

EEL News Service Issue 2014/06 of 2 July 2014

Announcement

Visit the International Court of Justice for participants to the Summer Programme International and European Environmental Law (25-29 August 2014) and hear first-hand about the ICJ's environmental case law. Full list of speakers now available on the EEL website as well. See for more information the Asser website.

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Case Law

Import restricting green energy support in line with EU law

ECJ judgment Case C-573/12 Ålands Vindkraft AB v Energimyndigheten, 1 July 2014

The ECJ was asked if the Swedish support scheme for energy from renewable energy sources which only applies to producers in the national territory is compatible with EU law and particularly the Treaty provisions on free movement of goods. The case originated in a Swedish administrative court where Ålands Vindkraft, a Finish wind power company, challenged the Swedish Energy Agency's decision not to grant the company 'green certificates' on the grounds that the production was located outside of Sweden. According to Swedish law, electricity certificates are awarded to producers of electricity for each megawatt-hour (MWh) of green energy produced. The certificates are tradable on an open market where price is determined by supply and demand. The demand stems from an obligation placed on suppliers and certain users to hold, and surrender a certain number of certificates, to the State each year, corresponding to a proportion of the total quantity of electricity supplied or consumed during the preceding year.

The Court first concluded that the Swedish system was compatible with the relevant EU secondary law, the Renewable Energy Directive 2009/28/EC, that it constitutes a 'support scheme' within the meaning of Article 2, point k and Article 3(3) of the directive and that this directive provides the Member States the possibility to reserve their support schemes for renewables to production inside their own territory.

Then the Court turned to the question whether the Swedish law is in line with EU primary law, notably Article 34 TFEU on free movement of goods. In assessing the directive and the degree of harmonisation which has been achieved by it in the field of support schemes for renewables, the Court came to the conclusion that it is not exhaustive enough as to preclude an examination of whether the national legislation at issue is compatible with the Treaty provisions relating to the free movement of goods. After examining the Swedish legislation, the Court established that it is capable of impeding imports of green electricity from other Member States, and that in consequence, it

constitutes a measure having equivalent effect to quantitative restrictions on imports. Although the Court thus found the scheme to be, in principle, incompatible with Article 34 TFEU, it nevertheless held the legislation to be justified. The Court referred to 'overriding requirements relating to the protection of the environment' (the 'rule of reason' case-law), and the right to protect the health and life of humans, animals and plants exception (Article 36 TFEU) in this respect.

The outcome of this case is highly relevant to all Member States, most of which have established their own territorially confined regimes of support for renewable energy in order to meet the national targets for their share of green electricity in final energy consumption as required by Directive 2009/28/EC.

See also:

Advocate General Bot's Opinion, 28 January 2014 German Energy Blog Ålands Vindkraft: Swedish Green Electricity Certificate System Complies With European Free Movement of Goods Rules, 1 July 2014

ECJ strikes down on Council's excessive use of legal bases for PCA

ECJ judgement Case C-377/12 European Commission v Council of the European Union, 11 June 2014

This judgment concerns an action for annulment of a Council decision authorising the signing of a framework partnership and cooperation agreement (PCA) between the EU and the Philippines. The Commission argued that the addition of a number of legal bases for the agreement including transport, environment and readmission of third-country nationals to the proposed bases Articles 207 TFEU and 209 TFEU relating to the common commercial policy and to development cooperation (in conjunction with Article 218(5)) TFEU was 'unnecessary and unlawful'.

The Court first recapped that according to settled case law, the choice of legal bases for EU measures must be based on objective factors amenable to judicial review. These objective factors include the aim and the content of the measure. As an exception, EU measures can be based on more than one legal basis, but only when no single purpose can be identified as the main or predominant purpose. Dual legal bases are not possible where the procedures required by them are incompatible with each other. In this case the main issue was, according to the Court, whether the provisions relating to readmission, transport and environment fall within development cooperation policy or whether they go beyond the framework of that policy and therefore required the decision to be founded on additional legal bases.

Examining the wording of Articles 208 and 209 TFEU, the court concluded that EU policy in the field of development and cooperation is not limited to measures directly aimed at the eradication of poverty. It also encompasses objectives referred to in Article 21(2) TEU (EU external action) such as fostering the sustainable economic, social and environmental development of developing countries. Citing settled case law, the Court stated that the fact that a development cooperation agreement includes provisions on various matters 'cannot alter the characterisation of the agreement, which must be determined having regard to its essential object and not in terms of individual clauses, provided that those clauses do not impose such extensive obligations concerning the specific matters referred to that those obligations in fact constitute objectives distinct from those of development cooperation'.

According to the Court, the evolution of development cooperation has led to an increase in its objectives and in the matters concerned by it reflecting the EU vision for development which is set

out in the European Consensus. The Court found that the framework agreement itself displays a link between the cooperation that it aims to establish regarding migration, transport and the environment on the one hand and the objectives of development cooperation on the other. Considering these connections, the Court concluded that the provisions relating to readmission of nationals of the contracting parties, transport and the environment contribute to the pursuit of the objectives of development cooperation and do not contain obligations so extensive that they may be considered to constitute objectives distinct from those of development and cooperation that are neither secondary nor indirect in relation to latter objectives. Therefore, the Council made an error when selecting Articles 79(3) TFEU, 91 TFEU, 100 TFEU and 191(4) TFEU as legal bases for the contested decision. The Court orders that it should be annulled in so far as these legal bases were added by the Council.

See also:

Advocate General Mengozzi's Opinion, 23 January 2014 European Law Blog The boundaries of the development cooperation legal basis: What to make of the Court's 'centre of gravity' test?, 13 June 2014

Climate Change

Agreement on first generation biofuels cap

On 13 June 2014, the Energy Council reached a political agreement on limiting the use of firstgeneration biofuels. The draft directive will amend the fuel quality (98/70/EC) and renewable energy (2009/28/EC) directives. According to the draft proposal, a cap will be placed on the amount of firstgeneration biofuels (made from food and feed biomass) that can be counted towards meeting the 10% renewable energy target for transport (that all Member States need to meet by 2020) at 7%. This is less strict than the 5% cap in the Commission's proposal but could form a possible solution to the issue which has been standstill in the European Parliament and the Council since the Commission put forward its proposal in the fall of 2012. In practice, almost all biofuels used in the EU so far are first-generation biofuels, because second-generation or novel biofuels made from waste or algae are more expensive.

The proposal is intended to mitigate the negative effects of first-generation biofuels such as land grabbing, food shortage / rising food prices and increased greenhouse gas emissions due to indirect land use change (ILUC). The Parliament is to revisit the issue for a second reading in the fall 2014.

See also:

COREPER political agreement, 3 June 2014 EurActiv Biofuels debate continues, despite EU agreement, 17 June 2014 European Voice Member states reach compromise on biofuel, 28 May 2014 EEB EU biofuels policy revision one step closer, 28 May 2014 EEL "U-turn" on biofuels from food crops causes hot debate, 12 October 2012

G7 and EU leaders on energy and climate change

On 4-5 June 2014, the leaders of the US, Canada, Japan, France, Germany, Italy and the UK and the European Union met in Brussels. Due to Russia's annexation of Crimea, the G7 and the EU leaders decided to cancel their participation in the planned G8 Summit in Sochi, Russia. The G7 summit was hosted by the EU which was represented by Commission President José Manuel Barroso and European Council President Herman Van Rompuy.

On top of the agenda was the development in Ukraine and relations with Russia. More general topics such as trade, energy security and climate change were also discussed. On trade and investment the G7 leaders declared their commitment to liberalise trade in environmental goods and services, including through an Environmental Goods agreement. Concerning energy and climate change the leaders discussed energy security on the backdrop of the Ukraine crisis and built on the energy initiative agreed by the G7 energy ministers on 6 May in Rome. The leaders expressed their ambition to identify and implement concrete domestic policies, to build a more competitive, diversified, resilient and low-carbon energy system. Some of the measures mentioned were diversification of routes and sources, upgrading energy infrastructure, development of indigenous resources and energy efficiency, while reducing greenhouse gas emissions. Promotion of clean technology was also highlighted as an important element. However, the leaders will also promote a more integrated Liquefied Natural Gas (LNG) market, including through new supplies, development of transport infrastructures, storage capabilities, and LNG terminals. On climate change, the G7 reaffirmed their commitment to effectively limit the increase in global temperature below 2°C above pre-industrial levels and they expressed their strong determination to adopt a global agreement, ahead of the Climate Summit of the United Nations General Assembly in September and the upcoming COP2015 in Paris. The leaders also reaffirmed their support for the Copenhagen Accord commitments to mobilise USD 100 billion per year by 2020 from both public and private sources, to address the climate mitigation and adaptation needs of developing countries.

See also:

European Commission memo The Brussels G7 Summit Declaration, 5 June 2014

European Commission memo G7 Summit in Brussels, 4 – 5 June 2014: Background note and facts about the EU's role and actions, 3 June 2014

EUobserver The first G7 summit in Brussels, but not the last?, 5 June 2014

Oxfam Stronger steer needed on energy security, climate change and the global economy, 5 June 2014

UN climate change negotiation talks in Bonn

During the UN climate negotiation meeting that took place in Bonn, Germany from 4 to 15 June 2014, the EU reaffirmed its commitment to more ambitious post-2020 climate change goals as well as towards measures to step up international climate action before 2020. According to the Commission such measures are needed to bridge a wide gap between countries' current pledges to limit greenhouse gas emissions and the reductions needed to keep global warming below 2°C

compared to the pre-industrial temperature. The EU also reiterated its promise to increase its official greenhouse gas emission reduction target for 2020 from 20% to 30%, provided that other major economies take comparable action.

See also:

EU statements Bonn, 4 - 15 June 2014 UNFCCC climate action talks, 23 June

European Commission press release EU to set out major contribution to more ambitious global climate action at Bonn conference, 4 June 2014

ENDSEurope Draft elements of global climate deal due in July, 16 June 2014

Oxfam Eliminating inequality and the threat of climate change key to new UN development goals, 17 June 2014

UNFCC website

Energy

Commission presents energy security strategy

On 28 May 2014, the European Commission presented a strategy to strengthen security of energy supply in the EU accompanied by an in-depth study on energy security. The communication will be discussed by Heads of State or Government at the European Council on 26-27 June. While focusing mainly on the short- and long-term solutions to the EU dependence on Russian gas imports in its communication, the Commission also emphasised the importance of connecting the energy security strategy to the 2030 Framework for climate and energy. According to the Commission, the European Energy Security Strategy should be accomplished 'in full compatibility' with the 2030 Framework and it urged the European Council and the Member States to take decisions on the 2030 framework as soon as possible. The strategy further includes proposed actions on key issues such as the completion of the internal energy market, increased grid interconnectivity, energy solidarity, a common external energy policy and increasing indigenous energy production, including further deployment of renewables.

See also:

EEL News Service 2014/05 Russia refers EU to WTO over energy legislation, 28 May 2014

European Commission press release Energy security: Commission puts forward comprehensive strategy to strengthen security of supply, 28 May 2014

European Commission Communication European Energy Security Strategy, 2 June 2014

European Commission In-depth study of European Energy Security, 28 May 2014

European Commission Questions and answers on security of energy supply in the EU, 28 May 2014

Agreement on revised nuclear safety directive

On 11 June 2014, the Permanent Representatives Committee of the Council (COREPER) agreed to a proposed revision of the directive on nuclear safety. The agreement is based on a text agreed by a

working party on atomic questions on 28 May 2014 which supports the 2013 Commission proposal. The Parliament, which is only consulted and not co-legislator in nuclear matters, adopted its position on 2 April 2014 following a vote in the industry, research and energy committee. Before entry into force the directive now has to be formally endorsed by the Council.

The revision includes strengthened rules on nuclear safety and provides that member states implement a regulatory framework requiring accident prevention and in case of an accident, mitigation of consequences of radioactive release. The rules are intended to reinforce crucial components of the nuclear safety system such as the independent role and function of the regulatory authorities, the safety peer review mechanism and the promotion of safety culture. Another component of the directive is the introduction of requirements on transparency, public information, public participation and cooperation between member states, nuclear and non-nuclear, in the vicinity of nuclear installations.

See also:

Proposal for a Council Directive amending Directive 2009/71/EURATOM establishing a Community framework for the nuclear safety of nuclear installations, 4 June 2014

Greek presidency statement, 11 June 2014

European Commission statement, 11 June 2014

Portugal facing high financial penalty over non-implementation directive

Portugal has been referred to the ECJ by the European Commission (EC) for failing to transpose the Directive on Energy Efficiency in Buildings into national law. According to the directive, the member states must establish and apply minimum energy performance requirements for all buildings, undergo the certification of the energy performance of buildings and require regular inspection of heating air condition systems. By 2020 all new buildings must meet the so-called near zero-energy standards. The directive had to be transposed into national law by 9 July 2012. Despite communication between the Commission and Portugal, which has claimed to be working on a draft legislation, there is no information on when it will be adopted or enter into force. Due to the lack of full transposition of the directive, the Commission asks for a daily penalty of ≤ 273.60 that, in case of an affirmative judgment, is to be paid from the day of the judgment until transposition is completed. The possibility to demand such a financial penalty for failure to transpose EU legislation into national law within the required deadline was introduced by the Lisbon Treaty, which entered into force on 1 December 2009.

See also: European Commission press release, 20 June 2014

Waste

Italy risks huge fines for lack of waste management

The European Commission's June 2014 infringement package included a referral of Italy to the ECJ due to its ongoing failure to manage waste adequately in the Campania region. According to EU waste legislation, member states are under obligation to recover and dispose of waste in a manner that protects human health and the environment. In March 2010 the ECJ found the waste management in the region to be in breach of EU law, the Court was particularly concerned with the lack of an integrated and adequate network of disposal installations, which is a requirement under the Waste Framework Directive. Italy adopted a waste management plan for Campania in 2012 and in June 2014 a programme of measures intended to manage waste in the region until 2016, when new waste treatment plants are expected to become operational. Although some improvements have been made, the region is still heavily dependent on other regions for the management of waste and more long-term solutions are taking too long to implement. The Commission is concerned with the delays that have halted construction of most of the planned plants for recovering organic waste, incinerators and landfills. Due to the infringements of EU law and non-compliance with the 2010 ECJ judgement, it proposes a daily penalty of € 21 067 per day from the day of the last judgment to the day of the second. On top of that the Commission asks for a lump sum € 25 million.

See also:

European Commission press release, 20 June 2014 Judgment Case C -297/08 *Commission v Italy*, 4 March 2010 Reuters EU sends Italy back to court over Naples trash epidemic, 20 June 2014

Chemicals

Roadmap for EDC regulation proposed by the Commission

On 17 June 2014 the European Commission presented a long-awaited proposal for the details on regulation for endocrine disrupting chemicals (EDCs) in EU regulations on pesticides and biocides. The direction set out by the roadmap seems a step back from a hazard-based to a risk-based approach. It does however call for an impact assessment, which will be carried out before any decisions on the criteria for allowing EDCs in pesticides and biocides are taken. Progress on the criteria has been slow due to conflicts between the Commission's departments, ENDS Europe reports. The roadmap and its more lenient approach to EDCs was welcomed by European Crop Protection Association (ECPA) but has been heavily criticised by member states and green NGOs, which stress that this is a step away from the hazard-based approach approved by the European Parliament and the Council of Ministers. Furthermore, on 22 May 2014 the Swedish environmental minister declared that Sweden will bring the Commission to Court over the failure to produce rules on these hormone disrupting chemicals on time, in December 2013.

See also:

European Commission Roadmap Defining criteria for identifying Endocrine Disruptors in the context of the implementation of the Plant Protection Product Regulation and Biocidal Products Regulation, June 2014

Pesticide Action Network Endocrine Disruption Criteria Update: A roadmap to nowhere, 18 June 2014

Health and Environment Alliance €31 billion per year in EU health savings possible from reducing exposures to hormone disrupting chemicals, 18 June 2014

ENDSEurope Commission reveals EDC criteria options, 18 June 2014 Reuters Sweden to sue EU Commission over delays to rules on chemicals, 22 May 2014 ENDSEurope DG Sanco accused of undermining endocrine rules, 20 May 2014

Commission sets stricter limit for Bisphenol A in toys

On 25 June 2014, the Commission decided to set a stricter limit of 0.1 mg/l (migration limit) of BPA in toys for children up to the age of 3 years and in any toys intended to be placed in the mouth. The limit was taken from standards that have been applied voluntarily by the European toy industry.

See also:

European Commission press release, 25 June 2014

Nature

Commission proposals for UN Sustainable Development Goals

On 2 June 2014, the European Commission issued a communication on the UN Sustainable Development Goals (SDGs). The communication builds on the existing EU position, as laid down in the Council Conclusions on The Overarching Post 2015 Agenda of June 2013. The Commission does not recommend a specific goal linked to climate change but promotes the integration of the issue into all the other targets. In the Commission's view the goals should be relevant to all countries, reflecting the 'universality' of the goals as expressed in the Rio +20 agreement but it also acknowledges the need to reflect countries varying circumstances. Unlike many developing countries who insist on applying the principle of 'common but differentiated responsibility', the Commission holds that the principle should only apply to global environmental degradation and is 'not useful to address the wider challenges of the post-2015 framework'. The issues raised by the Commission are largely the same as the UN Open Working Group's current list, including food and sustainable agriculture, sustainable energy, sustainable consumption and production, and biodiversity and forests. To this list the Commission has added land deregulation. Within these areas, it puts forward more specific suggestions, such as reducing human exposure to hazardous chemicals and their release into the environment, and reducing marine pollution and litter, but there are no quantitative proposals. The communication will be discussed by the Council of ministers and the European Parliament and the outcome of the process will decide the EU's position in negotiations in the UN and contribute to the report of the UN Secretary General on the post-2015 framework that is due later in 2014.

See also:

European Commission communication A decent Life for all: from vision to collective action, 2 June 2014

ENDSEurope Commission proposes SDG negotiating position, 2 June 2014

EurActiv TTIP contradicts post-2015 development goals, experts say, 11 June 2014

Swedish health tests for imported bovine animals challenged

The European Commission is referring Sweden to the ECJ over the practice of testing bovine animals imported from other member states for paratuberculosis. According to the Commission, these measures represent a failure to correctly implement Directive 64/432/EEC which harmonises animal health conditions for trade in bovine animals, since the directive does not lay down any health requirements for paratuberculosis. The Commission also claims that the mandatory testing deters Swedish farmers form importing bovine animals from other EU member states and thereby have equivalent effect of quantitative restrictions (Article 34 TFEU) that cannot, according to the Commission, be justified under Article 36 TFEU.

See also:

European Commission press release, 20 June 2014

OECD complaint against Dutch bank over palm oil investment

On 27 June 2014 Friends of the Earth Europe (FoEE) and Milieudefensie-Friends of the Earth Netherlands (FoENL) filed a complaint against the Dutch bank Rabobank for breaches of OECD Guidelines for Multinational Enterprises, concerning financial services to the Indonesian palm oil company Bumitama Ltd. The environmental NGO is concerned with the activities and conduct of Rabobank in relation to loans it provided to the company and the adverse environmental impact of the company's palm oil plantation in Indonesia. According to Friends of the Earth, the bank should have known the severe environmental, social and legal problems with Bumitama's operations in Indonesia and still they provided significant loans to the company. The OECD Guidelines (Chapter II, paragraphs 10 and 12 and the related Commentary) provide that multinational enterprises should carry out risk-based due diligence to identify, prevent and mitigate actual and potential adverse impacts that are directly linked to their operations or services by a business relationship. Rabobank has, according to Friends of the Earth, not complied with the duty of due diligence and requests the bank to bring their actions in line with the guidelines by e.g. disclosing their due diligence procedure including an impact assessment, by using its leverage in prevent future adverse impacts from its business relationship with BGA by publicly committing to withhold financial services from the company and by implementing its own Environmental, Social and Governance (ESG) policy in a transparent and effective way.

See also: Milieudefensie OECD complaint, 27 June 2014 OECD Guidelines for Multinational Enterprises Implementation of the OECD Guidelines

Agriculture

Environmental ministers reach compromise GMO regulation

On 12 June 2014, EU member state ministers of environment struck a political agreement to allow the prohibition of GMO cultivation. The agreement is the latest step in order to meet the longstanding request from the member states for more flexibility and legal certainty for national decisions on cultivation of GMOs on their territory. Under the agreement, a two-step procedure is established to restrict or ban the cultivation of authorised GMOs. The first step is the preauthorisation geographical scope restriction and the second is the post-authorisation opt-out where the member state maintains the right to withdraw their approval regardless of the applicant's views. In addition, the member states have the right to adjust their decision to restrict or ban cultivation during the authorisation period, if new circumstances arise. The agreement will now go back to the Parliament for a second reading.

Although announced by the member states representatives as a step forward for legal certainty, the agreement was criticised by the Green EP group. Food safety spokesperson Bart Staes commented on the agreement saying that it risks opening up the door for GMOs in the EU, despite the strong public opinion against it.

See also:

Environment Council press release, 12 June 2014 Environment Council main outcomes, 12 June 2014 Statement by Commissioner Borg, 12 June 2014 Greens/EFA group Greek compromise is Trojan horse for GMOs in Europe, 12 June 2014 EUobserver EU ministers agree rules allowing choice on GM crops, 12 June 2014 ENDSEurope Environment ministers set to back GM bans, 30 May 2014

Commission takes Poland to Court over GMO registry

On 20 June 2014, the European Commission decided to refer Poland to the ECJ for non-compliance with EU rules on monitoring of Genetically Modified Organisms' (GMO) cultivation. Under the GMO Directive cultivation locations for genetically modified organisms have to be notified to the competent nation authorities, recorded in a register set up by the member state and made known to the public. According to the Commission, Poland has so far failed to implement these requirements into its national legislation and has thereby failed to adequately comply with EU law.

See also: European Commission press release, 20 June 2014

Commission refers Greece to ECJ over nitrate pollution

The European Commission is referring Greece to the ECJ due to its failure to take measures to guarantee that water pollution by nitrates is addressed effectively. According to the Commission, Greece has not designated a number of zones vulnerable to nitrates pollution and it has yet to adopt measures to effectively handle nitrates pollution in these zones which is required of member states under the Nitrates Directive that has been in force since 1991. High levels of nitrates can cause damage to freshwater and marine environment by eutrophication a process promoting excessive growth of algae which negatively effects the life of other underwater life.

See also: European Commission press release, 20 June 2014

Upcoming Events

Summer Programme on International and European Environmental Law: Facing the Challenges?

The T.M.C. Asser Institute in cooperation with the Institute for Environmental Security is organizing a Summer Program on International and European Environmental Law: Facing the Challenges? New information on the full list of confirmed speakers and the excursion to the International Court of Justice is available at the Asser website.

Dates: 25-29 August 2014 Venue: T.M.C. Asser Instituut, R.J. Schimmelpennincklaan 20-22, 2517 JN The Hague

2nd EELF Conference: "Environmental and Planning Law Aspects of Large Scale Projects"

The European Environmental Law Forum (EELF) together with Hasselt University and HUBrussel are organising the second EELF Conference in Brussels. The goal of the conference is to bring academics, members of EU and national/regional institutions, industry and environmental associations together and exchange views and debate on the central topic. We especially want to also offer an opportunity to young academics to present their research.

The conference focuses on all kinds of environmental and planning law aspects of large scale projects. These can be subdivided into the following four subthemes; the role of spatial and environmental planning, permitting and review procedures, critical sectorial regimes and horizontal measures.

The conference will consist of two days of presentations and discussions, and a third day with an excursion. More information on the conference (e.g. hotel accommodation, registration form,

conference dinner etc.) will soon be available on the EELF website and the 2014 Conference webpage of Hasselt University.

Dates: 10-12 September 2014 Venue: Hogeschool-Universiteit Brussel (HUBrussel), Belgium

VMR Presentatie preadvies Werkgroep Mondiale Duurzaamheid

Tijdens deze bijeenkomst presenteren de leden van de Werkgroep Mondiale Duurzaamheid van de Vereniging voor Milieurecht hun preadvies 'juridische aspecten van verduurzaming van handelsketens'. Aandacht zal onder andere worden besteed aan maatschappelijk verantwoord ondernemen, de veranderende rol van het civiele aansprakelijkheidsrecht bij de bescherming van internationale milieubelangen, de werking en beperkingen van gedragscodes, de EU conflict mineralen-richtlijn, waterschaarste en katoen, verduurzaming van de palmolieketen, juridische aspecten van duurzaam hout en de rol van alternatieve geschillenbeslechting. Tijdens deze middag zal Jonathan Verschuuren, professor Internationaal en Europees milieurecht, als voorzitter optreden.

Datum: 26 september 2014 Tijd: 13.00-17.00 Locatie: T.M.C. Asser Instituut, Schimmelpennincklaan 20-22, Den Haag

Colofon

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