THE MERGERS & ACQUISITIONS REVIEW

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Editor
Mark Zerdin

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THE LENDING AND SECURED FINANCE REVIEW

THE LIFE SCIENCES LAW REVIEW

THE MERGER CONTROL REVIEW

THE MERGERS AND ACQUISITIONS REVIEW

THE MINING LAW REVIEW

THE OIL AND GAS LAW REVIEW

THE PATENT LITIGATION LAW REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE PRIVATE EQUITY REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE PROFESSIONAL NEGLIGENCE LAW REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

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CONTENTS

PREFACE

Despite a slight decrease in overall activity compared with 2016, 2017 was a strong year for global M&A activity as, for the fourth consecutive year, global deal-making activity exceeded US$3 trillion with announced transaction volumes reaching US$3.7 trillion. Even though 2017 did not replicate the record-breaking number of mega-deals in 2015 nor the high volume seen in 2016, market participants in a number of sectors took advantage of continued access to cheap capital globally to engage in M&A activity.

The United States remained the most active region, although aggregate deal value decreased by 16 per cent year on year. However, deal volume surged with a record 12,400 individual deals, largely due to an increase in transactions with a value of less than US$1 billion. The relative decline in mega-deals in 2017 is largely attributable to continued regulatory uncertainty, particularly in the United States, where President Donald Trump's electoral rhetoric on antitrust has led to an increase in scrutiny for M&A deals. In Europe, however, continuing uncertainty arising out of the stuttering progress in the Brexit negotiations and a number of significant elections within the European Union did little to halt the momentum of the M&A market as aggregate deal value in Europe increased by 12.1 per cent in 2017 to reach a post-financial crisis high of more than €830 billion. Notably, the industrials and chemicals M&A sector flourished, with record high aggregate deal value and deal volume. Chinese outbound M&A was limited during 2017 by both a new capital-controls regime and increased scrutiny from the US and European governments.

On the back of tax reform in the United States and encouraging economic growth in Europe, the first quarter of 2018 has displayed record-breaking deal-making activity. However, global political uncertainty presents a threat to global M&A in 2018. Although there were positive signs from the European M&A market in 2017 and Europe registered the largest year-on-year increase in deal volume in the first quarter of 2018, the rise of anti-EU populist parties threatens to derail the buoyant global M&A market. Notably, the election of an anti-EU populist government in Italy, formed from a coalition of the Five Star Movement and the League, threatens to unnerve foreign investors and increase uncertainty about the integrity of the eurozone.

In addition, President Trump's imposition of tariffs and protectionist instincts have raised concerns about the possibility of a global trade war. It is hoped that a resolution to Brexit-related uncertainty and a settling of trade worries will foster an environment in which markets can thrive. All that being said, markets have shown during the past two years that despite an ever-evolving geopolitical landscape, there are numerous opportunities for those market participants who are keen to pursue them.

I would like to thank the contributors for their support in producing the 12th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 50 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May, London
July 2018

Chapter 44

TURKEY

Emre Akın Sait[1]

I OVERVIEW OF M&A ACTIVITY

The total number of M&A deals in 2017 was 251.[2] This represents a similar level compared to the 243 deals in 2016. Of the 251 deals, there were 127 with disclosed values totalling US$7.4 billion. There was only one deal exceeding the billion-dollar milestone and, similar to 2016, there were 17 deals over US$100 million during 2017. The total value of the top 10 deals was US$5.2 billion; of these, one was in the public sector and nine in the private sector. The public sector deal accounted for 7 per cent of the total value of the top 10 deals: this was the transfer of operating rights tender of Menzelet and Kılavuzlu HPPs, awarded to Entek Elektrik for US$365 million.

In the private sector, the major deals that accounted for the remaining 93 per cent of the total value of the top 10 deals were the acquisition of OMV Petrol Ofisi by Vitol Investment for US$1.44 billion, the acquisition of a 9.95 per cent stake in Garanti Bank by BBVA for US$917 million and the acquisition of a 40 per cent stake in Mersin Port by IFM Investors for US$869 million.

In 2017, the percentage of the value of top 10 deals to the total value of all transactions increased to 71 because of the higher number of large deals, whereas in 2016 it accounted for 62 per cent of all transactions.

Turkish investors engaged in more transactions (173) as compared to foreign investors (78). However, the total estimated value of transactions in which Turkish investors participated was US$2.8 billion, while the total estimated value of transactions by foreign investors was US$4.6 billion.

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

M&A activities in Turkey are carried out primarily in four ways: mergers, demergers, share transfers and asset sales. However, the requirements and procedures with regard to M&A transactions are not regulated under a single code. The relevant provisions of the new Turkish Commercial Code No. 6102[3] (TCC) apply, for example, to share transfers, mergers

1 Emre Akın Sait is a consultant at Legal Attorneys & Counselors.

2 Based on E&Y's 'Mergers and Acquisitions Report Turkey 2017'. Please note that the information provided by different sources may vary. For instance, Deloitte's 'Annual Turkish M&A Review 2017' provides 298 as the total number of deals in 2017.

3 The new Turkish Commercial Code entered into force on 1 July 2012.

and demergers of companies, whereas the provisions of the Turkish Code of Obligations No. 6098[4] (TCO) are applicable to sale and purchase agreements, events of default and available remedies.

Depending on the revenues of the companies involved in a given transaction, a notification to the Turkish Competition Authority (TCA) may be required to obtain pre-closing clearance for qualifying transactions, pursuant to Law No. 4054 on the Protection of Competition[5] (POC).

M&A activity involving a public company is subject to the Capital Markets Law No. 6362 and the relevant communiqués, and to the TCC and TCO, as indicated above.

Based on the industrial sector concerned, there may be additional requirements or approvals to be obtained prior to implementing an M&A transaction, such as the approval required from the Energy Market Regulatory Authority for transactions in the energy sector.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Mergers and demergers of companies are regulated under the TCC, according to which companies can merge in two different ways: by acquisition, in which the target company is acquired by the acquirer; or through the establishment of a new company. Different types of companies can merge; that is to say, companies with share capital (joint-stock companies, limited liability companies) can merge with any type of company, such as cooperatives, unlimited liability companies and limited partnerships, provided that the latter is the acquired party.

Merger agreements, which must be executed in writing pursuant to the TCC, must be signed by the competent company organ (the board of directors for joint-stock companies or the board of managers for limited liability companies) and approved by the general assembly of the company. The necessary content of merger agreements is prescribed by the TCC. Furthermore, a merger report must be drafted by the merging parties' boards of directors. The TCC also specifies the necessary content that must be included in the report.

When merging, the parties to the merger may either offer the shareholders shares and the related shareholders' rights in the target company, or cash payments corresponding to the value of the shares to be received in the target company.

The merger agreements of companies with a share capital must be presented by the board of directors to the shareholders at the general assembly meeting, and the merger agreement must be approved at the general meeting by three-quarters of the members attending. If a partition payment is conducted under the merger agreement, the merger agreement must be approved by 90 per cent of all available votes.

Moreover, 30 days prior to the general assembly meeting, each company that is a party to the merger must present the merger agreement, the merger report, financial tables and activity reports for the previous three years for review by the shareholders, the holders of dividend right certificates, the bearers of securities and any other relevant party.

A merger takes effect and the target company dissolves upon the registration of the decision of the general assembly meeting at the trade registry office.

4 The new Code of Obligations entered into force on 1 July 2012.

5 Law No. 4054 on the Protection of Competition entered into force on 13 December 1994.

According to the TCC, companies can demerge completely or partially. In a complete demerger, all assets of the target company are divided and transferred to the acquirer companies. The shareholders of the target company receive the shares and rights of the assignor companies. Upon the registration of the demerger, the target company is dissolved.

In a partial demerger, one or more parts of assets of the target company are transferred to the acquirer companies. The shareholders of the target company receive the shares and rights of the acquirer companies, or the target company forms its own subsidiaries by receiving the shares and rights of the assignor companies against its transferred assets.

The transfer of shares of joint-stock companies and limited liability companies is regulated under the TCC. Registered shares of joint-stock companies can be transferred by assignment or through the endorsement and delivery of the share certificates to the transferee. Moreover, the share transfer must be approved by the board of directors and registered in the share ledger of the company. The shares of a limited liability company can only be transferred by a contract signed before a notary public. Furthermore, the share transfer must be approved by the general assembly and registered in the share ledger of the company.

The sale of assets is subject to the relevant provisions of the TCO regarding organising the 'sales agreements'. It is not mandatory to execute sales agreements in writing, but in practice parties sign a written agreement, according to which a considerable number of provisions focus on the events of default and available remedies.

IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

During 2017, foreign investors contributed US$4.6 billion of the US$7.4 billion total transaction value of the 251 deals in Turkey (including those of which the value was undisclosed). As in 2016, foreign investors outperformed Turkish investors in terms of transaction value – the total estimated value of transactions engaged in by Turkish investors was US$2.8 billion, while the total estimated value of transactions engaged in by foreign investors was US$4.65 billion. However, Turkish investors (173) engaged in a greater number of transactions than foreign investors (78), which has been the case for the past eight years. In terms of value, though, foreign investors have continued to outperform Turkish investors: foreign investors' involvement in 2017 accounted for 62 per cent of the total transaction value, up from 54 per cent of total transaction value in 2016.

The average size of investments by foreign investors was approximately US$142 million in 2017, marking an increase compared to 2016, when the average was approximately US$68 million.

The largest transactions carried out by foreign investors in 2017 were the acquisitions of OMV Petrol Ofisi-Vitol Investment and Garanti Bank-BBVA, as noted above.

As in previous years, investors from the European Union and the United States continued to dominate foreign investor transactions in terms of the number of deals, followed by Japan, the UAE, South Korea and India. The United States had the highest number of transactions with 14 deals, followed by France with nine deals. Netherlands had the highest transaction volume, with US$1.44 billion, followed by Spain with US$921 million.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

As in previous years, the energy sector ranked first in terms of transaction value in 2017. However, in terms of the number of transactions, the energy sector (with 37 deals) came second behind the IT sector (which ranked first with 75 deals). The deals in the energy sector included four of the 10 largest transactions in 2017. The transaction value in the energy sector in 2017 increased by US$1.3 billion compared to 2016, totalling US$2.9 billion.

In 2017, public sector deals constituted 9 per cent of the total transaction value, totalling US$604 million, whereas in 2016 the public deals represented 23 per cent of the total transaction value, at US$1.1 billion.

The financial services sector accounted for 10 transactions in 2017 with a total transaction value of US$998 million, ranking third in terms of transaction value.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Investors have commonly used their own sources of funds to finance deals. They seem to prefer funding mechanisms that are structured to include both debt and equity. The demand to structure deals as debt financing convertible into shares of the target still continues.

The costs of local financing are high, which makes it tough for parties to obtain financing from local banks and financial institutions. This also causes M&A deals to be structured in a similar way to project finance deals, in which the main sources of income are assigned to lenders as security against a loan, and the loan is then converted into equity after a certain period, or after the related conditions precedent have been satisfied.

In M&A transactions, it is very common that the shareholders, the board of directors or the parent and affiliated companies provide financial assistance or guaranties to the target company. The TCC sets forth the principles governing the rights and obligations of related persons and companies as follows:

a a shareholder is prohibited from borrowing money from the company unless the shareholder has fully paid his, her or its capital subscription debt to the company, and the company's profit, including the free reserves, is sufficient to cover the losses from the previous years;

b the TCC prohibits companies from providing loans to non-shareholder members of the board of directors and their relatives. The company cannot provide any warranty, security or guarantee to, or undertake any liability on behalf of, the said persons. Furthermore, the shareholders are not allowed to enter into any transaction with the company without the consent of the general assembly; otherwise, the company may claim that the transaction is invalid; and

c a parent company is prohibited from using its control in a way that will damage an affiliated company. In particular, a parent company cannot force an affiliated company to enter into certain types of transactions, such as:

- transferring business, assets, funds, personnel, receivables or debt;
- reducing or transferring its profits;
- restricting its assets with rights in kind or personal rights;
- undertaking liabilities, such as providing a guarantee, warranty or surety;
- making payments; and
- taking measures to affect the business in a negative way.

VII EMPLOYMENT LAW

There is no specific code within the framework of Turkey's employment laws that regulates M&A activities. In the absence of this, one must refer to Labour Law No. 4857 and the TCC. The main provisions of these two pieces of legislation that apply to M&A transactions are Section 6 (The assignment of the workplace or a part of it) of the Labour Law and, if share capital companies are involved, Section 178 (Transfer of Labour Relations) of the TCC.

Section 178 of the TCC, which introduced a new provision that did not exist in the previous Turkish Commercial Code, imposed certain specific rules on M&A transactions entered into by companies with share capital (e.g., joint-stock companies and limited liability companies).

Although the aforementioned two provisions of the Labour Law and the TCC would apply to an M&A transaction, there is an apparent conflict between the relevant provisions of the Labour Law and the TCC as to which takes precedence in M&A transactions involving share capital companies. There is no case law addressing this matter yet; therefore, it is important to take into account the perspective of the legislature that led the drafting of Section 178 of the TCC to its current format. During the drafting stage of the TCC, the Justice Commission of the Turkish Grand National Assembly reviewed the position, and concluded that Section 178 of the TCC should be applied for M&A transactions involving companies with a share capital because it is more specific and appropriate for these circumstances, whereas Section 6 of the Labour Law should continue to govern all transactions involving the full or partial transfer of workplaces as a more general provision.

Once the case law starts to develop in this regard, there will be a clearer understanding of which of the two pieces of legislation would prevail. In the absence of this, the provisions of Section 178 of the TCC that would apply in a merger or acquisition transaction of companies with share capital are as follows:

a unless objected to by the employees, all the rights and obligations arising out of the employment contracts signed with the employees, until the day of acquisition, shall be transferred to the new employer on the day of acquisition. In the event of an objection by the employees, the transfer of such rights and obligations shall be deemed to take place at the end of the legal severance period;

b the former and the new employers shall be held jointly and severally liable for all the payables to the employees that would fall due before the acquisition day and until the end of the term of the employment contracts, or until the end of any term that may be applicable should an employee raise an objection; and

c the employees have the right to request security for their receivables that would fall due.

In addition to the above, in an M&A transaction, the new employers will not benefit from the right to terminate employment contracts solely because the transfer of the business, unless there are grounds that would otherwise provide the right to validly terminate employment contracts (e.g., it is necessary for economic or technical reasons, or there is a change in the business organisation). Should the new employer wish to terminate employment contracts, it would have to comply with the termination notice periods set forth in Section 17 of the Labour Law. If the number of employees whose employment contracts are to be terminated

exceeds the thresholds provided in Section 29 of the Labour Law,[6] this would be considered a collective dismissal and would therefore require written notice to be given to the Turkish Labour Authority at least 30 days in advance.

VIII TAX LAW

The current Corporate Tax Law of Turkey was enacted in 2006. The corporate tax rate was reduced to 20 per cent in the same year. However, with Law No. 7061 enacted in November 2017 the corporate tax rate for the years 2018, 2019 and 2020 has been temporarily increased to 22 per cent. The Income Tax Law and Corporate Tax Law also stipulate a 15 per cent withholding tax (the amount of this tax is determined by the Cabinet, and the current figure has not been changed since 2009) on dividend distributions, but local corporate shareholders are exempt from such withholding tax. This system effectively creates a 32 per cent tax on distributed corporate earnings (e.g., 1.0 - 0.20 Turkish lira (corporate tax) = 0.80 Turkish lira, followed by 0.80 - 0.12 Turkish lira (withholding tax) = 0.68 Turkish lira). Currently, because of the temporarily implemented 22 per cent corporate tax rate, the effective taxation on distributed corporate earnings is 33.7 per cent. Where there is a treaty regarding the prevention of double taxation between the home country of a non-resident shareholder and Turkey, different taxation rates may apply. Note that a new draft law, which will merge the Income Tax Law and Corporate Tax Law into a single law, is being prepared at the time of writing this chapter.

Last year an amendment was made to the Income Tax Law and a 5 per cent discount has been introduced for taxpayers who pay their taxes on time regularly. Accordingly, any person subject to income tax or corporate tax will receive a 5 per cent discount on the total amount of tax payable if they have, for three consecutive years, delivered their tax statements on time, accurately and made the respective payments on time. However, banks, financial institutions, insurance companies, pension companies and private pension funds are exempt from this discount. Also the discount received this way may not exceed 1 million Turkish lira. Further details regarding this amendment can be found in Communiqué No. 301 on Income Tax, issued on 23 December 2017.

Several tax laws have been enacted in recent years incentivising industrial investments and research and development activities to improve Turkey's export–import ratio, which, according to 2017 numbers, is around 0.67:1.

Under Turkish law, borrowings from shareholders and related parties in excess of a 3:1 debt-to-equity ratio qualify as thin capitalisation. If the related party is a bank or a financial institution, the applicable ratio is 6:1.

Another important point to note is the application of stamp duty to companies in Turkey. Different percentages and amounts of stamp duty are imposed on different types of documents. The most important stamp duty within the context of M&A transactions is that imposed on contracts (for 2018, this is 0.948 per cent of the transaction value of the relevant contract). With an amendment that was introduced in January 2017, stamp duty will arise only once for each contract regardless of the number of original copies. Before January 2017, every signed original contract was taxed separately; therefore, a 1 million Turkish lira sales

6 For example, in workplaces that have 20 to 100 employees, the termination of 10 employees' contracts would qualify as a collective dismissal.

contract signed in two originals resulted in a stamp duty of 189,600 Turkish lira (94,800 Turkish lira + 94,800 Turkish lira). With this particular amendment, the same sales contract signed in two originals will result in a stamp duty of 94,800 Turkish lira.

IX COMPETITION LAW

The TCA was established in 1997 pursuant to the POC. The TCA is an independent organisation and is in charge of enforcement of the POC. The Competition Board (the Board) is the decision-making body of the TCA.

Under the Turkish merger control regime, a prior merger control filing before the TCA is required where the revenues of the parties to the transaction exceed the applicable thresholds. According to Communiqué No. 2010/4 on Mergers and Acquisitions Requiring the Approval of the Board, the Board sets new thresholds every two years. The current thresholds are as follows: transactions in which the parties' total combined revenues in Turkey exceed 100 million Turkish lira and the revenues of each of at least two of the parties exceed 30 million Turkish lira in Turkey, or where the target asset or activity subject to the transaction generates a revenue in Turkey exceeding 30 million Turkish lira and one other party to the transaction has a global turnover exceeding 500 million Turkish lira. The thresholds were last set in 2013 and maintained for 2017. According to a recent amendment of Communiqué No. 2010/4, the thresholds shall remain valid unless otherwise resolved by the Board.

Section 7 of Communiqué No. 2010/4 states that the approval of the Board is required for the related M&A transaction to be legally valid and thus trigger the relevant legal consequences. Section 10 of the Communiqué further emphasises that an M&A transaction will have no legal validity unless it is approved by the Board in accordance with the Communiqué.

The notification for approval can be made jointly by the transaction parties, or individually by one party on behalf of all transaction parties. Pursuant to Communiqué No. 2010/4, a transaction is deemed to be carried out on the date when the change in control takes effect.

A failure to notify a qualifying transaction is subject to administrative fines, pursuant to Section 16 of the POC. The fines apply to all transaction parties in mergers, and the acquirer party in acquisitions. The amount of the fine is 0.1 per cent of the related transaction party's annual turnover generated in the financial year preceding the date of the fine. The same amount of fine will also be applicable if a notification is made based on incorrect or misleading information. It should be noted that any such fine imposable until the end of 2018 will not be less than 21,036 Turkish lira pursuant to Communiqué No. 2018/1, and can be considerably higher.

Pursuant to Section 11 of the POC, where the Board learns, in any manner, about a notifiable M&A transaction that has not been notified, it will launch an *ex officio* assessment of the transaction, and if it is determined that the unnotified transaction is in accordance with the POC, the Board will grant an approval. However, the Board will also impose fines as specified above for failure to notify. If the Board decides that the notifiable (but unnotified) transaction should not be granted an approval pursuant to the POC, it will then unwind the transaction by issuing the necessary order to restore the position that existed before closing (i.e., it will stop the relevant M&A transaction, cancel all the actions that have been executed illegally, return all assets to their owners pursuant to the procedures and timing

to be decided by the Board). The Board has the right to issue an administrative fine on the concerned transaction parties of up to 10 per cent of their annual turnovers in the financial year preceding the date of the Board's decision.

Note also that the Board has the right to impose personal fines on the managers and employees of the parties to the M&A transaction if the Board believes that any such individuals have had an important role in the violation of the provisions of the POC. The level of fines imposable on individuals in this case would be up to 5 per cent of the fine imposed on the parties to the transaction.

With the entry into force of Communiqué No. 2017/2, which made certain amendments to Communiqué No. 2010/4, the scope of transactions that are to be considered as a single transaction for the purposes of calculation of turnover has been expanded. Accordingly, not only two or more transactions carried out between the same persons or parties, but also by the same undertaking in the same related product market within a period of three years (this period was two years before Communiqué No. 2017/2 entered into force), are now considered as a single transaction for the calculation of turnovers. A further amendment made in Communiqué No. 2010/4 with Communiqué No. 2017/2 is that for the transactions that enable control on a company quoted on a stock exchange through serial transactions from different buyers, it is now possible to notify the Board after such transactions are completed, provided that the conditions set forth in Communiqué No. 2010/4 are met.

Ancillary guidelines that supplement the main Communiqué No. 2010/4 are Guidelines On Undertakings Concerned, Turnover and Ancillary Restraints in Mergers and Acquisitions, Guidelines on the Assessment of Horizontal Mergers and Acquisitions, Guidelines on the Assessment of Non-Horizontal Mergers and Acquisitions, Guidelines on Cases Considered as a Merger or an Acquisition and the Concept of Control, and Guidelines on Remedies That are Acceptable by the Turkish Competition Authority in Merger/Acquisition Transactions.

As per the report published by the Competition Authority on mergers and acquisitions realised in 2017, a total of 184 merger and acquisition notifications have been made.

X OUTLOOK

Compared to 2016, M&A activity increased in terms of the volume and number of transactions in 2017, but the average deal size was notably lower as the majority of the transactions were small or medium-sized.

Although a significant increase is not expected in 2018, substantial future M&A activity is expected in the energy, healthcare, manufacturing, retail and IT sectors. Taking into account both potential privatisations and private sector deals, the energy sector is again expected to be among the leaders in terms of M&A activity.

Privatisations have had a significant role in Turkey's overall M&A activity. The major privatisations that are expected in the public sector in 2018 are the privatisation of Fenerbahçe-Kalamış MarinaTekirdağ Port and the tenders of various electricity generation assets of EÜAŞ.

As for the private sector, small and medium-sized transactions are expected to continue to dominate the market in 2018.

Appendix 1

ABOUT THE AUTHORS

EMRE AKIN SAIT

Legal Attorneys & Counselors

Emre Akın Sait acquired his LLB from University of Warwick in 1995. In the same year, he joined the Honourable Society of the Inner Temple of the United Kingdom. Mr Sait further pursued his legal studies at King's College London and earned his master of arts degree in European competition law in 2011. He was called to the Bar of England and Wales in July 2013 after completing his Bar Practice Training Course at University of the West of England.

Mr Sait has acted as the legal manager of Fiat Auto Turkey, and as the corporate relations director in charge of the legal, media relations, public relations and corporate governance departments, to which he was also appointed as a steering committee member for two consecutive years.

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