Turkey

Cetinkaya


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1 General

1.1 Please identify the scope of claims that may be brought in your jurisdiction for breach of competition law.

The Competition Authority ("Authority") is the authorised regulatory body for determining the breach of competition law and the Competition Board ("Board") is its decision-making body which imposes sanctions accordingly. Initially, a breach of competition issues is held by the Board. However, the Board can only decide on the sanctions that will be imposed on the violating party and cannot decide on the compensation of the damage by indemnification or otherwise.

Compensation claims can be brought to the national civil courts by parties which have suffered from damages due to the violation of the Law on Protection of Competition No. 4054 ("Competition Law"); such parties are generally consumers or competitors. Also, parties can bring reimbursement claims to the court in case they have engaged in a contract that violates Article 4 of the Competition Law and they already have executed the contract.

It is worth noting that according to the general and current practice of the courts, compensation and reimbursement claims are a follow-up of the decision of the Board, since the Board is the main authority for the determination of the violation of the Competition Law in practice. In other words, the claimant must apply to the Authority first for the determination of the infringement. After the decision of the Board has gone through the administrative appeal process and has been finalised, the damaged party can apply to the civil courts for compensation. However, there are several court decisions to the contrary, stating that compensation and reimbursement claims can be brought to civil courts before the Board's decision has been finalised. Civil courts' practices on this subject are not yet unified. In practice, courts make the finalisation of the Board's decision a preliminary issue if the claim has been filed before the Board's final decision is granted.

1.2 What is the legal basis for bringing an action for breach of competition law?

Article 57 of the Competition Law ensures the compensation claims after an infringement of the Competition Law are determined by providing that anyone who infringes the Competition Law and acts in anticompetitive manner is obliged to compensate the parties who suffer damages as a result of such infringements and acts. Article 56 of the Competition Law, on the other hand, provides that the contracts and decisions of undertaking associations are void and the parties are not obliged to perform such contracts and decisions. Article 56 further states that parties who have already performed such contracts and decisions can request the reimbursement of such performance.

In addition to Articles 57 and 56 of the Competition Law, compensation and reimbursement claims arising from a breach of the Competition Law are also subject to the general provisions of the Code of Obligations No. 6098. In principle, an anti-competitive action is considered a tortious act under the Code of Obligations. In addition, in case there is a contract between the damaged party and the infringing party and infringement also constitutes a breach of this contract, the compensation claims can also be based on the provisions of the Code of Obligations regarding the contracts.

Reimbursement claims, on the other hand, are considered unjust enrichment, with direct reference made by Article 56 of the Competition Law to the unjust enrichment provisions of the Code of Obligations, since the contracts and decisions of undertaking associations violating Article 4 of the Competition Law are void. In principle, the party who engaged in a contract for an unlawful purpose cannot claim reimbursement based on the voidness of such contract as per Article 81 of the Code of Obligations. However, Article 56 of the Competition Law provides that this article is not applicable in case a contract is violating Article 4 of the Competition Law. Therefore, parties who engage in such contracts knowing their unlawful nature can also claim reimbursement.

1.3 Is the legal basis for competition law claims derived from international, national or regional law?

The Turkish Constitution Article 167 provides that the state is responsible for taking the necessary measures for protecting and improving the operation of the Turkish markets and preventing monopolisation and cartels. Within this context, competition law claims are derived from national law.

1.4 Are there specialist courts in your jurisdiction to which competition law cases are assigned?

There are no specialist courts for competition claims under Turkish law. The compensation claims regarding Competition Law are held before the consumer courts or commercial courts, whichever the case may be.

The competent court will be determined in accordance with the legal relationship between the parties.

According to Article 5 of Turkish Commercial Code No. 6102, in case the relationship between the parties is commercial

in accordance with Articles 3 and 4 of the Turkish Commercial Code, e.g. one of the parties is a supplier or competitor, the claims will be held before the commercial courts.

Consumer courts, on the other hand, have jurisdiction over disputes arising from consumer applications as per Article 73 of Consumer Protection Code No. 6502. Within this scope, if the claimant is a consumer of the defendant, the claims will be held before the consumer courts.

1.5 Who has standing to bring an action for breach of competition law and what are the available mechanisms for multiple claimants? For instance, is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation? If collective claims or class actions are permitted, are these permitted on an "opt-in" or "opt-out" basis?

As per Article 57 of the Competition Law, a party who violates the provisions of Competition Law by abusing its dominant position or restricting competition through agreements or concerted practices is obliged to compensate the parties who suffered damages from such violation. The Code of Obligations also provides that any person who suffers from such tortious act can seek compensation. Reimbursement claims, on the other hand, can be filed by parties who have performed a contract or decision of the undertaking association that violates Article 4 of the Competition Law, and who is considered impoverished under the provisions of the Code of Obligations.

Collective claims and class actions are not provided for under Turkish law. The damaged parties must seek compensation individually.

However, the parties can request the court to consolidate the lawsuits in case (i) they have a connection, (ii) they are held before the courts who are in same jurisdiction, and (iii) they are held before the court whose levels and types are the same. If the lawsuits have arisen from the same reason, or the result of one of these lawsuits will affect the results of others, the lawsuits are deemed connected.

1.6 What jurisdictional factors will determine whether a court is entitled to take on a competition law claim?

The Board has jurisdiction over competition infringements committed by undertakings operating in Turkey and that affect Turkish markets.

The jurisdiction of the courts, on the other hand, is determined in accordance with the International Private and Procedure Law, which references the Turkish Code of Civil Procedure with regard to jurisdiction rules.

As per Article 16 of the Turkish Code of Civil Procedure, for claims arising from tort, the competent court in the place where the tort was committed or where the damage occurred or is likely to occur, or the place of residence of the victim, has jurisdiction over such claims. The competent court for compensation claims arising from contracts is the court competent in the place where the defendant resides or the place where the agreement is performed, according to Articles 6 and 10 of the Turkish Code of Civil Procedure. Reimbursement claims that are considered unjustified enrichment are subject to general jurisdiction rules and must be held before the competent court in the place where the plaintiff is residing, as per Article 6 of the Turkish Code of Civil Procedure.

1.7 Does your jurisdiction have a reputation for attracting claimants or, on the contrary, defendant applications to seize jurisdiction, and if so, why?

The Authority has a responsibility to act impartially and favour neither of the parties. There is no fee to be paid to apply to the Authority as a claimant.

Private enforcement in Turkey is still in development and does not yet have a clear and certain path. Therefore, a claimant cannot clearly estimate the result and timing when challenging a counterparty.

1.8 Is the judicial process adversarial or inquisitorial?

In civil matters, the Turkish civil law system generally follows an adversarial model except where the laws provide for the court to research the matter *ex officio*.

Both written submissions and oral arguments are available under Turkish law. In principle, written submissions are the primary submissions in the Turkish legal system. Most of the trials conclude on the basis of the written submissions while oral arguments are also allowed during the trial. Both written submissions and oral arguments play an important role. While written submissions are generally thought to be significant, in lawsuits where issues in rare specialisms such as competition law and in relation to the economy are argued, court advocacy becomes central.

2 Interim Remedies

2.1 Are interim remedies available in competition law cases?

Pursuant to Article 9/4 of the Competition Law, in cases where serious and irreparable damages are likely to occur up until the final decision, the Board may take temporary measures to protect against such violation and not exceed the scope of the final decision.

In addition to the Board's measures, the courts may also order interim remedies in the proceedings, carried out before both administrative and commercial courts.

2.2 What interim remedies are available and under what conditions will a court grant them?

Regarding the compensation claims carried out before commercial courts, interim remedies are mainly regulated under the Turkish Code of Civil Procedure. However, there are also special provisions in other laws, such as the Bankruptcy and Enforcement Law and the Commercial Code, that are relevant for the present purposes. Interim remedies used by the courts are mainly divided into three groups: injunctive relief; provisional attachments; and the determination of evidence.

The court may order to suspend the execution of a Board decision if objections are made to such decision before the administrative courts.

3 Final Remedies

3.1 Please identify the final remedies which may be available and describe in each case the tests which a court will apply in deciding whether to grant such a remedy.

When the Board detects a violation, it takes the necessary measures

to remedy such violation and imposes administrative fines on those responsible for the violation. In addition, in accordance with Article 9/1 of the Competition Law, the Board may decide on action that should be taken or avoided in order to establish competition and structural measures, such as the transfer of certain activities or partnership shares or assets by the undertakings.

In addition, if the undertakings prevent, distort or restrict competition through unlawful acts, decisions, contracts or agreements or abuse their dominant position in a particular market of goods or services, they are obliged to compensate all damages of those who suffer as a result.

3.2 If damages are an available remedy, on what bases can a court determine the amount of the award? Are exemplary damages available? Are there any examples of damages being awarded by the courts in competition cases which are in the public domain? If so, please identify any notable examples and provide details of the amounts awarded.

Pursuant to Article 58 of the Competition Law, those who suffer as a result of the prevention, distortion or restriction of competition can claim the difference between the price they paid and the price they would have paid if competition had not been restricted.

Competitors affected by the restriction of competition may claim compensation for all their losses from the violators. The loss of profits of the damaged undertakings are calculated by taking into account the balance sheets of previous years (Article No. 58/1 of the Competition Law).

Regarding exemplary damages, if the resulting damage is due to the agreement or decision of the parties or to situations arising from their gross negligence, the judge may, at the request of the injured, award three times the amount of the material damage incurred or the profits obtained or likely to be gained by those who caused the damage (Article No. 58/2 of the Competition Law).

3.3 Are fines imposed by competition authorities and/or any redress scheme already offered to those harmed by the infringement taken into account by the court when calculating the award?

Whereas the Board can impose fines on undertakings, it cannot decide on the compensation that the other undertakings are entitled to.

Fines imposed by the Board are not taken into account by the courts when calculating the compensation award. Payments imposed by the courts are calculated in the method specified at question 3.2.

4 Evidence

4.1 What is the standard of proof?

The existence of agreements, decisions and practices limiting competition can be proven by all kinds of evidence in proceedings carried out by Board.

Likewise, parties may present all types of evidence in proceedings before Turkish courts.

4.2 Who bears the evidential burden of proof?

As a general rule, the party who asserts its claim has the evidential burden of proof unless otherwise indicated in law.

As per Article 59 of the Competition Law, if the aggrieved party presents to the judicial bodies evidence such as the existence of an agreement or the appearance of distortion of competition in the market, especially the actual sharing of the markets, the stability observed in the market price for a long period of time, or price increases by the enterprises operating in the market at close intervals, the burden of proof passes to the defendants.

4.3 Do evidential presumptions play an important role in damages claims, including any presumptions of loss in cartel cases that have been applied in your jurisdiction?

Competitor undertakings affected by the restriction of competition may claim compensation for all their losses from the undertaking or undertakings that have restricted competition. In determining the loss, all profits hoped to be claimed by the damaged undertakings are calculated by taking into account the balance sheets of previous years. Therefore, it can be said that balance sheets play an important role in damage and loss claims in compensation cases.

4.4 Are there limitations on the forms of evidence which may be put forward by either side? Is expert evidence accepted by the courts?

The principle of freedom of evidence applies in proceedings carried out before both administrative and commercial courts. All legal and admissible evidence can be presented to the court by the parties.

Expert reports and opinions are discretionary evidence and will be accepted by the courts. Although the courts usually appoint the experts *ex officio* or upon the request of either party, the parties can also obtain reports from the experts of their choice to substantiate their arguments. The judge and court-appointed expert will have the discretion to review and take those reports into consideration.

4.5 What are the rules on disclosure? What, if any, documents can be obtained: (i) before proceedings have begun; (ii) during proceedings from the other party; and (iii) from third parties (including competition authorities)?

There is neither a discovery mechanism in Turkey nor a mechanism that allows a document to be obtained from any party before proceedings have begun. Parties cannot be forced to submit any evidence or document that does not help and support their claims.

Since there is no discovery mechanism in Turkey, parties also cannot obtain discovery from a third party. However, courts, on the other hand, may order third parties or institutions to submit the necessary documents and upon such order, the third parties will be obliged to do so. In order to avoid disclosing a document, third parties have to explain their reasoning, along with evidence indicating why they are not able to do so.

4.6 Can witnesses be forced to appear? To what extent, if any, is cross-examination of witnesses possible?

Even if witnesses can be heard, the Authority cannot force them to appear. Only the courts can summon witnesses. According to Article 245 of Turkish Code of Civil Procedure No. 6100, persons summoned to testify must appear before the court. There are only a few exceptions to this rule. A witness who is duly summoned but does not attend without an excuse will be forced to appear.

As per Article 152 of the Turkish Code of Civil Procedure, attorneys participating in the hearing may directly ask questions to the witnesses, experts and other persons participating in the hearing. However, the parties can ask questions through the judge.

4.7 Does an infringement decision by a national or international competition authority, or an authority from another country, have probative value as to liability and enable claimants to pursue follow-on claims for damages in the courts?

Even though the Competition Law does not state whether the Board's decision is a prerequisite to filing a compensation case, the Court of Cassation's approach is that courts cannot award damages in the absence of such Board decision. Therefore, the Board's decision possesses a value beyond its probative nature; in order to pursue damages claims before courts, such decision is deemed essential.

4.8 How would courts deal with issues of commercial confidentiality that may arise in competition proceedings?

There is no specific regulation on this issue in civil law. However, a closed trial may be requested to avoid the disclosure of trade secrets, and for protection of commercial confidentiality. Trials in which confidential information and documents (trade secrets) will be disclosed can be held in a closed court, following the judge's decision upon the request of the parties.

4.9 Is there provision for the national competition authority in your jurisdiction (and/or the European Commission, in EU Member States) to express its views or analysis in relation to the case? If so, how common is it for the competition authority (or European Commission) to do so?

The Board is obliged to publish its reasoned decision, which shall include legal and economic analyses, on its website within 15 days of the decision. This decision is the only input parties can obtain from the Authority during court cases.

5 Justification/Defences

5.1 Is a defence of justification/public interest available?

There is no open justification/public interest defence before the Board. However, there is an "independent decision maker" justification, similar to the "engaged in economic activity" doctrine in EU law, applicable only for administrative bodies or firms which are acting for such bodies. The definition of "undertaking" in the Competition Law incorporates an important element – the ability to independently make decisions. When a firm is obliged by, for example, a ministry to act in a certain way, it is not deemed as an undertaking, which exempts it from the application of the Competition Law.

5.2 Is the "passing on defence" available and do indirect purchasers have legal standing to sue?

There are no explicit rules with regard to the passing-on defence in the Competition Law. Furthermore, case law has not emerged yet.

5.3 Are defendants able to join other cartel participants to the claim as co-defendants? If so, on what basis may they be joined?

Parties that jointly cause damage to persons through breach of the Competition Law have joint liability to the damaged party. Therefore, cartel participants are jointly liable in case damage occurs from such a breach, and they can make recourse to each other if the court decides that one of the participants must pay an indemnity to the damaged party.

According to Article 61 of the Turkish Code of Civil Procedure, a lawsuit can be notified to the persons provided that there is a recourse relationship between the notified party and the notifying party. The notified party can join the proceedings in such a case.

In addition to the notifying procedure, a third party can join a lawsuit along with the party whose prevailing will also benefits the third party who would like to join the lawsuit, without having to receive a notification. The third party who would like to join the lawsuit must apply to the court with a petition stating which party it would like to join and the reasons for its joinder request. After that, the court decides whether it will accept the joinder request or not. In case the court decides to accept the joinder request, the third party can join the lawsuit. However, the joinder party will not be considered a party to the proceedings and is only allowed to assist the party it has joined. In line with this concept, the joinder cannot appeal the decision by itself and cannot be a part of the decision. Also, in case the joinder party makes submissions which will be contrary to the ones made by the party it has joined the case with, these submissions can be cancelled by the court.

6 Timing

6.1 Is there a limitation period for bringing a claim for breach of competition law, and if so how long is it and when does it start to run?

As a general rule, a claim for compensation expires from the date on which the injured party learned about the damage and the compensation obligation, and in any case, 10 years from the date of the act. However, if the compensation has arisen from an act requiring a penalty for which a longer statute of limitations is stipulated, this prescription is applied.

Since violations of the Competition Law require administrative fines, the limitation period in compensation cases arising from violations of competition is eight years.

Although the start date of a statute of limitations is controversial, it is necessary to apply to the Board in order to file a claim for compensation as a prerequisite. For this reason, the statute of limitations for compensation cases arising from competition infringement should start after the finalisation of the Board's decision, and not on the date of the complaint. However, even though this is the most common view in Turkish doctrine, the Court of Cassation has opposite opinions on this issue.

6.2 Broadly speaking, how long does a typical breach of competition law claim take to bring to trial and final judgment? Is it possible to expedite proceedings?

Since the investigation procedure and all related timings are meticulously described in the Competition Law, the maximum duration of an investigation that has triggered a claim is definite. With all the extensions stated in the Law used by both the defendants and the case handlers, a full investigation would last 22–24 months. In order to have a finalised verdict, the Board

decision should go through the entire appeal process, which does not have a certain timetable. This process takes broadly an additional five years, unless all the courts in the appeal process decide the same way.

According to current case law, a claimant can file a lawsuit before a commercial court asking for compensation only after having a finalised Board decision that determines a competition breach. Litigation, together with an appeal, would take not less than another four to five years.

7 Settlement

7.1 Do parties require the permission of the court to discontinue breach of competition law claims (for example, if a settlement is reached)?

After a competition investigation is started, the Board may initiate the settlement procedure at the request of those concerned or *ex officio*, while taking the procedural benefits, which may arise from the rapid completion of the investigation process and disputes regarding the existence or scope of the infringement at hand, into account. The Board may settle with the undertakings or association of undertakings up until the legal service of the investigation report.

In the event that the process results with settlement, administrative fines and the matters included in the settlement text cannot be subject to a litigation process by the parties.

On the other hand, compensation proceedings carried out before the courts can also be subject to settlement in accordance with the Code of Obligations in line with freedom of contract.

7.2 If collective claims, class actions and/or representative actions are permitted, is collective settlement/settlement by the representative body on behalf of the claimants also permitted, and if so on what basis?

Even though parties collectively offer settlement in accordance with the rules specified at question 7.1, since there is no mechanism allowing class actions and/or representative actions in Turkey, settlement by the representative body is not permitted.

8 Costs

8.1 Can the claimant/defendant recover its legal costs from the unsuccessful party?

The legal costs include expenses such as decision and judgment charges, expert and witness fees, notification fees, documentation fees and the official attorney fees.

Since the plaintiff is required to pay costs in advance before initiating the lawsuit, the defendant is required to reimburse the plaintiff party for the court fees and expenses only if it loses the case. However, the attorney fees are imposed by the award, so the losing party is obliged to pay the official representation fees to the prevailing party's lawyer, which is calculated *pro rata* to the quantum of the case according to official tariff in place.

8.2 Are lawyers permitted to act on a contingency fee basis?

Contingency fee basis agreements are illegal in Turkey. According to Article 164 of the Attorney's Act No. 1136, the attorney's fee cannot be determined under the attorney's minimum wage tariff.

On the other hand, attorneys and clients may agree upon a success fee, provided that the minimum wage is determined in accordance with the above Article. However, attorneys' fees cannot exceed 25% of the monetary value of the lawsuit.

8.3 Is third party funding of competition law claims permitted? If so, has this option been used in many cases to date?

Litigation funding is not specifically regulated under Turkish law. Since there is no regulation that forbids third parties from funding litigation costs in the Turkish jurisdiction, agreements between the parties and the third-party funders are subject to the general contract law provisions stipulated in the Code of Obligations. Therefore, it is possible to determine the conditions of third-party funding agreements by the provisions of freedom of contract.

9 Appeal

9.1 Can decisions of the court be appealed?

As the decisions of the Board are considered administrative transactions, such decisions are subject to the objection and appeal procedures which apply to other administrative transactions. Therefore, decisions of the Board can be submitted to the administrative courts in Ankara within 60 days of the service of the reasoned Board decision to the parties as per Article 7 of Code of Administrative Procedure No. 2577, for judicial review by the parties. The decisions of the Ankara Administrative Courts can be appealed to the regional administrative courts of appeal, which constitutes the first tier of the two-tiered appeal system in Turkey, within 30 days of the service of the first instance court's decision. However, decisions regarding disputes with a value not exceeding TRY 7,000 cannot be appealed, and the decision of the first instance court is final for such disputes. After the review of regional courts of appeal, the parties can appeal the decision to the Council of State, which is the final appeal authority for administrative lawsuits, within 30 days from the service of the decision of the regional administrative courts of appeal.

The decisions of civil courts regarding compensation and reimbursement can be appealed to the regional civil courts of appeal, which is the first appeal authority of the two-tiered appeal system for civil disputes, within two weeks of the service of the justified decision of the court. However, disputes with a value of less than TRY 5,880 cannot be appealed to the regional civil courts of appeal. The decisions of regional courts are subject to the appeal review of the Court of Cassation, which is the final appeal authority for civil disputes, provided that the value of the appealed part of the claim exceeds TRY 78,630. The application to the Court of Cassation must be made within two weeks from the service of the regional civil court of appeal's decision.

10 Leniency

10.1 Is leniency offered by a national competition authority in your jurisdiction? If so, is (a) a successful, and (b) an unsuccessful applicant for leniency given immunity from civil claims?

Yes. The Board offers immunity from fines for successful applicants. However, this immunity or reduction of fines will not prevent the applicant from filing claims before commerce courts for damages.

10.2 Is (a) a successful, and (b) an unsuccessful applicant for leniency permitted to withhold evidence disclosed by it when obtaining leniency in any subsequent court proceedings?

Neither successful nor unsuccessful leniency applicants can withhold evidence disclosed by them after the investigation phase of the Authority.

11 Anticipated Reforms

11.1 For EU Member States, highlight the anticipated impact of the EU Directive on Antitrust Damages Actions at the national level and any amendments to national procedure that are likely to be required.

This is not applicable.

11.2 What approach has been taken for the implementation of the EU Directive on Antitrust Damages Actions in your jurisdiction? How has the Directive been applied by the courts in your jurisdiction?

This is not applicable.

11.3 Please identify, with reference to transitional provisions in national implementing legislation, whether the key aspects of the Directive (including limitation reforms) will apply in your jurisdiction only to infringement decisions post-dating the effective date of implementation; or, if some other arrangement applies, please describe it.

This is not applicable.

11.4 Are there any other proposed reforms in your jurisdiction relating to competition litigation?

The Judicial Reform Strategy was issued by the Justice Ministry in May 2019. According to this Strategy, "the administrative procedure will be simplified and made more efficient". We are of the view that reforms that accelerate the appeal procedure of the Board decisions would make competition litigation more attractive for claimants.

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Mr. Ilicak's experience in competition and regulation consultancy ranges from the creation of economic impact analyses reporting in competition litigation cases and helping clients to reduce fines, to advising clients on the introduction of compliance culture in the pharmaceutical, chemical, cement, tobacco, and automotive industries.
His previous roles include Competition, Data Privacy and Economic Regulations Director at PwC where he established the Competition and Data Privacy Law department. As a local partner at Dentons, Mr. Ilicak was instrumental in incorporating a new compliance programme for the leading automotive supplier in Saudi Arabia. He created the first online competition compliance platform in Turkey as a partner at ACTECON. In addition, working as a competition expert, he helped to establish the Turkish Competition Authority in 1997.

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Mr. Cetinkaya has extensive courtroom experience with an exemplary record in high-profile civil litigation in Turkey. He has particular experience in a number of substantive areas; these include disputes related to joint ventures, mergers and acquisitions, shareholder actions and contractual claims, breach of contract claims and post-transaction proceedings, international trade, public international law, and fraud and financial crimes.
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Cetinkaya is a full-service law firm based in Istanbul servicing local and international clients. Our lawyers have extensive expertise in advising on dispute resolution, business crime, competition, data protection and compliance.
Cetinkaya's competition and economics practice focuses on merger control, competition litigation, regulatory economics, and government relations. With more than three decades of industry experience we work with international law firms, national governments, blue chip enterprises and leading Turkish companies providing informed insight on how best to interact with regulators to resolve cases quickly. We understand that an in-depth knowledge of economics in antitrust and merger assessments is of paramount importance and the team's economists have unparalleled experience in dealing with the Turkish Competition Authority. The Practice is led by a former Competition Authority expert who served with the agency for almost a decade. With vast experience of working with international clients, Cetinkaya can achieve seamless integration with multinational legal teams to ensure that projects are delivered successfully.

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