for the Asia-Europe routes, trans-Pacific routes, and trans-Atlantic routes. MOFCOM focused its analysis on the Asia-Europe routes and the trans-Pacific routes.

MOFCOM took the view that the transaction would significantly increase the parties’ market power by combining the top three players in the market, leading to a combined share of 46.7%. It reasoned that this level of concentration gave rise to concerns about the ability of disadvantaged Chinese shipping companies to compete effectively post-transaction. It also had concerns about the allegedly weak bargaining power of Chinese ports and shippers. Regrettably, MOFCOM’s published analysis does not discuss why its concerns failed to be mitigated by the fact that the P3 Network did not involve joint control of the parties’ pricing, marketing, and sales functions.

It appears, as has been the case in the past, that MOFCOM remained unconvinced about the efficiencies claimed by the parties. As the decision contains little discussion about the efficiency arguments, however, it remains unclear if, and to what extent, MOFCOM’s ruling was driven by a general skepticism towards merger efficiencies, doubts that the size of the projected efficiencies would be enough to counteract any anticompetitive effects, or questions about whether the efficiencies could be achieved by the parties without the alliance.

MOFCOM merger review statistics

In the second quarter of 2014, MOFCOM reviewed 71 transactions. Of these, 68 were cleared unconditionally, conditions were imposed on two (Microsoft/Nokia and Merck/AZ), and one was blocked (P3 Shipping Alliance).

HONG KONG

Proposed amendments to Competition Ordinance to confer specific powers on Competition Tribunal

On May 9, the government published the Competition (Amendment) Bill 2014 (the "Bill"), which will be tabled for discussion at the Legislative Council. The Bill seeks to confer on the Competition Tribunal various powers for enforcement of the Competition Ordinance, which are similar to those currently exercised by the judges and judicial officers of the Court of First Instance in respect of civil proceedings. The powers include the ability to prohibit an individual from leaving Hong Kong and to award interest on debts and damages for which a judgment has been issued. The Bill also includes language regarding certain operational matters relating to the proper functioning of the Competition Tribunal.

INDIA

CCI fines Thomas Cook for failure to notify

On May 21, the Competition Commission of India ("CCI") imposed a fine of INR 10 million (~$170,000; €125,000) on Thomas Cook (India) Ltd. ("TC"), Thomas Cook insurance Services (India) Ltd. ("TCIS"), and Sterling Holiday Resorts (India) Ltd. ("SH") (collectively referred to as the "Parties") for failure to notify certain market purchases. The transaction involved a multi-stage process comprising a number of acquisitions and a scheme of arrangement and amalgamation (the "Scheme").

Under section 6(2) of the Competition Act 2002, the Parties were required to notify the Scheme to the CCI, which they did on February 14, 2014. The notification referred to February 10 and 12, 2014 TCIS acquisitions of SH shares (the "Market Purchases"). These Market Purchases were consummated before the Parties filed notice of the Scheme on February 14, but the Parties believed the Market Purchases to be exempt from the notification requirements, as SH's turnover was less than INR 750 crores (~$125 million; €95 million) in the previous fiscal year.

While neither the Competition Act nor the Combination Regulations 2011 make any reference to composite combinations, the CCI held that the Parties had failed to comply with the Competition Act because the various transactions amounted to a composite combination, which meant that the Market Purchases were not an isolated acquisition exempt from the obligation to notify.

The CCI explained that there is no explicit bar under the Competition Act to considering a number of contemporaneous transactions as one combination, particularly when they are authorized by the parties on the same day. Furthermore, argued the CCI, the fact that the Combination Regulations clearly acknowledge the possibility of a transaction being achieved by way of inter-connected or inter-dependent transactions means that a purely literal reading of the relevant clauses would be contrary to the spirit of the Competition Act.

The CCI further explained that whether two different transactions are deemed to be part of one composite combination does not depend on "mutual interdependence," but on the facts and circumstances of each case, having particular regard to: "the subject matter of the transaction; the business entities involved; the simultaneity in negotiations; and whether it would be practical and reasonable to isolate and view the transactions separately." The CCI considered that it is the substance of the transactions that is relevant to assessing the effect on competition, not whether the transaction is pursued through one or more transactions.

The Parties submitted that the Market Purchases were not part of a composite combination because they were undertaken when it was not certain that the Scheme would be consummated. This argument was rejected for a number of reasons: the Market Purchases and the Scheme were authorised in the same Board meeting of TCIS, albeit through separate resolutions; TC and SH issued a joint press release announcing a merger comprising a multi-stage process of acquisitions and a scheme; and the Market Purchases were referred to in the notice to the CCI made on February 14. The CCI stated that these facts strongly suggested that the Market Purchases would not have gone ahead independently of the Scheme.

The CCI's decision demonstrates an emboldened approach to the interpretation of section 6(2) of the Competition Act in relation to composite combinations. Specifically, it seems to indicate that if multiple transactions are conducted *de facto* inter-conditionally (*i.e.*, simultaneously and with factors that point to mutual interdependence), the CCI may look to them as one transaction.

CCI fines Tesco for late notification

On May 27, the CCI imposed a fine of INR 30 million (~$500,000; €370,000) on Tesco Overseas Investment Ltd. ("Tesco") for belatedly notifying its acquisition of a 50% interest in Trent Hypermarket Ltd. ("Trent"). The fine is the highest yet imposed by the CCI for delayed notification.

In December 2013, Tesco applied to the Department of Industrial Policy & Promotion ("DIPP") and the Foreign Investment Promotion Board ("FIPB") to seek approval in relation to the acquisition of Trent.

On March 21, 2014, Tesco executed a Joint Venture Agreement and SPA with Tata Group to acquire 50% of the issued and paid up equity share capital of Trent.

On March 31, 2014, Tesco filed a merger notification with the CCI.

Section 6(2) Competition Act 2002 provides that any party who proposes to enter into a reportable transaction must notify the transaction "within 30 days of execution of any agreement or other document".

The CCI held that Tesco's application to the DIPP and the FIPB constituted the execution of an "other document" and therefore constituted the point at which the reporting obligation arose. Accordingly, the notification filed on March 31 was 73 days late.

Tesco argued that at the time it made its application to DIPP and FIPB, it had not yet formed an intention to acquire Trent. The CCI explained that Tesco's intention was clear from a statement made by Trent's Board of Directors in December approving Tesco's offer to acquire the 50% interest.

Tesco also argued that it could not have filed notice in December because the full details of the proposed combination were not available at the time and therefore the notice would have been incomplete. The CCI rejected this argument as well, explaining that Tesco had supplied sufficient details of the proposed combination in their application to the DIPP and FIPB to demonstrate that the parties were aware of the type, nature, and purpose of the acquisition.

The maximum penalty that may be imposed for late notification under the Competition Act is 1% of the total turnover or assets, whichever is higher, of the acquirer in the previous financial year (in the case of a merger it is the turnover or assets of the combining parties). Tesco was in principle exposed to a fine of over INR 6 billion (~$100 million; €74 million). However, given that (i) Tesco had voluntarily filed a merger notice, albeit belatedly, and (ii) the acquisition would not cause an appreciable adverse effect on competition, the CCI chose to impose a lower fine.

This is the latest in a line of cases which shows that the CCI intends to protect the integrity of its merger control regime with vigour. It also makes clear that a triggering point for the notification requirement is not only the execution of a binding agreement (*e.g.*, the execution of a JVA or SPA), but also may be a communication to a government or statutory authority.

INDONESIA

KPPU fines various companies for late reporting of acquisitions

In April, the Commission for the Supervision of Business Competition ("KPPU") levied fines totaling IDR 2.2 billion (~$185,000; €140,000) on two subsidiaries of Tiga Pilar Sejahtera Food for delays in filing merger control notifications. One report was 76 days late and the other was 13 days late.

Similarly, in June, KPPU ordered Tiara Marga Trakindo to pay a fine of IDR 1 billion (~$85,000; €65,000) for being 41 days late in reporting its acquisition of HD Finance. The fine was levied despite Tiara having consulted the KPPU about the transaction a year earlier and the KPPU reaching a decision that the transaction did not raise substantive antitrust issues.

KPPU seeks significant increase in maximum cartel fine

In June, the KPPU reportedly proposed that the government raise the maximum penalty for cartel offenses from IDR 25 billion (~$2.1 million; €1.6 million) to IDR 500 billion (~$42.4 million; €31.6 million). The current cap was introduced in 1999, and the KPPU is concerned that the cap does not act as a sufficient deterrent. The KPPU is expected to seek parliamentary approval after the July general elections.

SINGAPORE

CCS fines ball bearings producers

On May 27, the Competition Commission of Singapore ("CCS") fined three Japanese ball bearings manufacturers – NTN Corp., NSK, and Nachi-Fujikoshi Corp. – and their Japanese subsidiaries SGD 9.3 million (~$7.5 million; €5.6 million) for fixing the prices of ball bearings. This represents the CCS' first cartel fine of companies based outside Singapore. A fourth company, JTEKT Corp., also participated in the cartel, but received full immunity under Singapore's leniency policy. NSK and Nachi received reduced fines in exchange for their cooperation with the CCS investigation.

SOUTH KOREA

KFTC to focus on patent-related competition issues

On April 22, the Korea Fair Trade Commission's (the "KFTC") Vice Chairman, Hack-Hyun Kim, said that the agency will monitor potential patent-related antitrust issues, including the refusal to license SEPs and imposing excessive licensing fees on competitors. Mr. Kim also noted that the KFTC, like its counterparts in other jurisdictions, will study the impact that non-practicing entities, so called "patent trolls," have on competition.

Korean Supreme Court upholds price fixing fine on foreign airline

On May 23, the Supreme Court of Korea upheld the KFTC's imposition of fines on Japan's All Nippon Airways ("ANA"). The KFTC imposed fines on ANA as well as Korean domestic airlines for fixing fuel surcharges in various markets, including Korea, between 2003 and 2006. ANA argued that the KFTC lacked jurisdiction over the relevant activity. The Supreme Court ruled that the KFTC had the authority to apply the applicable Korean law to price fixing activities conducted outside of Korea if such activities had an anticompetitive impact on Korea.

KFTC reviewing Microsoft's purchase of Nokia

In May, the KFTC may have opened an investigation into Microsoft's consummated purchase of Nokia. The transaction did not meet the KFTC's merger notification thresholds after Nokia abandoned the sale of its manufacturing facility in Korea. As a result, the parties did not make a merger control filing with the KFTC. However, the KFTC has jurisdiction to review mergers that may have anticompetitive effects on Korea's market regardless of whether there is a merger control filing obligation.

TAIWAN

TFTC fines various companies for failure to notify

An April 24 statement by the Taiwan Fair Trade Commission ("TFTC") announced that it issued fines to Cashbox Partyworld of TWD 5 million (~$165,000; €125,000) and Holiday Entertainment of TWD 4 million (~$135,000; €100,000) for failing to notify the commission of their joint business operation, such as combined customer service centers.

In addition, on June 11, the TFTC announced fines on five taxi companies for failure to notify joint ventures. The fine was a combined TWD 2.05 million (~$70,000; €50,000).

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