

The Cartels and Leniency Review

Chapter 24 Taiwan

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I ENFORCEMENT POLICIES AND GUIDANCE

i Definition

Cartels are regulated by the provisions governing concerted actions under the Taiwan Fair Trade Act ('the TFTA'). A concerted action is a conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding,² with a competing enterprise, to jointly determine the price of goods or services, or to limit the terms of quantity, technology, products, facilities, trading counterparts, or trading territory with respect to such goods and services, thereby restricting each others' business activities. A concerted action is limited to a horizontal action that is conducted by enterprises competing at the same production or sale stage and may interfere with the market mechanism with regard to production or supply and demand of goods or services.

ii Exemption

Under the TFTA, a concerted action is prohibited unless it meets one of the requirements stipulated in Article 14 of the TFTA and is beneficial to the economy as a whole and in the public interest, and the application filed with the Taiwan Fair Trade Commission ('the TFTC') for the concerted action has been approved.

Article 14 of the TFTA provides the following seven requirements for a concerted action to approved by the TFTC:

- a unification: it unifies the specifications or models of goods for the purpose of reducing costs, improving quality, or increasing efficiency;
- b joint research and development: it entails joint research and development for the purpose of enhancing technology, reducing costs, improving quality, or increasing efficiency;
- c specialisation: it develops a separate and specialised area for the purpose of rationalising operations;
- d exportation: it is to enter into agreements concerning solely competition in foreign markets for the purpose of securing or promoting exportation;
- e importation: it is for the importation of foreign goods for the purpose of strengthening trade;
- f economic downturn: it is to limit the quantity of production and sales, equipment, or prices for the purpose of meeting the demand expected during an economic downturn, in which the market price of products is lower than the average production costs so that the enterprises in a particular industry have difficulties in

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² Any other form of mutual understanding means a meeting of minds other than a contract or agreement, regardless of whether it is legally binding or not, which would in effect lead to joint actions. A resolution of an association's general meeting of members or board meeting of directors or supervisors to restrict the activities of its member enterprises will also be deemed a horizontal concerted action.

maintaining their business or face overproduction; and

- g small to medium-sized enterprises: it is for the purpose of improving operational efficiency or strengthening the competitiveness of small to medium-sized enterprises.

Since a prior approval system is adopted for a concerted action, enterprises participating in a concerted action must submit the documents specified in Article 14 of the Enforcement Rules to the TFTA for a prior approval. The TFTC is required to make a decision within three months of receipt of an application and may extend the three-month period once. The three-month period starts to run from the time when all the required documents are submitted to the TFTC. The approval granted by the TFTC shall specify a time limit not exceeding three years for the implementation of a concerted action, and may attach conditions to the approval. At least three months prior to the expiration of the approval, the enterprises may, with justification, file a written application with the TFTC for extension of approval for a period of no more than another three years.

iii Enforcement rules

The TFTC has enacted several guidelines and regulations detailing the concrete steps that the TFTC should take in reviewing a cartel case.

The following are guidelines related to the application for concerted action approval:

- a TFTC's Guidelines on Handling Filing for Approvals of Concerted Action by Enterprises;
- b TFTC's Guidelines for Concerted Petroleum Purchasing by Individual Petrol Stations;
- c TFTC's Guidelines on Approval of Concerted Pricing among Small or Medium-sized Enterprises; and
- d TFTC's Guidelines for Handling Cases of Local Airlines' Combination and Concerted Action.

The following are regulations that are relevant to the Leniency Programme, which were introduced into the TFTA at the end of 2011:

- a Regulations on Immunity and Reduction of Fines in Illegal Concerted Action ('the Leniency Programme'; please see Section III, *infra*, for details); and
- b Regulations for Calculation of Administrative Fines for Serious Violations of Articles 10 (i.e., monopoly) and 14 (i.e., cartel) of the TFTA ('the Fine Formula'; please see Section IV, *infra*, for details).

iv Key policies

The TFTC is in charge of the enforcement of the TFTA and the policymaking. For cartel enforcement, the TFTC's priority objectives for 2013 to 2016 are:³

- a to take more aggressive action against illegal conduct that may undermine competition in the market, including conspiracies among basic commodity and consumer product enterprises so as to ensure proper functioning of the market mechanism and protect consumers' interests;
- b to promote international anti-cartel projects to help Taiwanese enterprises understand the antitrust regulations of other jurisdictions. In addition to holding seminars on this topic, the TFTC also plans to issue several guidelines such as

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www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=1133&docid=11930.

'How TFTC Helps Taiwanese Enterprises Respond to International Cartel Investigations', 'TFTC's SOP for Handling International Cartel Cases', and 'Compliance Project of Taiwanese Enterprises'; and

- c to supervise industries exposed to a high risk of violating the cartel regulations. The targets include LCD, DRAM, and LED industries, which have been suspected or even fined in several large cartel cases.

- v Controversies

- Exemption requirements

- The rigid exemption requirements have been criticised since the enactment of the TFTA. Although collaboration with horizontal competitors that meets one of the requirements under Article 14 of the FTFA may be implemented with the TFTC's approval, the seven requirements provided under Article 14 of the TFTA hardly cover all types of pro-competition cooperation given the myriad business models in modern times. Without adding a catch-all provision to this Article 14, some enterprises will have difficulty in finding a legal ground under Article 14 of the TFTA to justify their cooperation which does not entail price fixing or other acts of conspiracy. They may either give up the cooperation projects or decide to go ahead and try their luck. The inadequate legislation has resulted in few case precedents regarding the concerted action approval.

- Leniency Programme

- The newly introduced Leniency Programme helped the TFTC disband a cartel of optical disk drive manufacturers in September 2012 (please see Section VII, *infra*, for details). A remarkable aspect of the case is that the TFTC did not disclose the identity of the enterprise that applied for leniency at the enterprise's request. While this non-disclosure option is unheard of in some jurisdictions, whether such option is appropriate has sparked intense debate. In any event, since the Leniency Programme under the TFTC is still in the nascent stage, it may be further shaped by issues arising in the future.

II COOPERATION WITH OTHER JURISDICTIONS

Please see Section VII, *infra*, for details.

III LENIENCY PROGRAMMES

- i Overview

- On 23 November 2011, the President announced the amended the TFTA, introducing a Leniency Programme for enterprises participating in a cartel (Article 35-1) and imposing a higher fine for violation of cartel provisions (Article 41). On 6 January 2012, the Leniency Programme came into effect. The Leniency Programme specifies, *inter alia*, the requirements for leniency, the maximum number of cartel participants eligible for leniency, the fine reduction percentage, the required evidence and confidentiality treatment. Adoption of the Leniency Programme is expected to significantly affect the enforcement of cartel regulations in Taiwan.

- ii Elements of leniency immunity

- According to the Leniency Programme, an enterprise violating the cartel prohibitions under the TFTA can be exempted from or entitled to the reduction of fine if it meets one of the following requirements and the TFTC agrees in advance that the enterprise qualifies for the immunity or reduction:

a before the TFTC knows about the unlawful cartel activities or commences investigation on its own initiative, the enterprise voluntarily reports in writing to the TFTC the details of its unlawful cartel activities, provides key evidence, and assists the TFTC in its subsequent investigation; or

b during the TFTC's investigation, the enterprise provides specific evidence that helps prove unlawful cartel activities and assists the TFTC in its subsequent investigation.

iii Markers

An enterprise that intends to apply for fine immunity but has not had information and evidence required by the Leniency Programme and therefore is unqualified to file the application may submit a written statement containing the following information to the TFTC and request for preservation of the priority status for fine immunity (i.e., to obtain a 'marker'):

a the information on the enterprise's name, paid-in capital, annual revenue, name of its representative, address, and date of company registration;

b the product or service involved, the form of the concerted action, the geographical areas affected, and the duration of the action; and

c the names, company addresses, representatives of other cartel members.

An enterprise that has been granted with a marker should provide the information and evidence required by the Leniency Programme within the period specified by the TFTC, or they will lose the marker. The application for a marker should be made in writing and follow the format designed by the TFTC.

iv Applicant's obligations to cooperate

From the time the application is filed until the case is concluded, the enterprise that files the application ('the applicant') should withdraw from the cartel immediately or at the time specified by the TFTC, follow the instructions of the TFTC, and provide honest, full and continued assistance to the TFTC during its investigation. The assistance should include the following:

a the applicant should provide the TFTC as early as possible with all the information and evidence regarding the cartel that it currently possesses or may obtain in the future. For those applying for a fine reduction, the information and evidence provided must be of significant help in the TFTC's investigation on the cartel or able to enhance the probative value of the evidence the TFTC has already obtained;

b the applicant should follow the instructions of the TFTC and provide prompt description or cooperation to help the investigation on related facts capable of proving the existence of the cartel;

c if necessary, the applicant must allow its staff members or representatives having participated in cartel-related activities to be questioned by the TFTC;

d the content of the statement, information or evidence provided may not contain any untruthfulness and no destruction, forgery, alteration or concealment of any information or evidence related to the cartel will be tolerated; and

e without the consent of the TFTC, the applicant may not disclose to any other parties about filing the application or any content of the application before the case is concluded.

v Immunity or reduction of fines

Only up to five applicants can be eligible for fine immunity or a fine reduction in a case. The applicant that was the first to file the application can qualify for full immunity from a fine. The fines for the second to fifth applicants can be reduced by 30–50 per cent, 20–30 per cent, 10–20 per cent, and 10 per cent or less respectively. An applicant that has coerced any other enterprises to join or not to exit the cartel cannot be eligible for immunity or a reduction of the fine.

The board directors, representatives or managers of an involved enterprise, or others with the authority to represent the enterprise who should be jointly penalised based on the ROC Administrative Penalty Act, may be granted immunity or a reduction of the fine if the following requirements are met:

- a the enterprise is an applicant that can be granted immunity or reduction of fines;
- b these persons have provided honest and full statements with regard to the unlawful act; and
- c these persons have followed the instruction of the TFTC and provided honest, full and continued assistance to the TFTC during its investigation before the case is concluded.

vi Non-disclosure versus discovery of materials

According to the Leniency Programme, when the TFTC grants an applicant immunity or reduction of the fine, it must take the following measures to protect the confidentiality of the applicant's entity:

- a not to indicate the name of the applicant, the fine imposed, and the amount of fine reduced and the reasons, unless with the consent of the applicant. Where consent is not granted, the TFTC should use aliases and other confidential means to indicate the identity of the applicant and avoid giving any information that may indicate the identity of the applicant; and
- b send its decision letter to each violating enterprise and the main text regarding the fine should refer only to the enterprise that receives the decision letter. The decision letter should not contain information about other violating enterprises involved in the same case.

Furthermore, the conversation records or original documents carrying information on the identity of the applicant should be kept in a file and stored appropriately. The same measure should be taken for other documents that may give away the identity of the applicant. Unless otherwise stipulated by law, the conversation records and documents stated above may not be provided to any agencies, groups, or entities other than investigation and judicial agencies. Despite the foregoing, if any injured party files a civil lawsuit for damages against the violating enterprises, the injured party may request the court to ask the TFTC to provide relevant documents according to the ROC Code of Civil Procedure. The applicant will likely be identifiable during the court procedure.

IV PENALTIES

i Basic concept: administrative fine first, criminal liability later

If any enterprise is found to have conducted a concerted action without the TFTC's approval, the TFTC may, pursuant to Article 41 of the TFTA, order it to discontinue the illegal conduct, or set a time limit for it to rectify the conduct or take necessary corrective measures, and impose an administrative fine of between NT\$50,000 and NT\$25 million. If the violating party fails to act as ordered, the TFTC may continue to order the violating

party to cease the violation, or set another time limit for the violating party to comply, and may impose successive administrative fines of NT\$100,000 to NT\$50 million until the violating party complies.

In addition to the administrative punishments mentioned above, a violation of cartel regulations may also carry criminal liability. That is, if any enterprise is ordered by the TFTC pursuant to Article 41 of the TFTA to cease, rectify or take necessary measures to correct its violation of the cartel regulations under the TFTA, but fails to follow such order or repeats the violation, its responsible person may, pursuant to Article 35 of the TFTA, face a prison term of up to three years, while the enterprise may receive a criminal fine of up to NT\$100 million.

ii Higher administrative fine for serious violation

According to the Fine Formula, if the TFTC considers a concerted action to be serious, it may impose a fine up to 10 per cent of the violating enterprise's revenue in the last fiscal year. Such fine is not capped by the amount mentioned in Section IV.i, supra.

While calculating the revenues, the revenues from an enterprise's domestic and foreign branches should be included, but those from its subsidiaries, if any, are excluded. The reason is that the TFTC considers a subsidiary as a separate entity that operates independently. Given the above, the TFTC will not consider the consolidated revenues of a conglomerate but only the revenues of the enterprise that violates the TFTA. Since some enterprises (such as holding companies) do not have actual operation activities, the fine calculated without including the consolidated revenues may be much lower than the TFTC's expectation.

A 'serious' concerted action is one that materially affects the competition status in the relevant market by taking the following factors into account:

- a the scope and extent of the market competition and order affected;
- b the duration of the damage to market competition and order;
- c the market status of the violating enterprise and the structure of the corresponding market;
- d the total sales and profits obtained from the unlawful conduct during the violation period; and
- e the type of concerted cartel – joint price decision on product or service, or restriction on quantity, trading counterpart or trading area.

In case of any of the following circumstances, the violation should be deemed as serious:

- a the total amount of turnover of the relevant products/services during the period the cartel is active exceeds NT\$100 million; or
- b the total amount of gains derived from the cartel exceeds the maximum fine under the TFTA (i.e., NT\$50 million).

iii Calculating fine for a serious cartel

According to the Fine Formula, the fine imposed on a serious cartel should be reached based on the 'basic amount' and 'adjusting factors'. The basic amount refers to 30 per cent of the total amount of turnover of the relevant products/services during the cartel period. The adjusting factors include aggravating factors and mitigating factors.

The aggravating factors are as follows:

- a the violating enterprise has organised or encouraged the unlawful conduct;
- b the violating enterprise has implemented supervision or sanctioning measures to ensure that the concerted action is upheld or executed; and

- c the violating enterprise has been sanctioned for violation of monopoly or cartel regulations within the past five years.

The mitigating factors are as follows:

- a the violating enterprise has immediately ceased the unlawful act when the TFTC began the investigation;
 - b the violating enterprise has shown real remorse and cooperated in the investigation;
 - c the violating enterprise has established compensation agreements with the victims or has taken remedial measures;
 - d the violating enterprise in concern has participated in the concerted action under coercion; and
 - e other governmental agencies approve or encourage the fine imposed to be reduced, or the fine reduction can be granted in accordance with other laws.
- iv Administrative settlement

In addition to the Leniency Programme, the administrative settlement also provides another channel for seeking plea-bargaining. According to the TFTC Guidelines for Handling Administrative Settlement Cases, the TFTC may settle a case with a party if it does not have enough evidence to secure a sanction. This is a contractual arrangement between the TFTC and the party. In assessing whether to settle a case, the TFTC will have to consider the legality and appropriateness of the settlement; the possible impact on the public interest; and the possible detriment to the interested parties.⁴

How this settlement mechanism should work after the Leniency Programme comes into effect or be calibrated to complement the Leniency Programme remains an open issue.

V 'DAY ONE' RESPONSE

- i Limit of the TFTC's power
Under the current legal framework, the TFTC is not entitled to apply for a search warrant with the court because it is not granted with judicial power. Therefore, its investigatory power granted by the TFTA and other administrative regulations is somehow limited compared with that of other foreign competition authorities or the prosecutors' office. Accordingly, in Taiwan while the dawn raid may be initiated by a prosecutor based on a search warrant, the TFTC cannot take such action.
Although the TFTC has carried out unscheduled visits to the target enterprises, it may request the enterprises to provide necessary documents and information. However, it cannot compel those enterprises to submit documents and information to the TFTC or search the enterprises' premises to obtain the requested documents and information.
- ii TFTC's investigatory tools
According to the TFTA, the TFTC has the following three types of investigatory tools:
 - a to order the parties and any related third parties to appear before the TFTC to make statements;
 - b to order relevant agencies, organisations, enterprises, or individuals to submit books and records, documents, and any other necessary materials or exhibits; and
 - c to dispatch personnel to conduct any necessary on-site inspection of the office,

place of business, or other locations of the relevant organisation or enterprises.

In addition, the TFTC has to observe the principles in the Administrative Procedure Act ('the Act') just like all other administrative government agencies when conducting an investigation. In particular, the principle of proportionality under the Act requires that (1) the method adopted by a governmental agency should help achieve the intended objective; (2) where there are several methods that could lead to the same result, the method with the least harm to the people concerned be adopted; and (3) the harm caused by an action not be disproportionately greater than the benefits from the action.

iii Punishment for non-cooperation

If any person refuses the investigation without justifiable reasons, or refuses to appear when called to answer queries before the TFTC or to submit books and records, documents, or exhibits upon request by the set time limit, an administrative penalty of between NT\$20,000 and NT\$250,000 may be imposed upon that person. If such person continues to withhold cooperation without justification upon another notice, the TFTC may continue to issue notices of investigations, and may successively impose an administrative penalty of between NT\$50,000 and NT\$500,000 each time until the person cooperates with the investigation, appears when called to answer queries, or submits books and records, documents, or exhibits upon request.

VI PRIVATE ENFORCEMENT

According to the TFTA, if any enterprise violates the TFTA and thereby infringes the rights and interests of another, the injured party may demand the removal of such infringement; if there is a likelihood of infringement, prevention may also be claimed. Additionally, the injured party may claim damages from the violating enterprise.

As to calculation of damages, if the violating enterprise reaps gains from its act of infringement, the injured party may demand damages based solely on the monetary gain of the violating enterprise. Otherwise, the general principle under the civil lawsuit will apply to the damages calculation. That is, the compensation will be limited to the injury actually suffered and the interests that have been lost. 'Interests that have been lost' refers to those that were expected in the ordinary course of matters, from decided projects or equipment, or in other special circumstances.

Moreover, the TFTA allows claims for punitive damages. That is, if the violation is intentional, the injured is entitled to request the court to award damages exceeding actual damage, provided that no award should exceed three times the amount of the proven damage.

Although the TFTA provides legal grounds for civil action, so far there is no TFTC case precedent in which an injured party successfully obtains compensation from an enterprise violating the cartel regulations.

Please note that the Leniency Programme offers confidentiality protection to the applicant, forbidding the TFTC from disclosing the identity of the applicant and other relevant documents while issuing the decision letter. However, as mentioned in Section III, *supra*, the applicant will likely be identifiable during the court procedure if any injured party files a civil action against the enterprises involved in the violation.

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The parties that have entered into a settlement agreement with the TFTC include Matra Transport International (1998); RCA Thomson Licensing Corporation (1998); and Microsoft Taiwan Corporation (2003). However, none of these settlements is related to the cartel prohibition.

VII CURRENT DEVELOPMENTS

i The first application of the Leniency Programme: ODD case

Background

In September 2012, the TFTC ruled that four optical disk drive ('ODD') manufacturers – Toshiba-Samsung Storage Technology Korea Corporation ('TSSTK'), Hitachi-LG Data Storage Korea Inc ('HLDSK'), Philips & Lite-On Digital Solutions Corporation ('PLDS') and Sony Optiarc Inc ('SOI') – had conspired during the bidding process held by Hewlett-Packard Company ('HP') and Dell Inc ('Dell') and hence violated the cartel provisions under the TFTA.

According to the TFTC, from September 2006 to September 2009, the four ODD manufacturers, during or before the bidding procedure held by HP and Dell, exchanged their bidding prices and expected bid ranking through e-mails, telephone calls and meetings. Additionally, in several bidding cases, they agreed on the final price and ranking in advance while exchanging other sensitive information such as capacity and amount of production among themselves. A market survey indicated that the four ODD manufacturers jointly occupied at least 75 per cent of the ODD market. Meanwhile, HP's and Dell's notebooks and desktops made up around 10 per cent of the Taiwanese relevant market. As 90 per cent or more of the disk drives used in HP's and Dell's notebooks and desktops were purchased through bidding processes, the four ODD manufacturers' bid rigging had certainly affected the supply and demand in the domestic ODD market. Therefore, the TFTC fined TSSTK, HLDSK, PLDS and SOI NT\$25 million, NT\$16 million, NT\$8 million and NT\$5 million respectively.

The TFTC indicated that it began investigating the case because some parties involved in the cartel pleaded guilty and settled the case with the US Department of Justice in November 2011. After the commencement of the TFTC's investigation, one manufacturer applied to the TFTC for leniency and provided all relevant evidence to the TFTC in accordance with the Leniency Programme under the TFTA. Having fully cooperated with the TFTC, the leniency applicant was awarded full immunity from the fine. The identity of the applicant is being kept confidential by the TFTC at the applicant's request.

Implications

This case is the first time the TFTC concluded successfully with the help of an applicant after the Leniency Programme came into effect in 2011. Before the Leniency Programme was incorporated into the TFTA in 2011, whether the 'whistle-blower' mechanism would work in Taiwan as it does in other countries was doubted by local practitioners. In Taiwan, enterprises in the same industries have close interaction, and employees of these enterprises socialise with each other regularly. In addition, the Leniency Programme requiring an enterprise to betray its business partners in return for an immunity or reduction of fines contradicts the business practice in Taiwan. Nevertheless, the Leniency Programme, within one year of it coming into effect, assisted the TFTC in bringing the cartel members in the ODD case to justice.

The case is also the first time the TFTC sought assistance from competition authorities in other jurisdictions (such as the United States and European Union) because the cartel involved foreign markets and entities. The TFTC's news release also indicates that the TFTC's documents were served upon foreign entities in other countries with help from the Ministry of Foreign Affairs and its overseas offices.

ii Compliance programme

Guidance from the Authority

In order to assist Taiwanese enterprises to establish internal compliance rules to curb their risk of violating antitrust laws of other countries, in December 2011 the TFTC published the Guidelines on Setting up Internal Antitrust Compliance Programmes ('the Guidelines') and the Antitrust Compliance Dos and Don'ts ('the Principles of Conduct').

According to the Guidelines, an enterprise should stipulate an antitrust compliance programme appropriate for its business strategies and corporate culture. The programme should cover at least the following measures to ensure compliance:

- a developing a corporate culture where legal compliance is essential;
- b stipulating policies and procedures that everyone should observe;
- c providing education or training programmes;
- d establishing audit, review and report mechanisms;
- e creating proper rewards and punishments; and
- f designating a means for contact or consultant.

In order to allow each enterprise to grasp what actions are and are not permissible, the TFTC published the Principles of Conduct including types of violation under the TFTA and antitrust laws of other jurisdictions. The Principles of Conduct lists dos and don'ts relating to cartels, restrictions on resale price, monopolies and abuse of market power.

The Guidelines and Principles of Conduct are administrative directives with no binding legal effect. However, the TFTC encourages Taiwanese enterprises to take the initiative to draft their own compliance programme so as to lower their risk of violating the relevant laws. In addition, besides referring to the Guidelines and Principles of Conduct, the TFTC recommended that each enterprise take its corporate culture and industry characteristics into consideration while drafting such programme.

Reaction from the enterprises

Several Taiwanese enterprises were penalised by foreign competition authorities for their involvement in international cartels in the past decade. The most recent and notorious case ended with AU Optronics Corporation ('AUO'), its US subsidiary, and two senior executives being convicted by a jury on March 2012 of violating the US antitrust laws for colluding to fix prices of LCDs between 2001 and 2006. In September 2012, the court fined AUO US\$500 million and imposed on each of the executives a prison sentence of three years and a fine of US\$200,000. The severe penalties imposed on AUO and its high-ranking officers stunned the industry and alerted Taiwanese enterprises to the importance of compliance with antitrust law. In the wake of this case, Taiwanese enterprises may be more eager to establish internal compliance programmes to monitor the risk of cartel violation in various jurisdictions, as advised by the TFTC.

iii Outlook

In the past, the TFTC devoted most of its administrative resources to unfair competition matters, such as false advertisements or multi-level sales, while antitrust issues such as cartels received scant attention. Nonetheless, the amendment to the concerted action provisions, in particular the introduction of the Leniency Programme, may considerably transform how the TFTC enforces cartel regulations. As foreign competition authorities have vowed to take aggressive action to curb the growth of international cartels, the TFTC may follow the trend. A more mature enforcement strategy can be expected to be developed by the TFTC in the near future.

Appendix 1
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