Takeovers Panel

GUIDANCE NOTE 7: LOCK-UP DEVICES

Overview

This Guidance Note sets out the Panel's approach to lock-up arrangements entered into by targets, including devices[1] such as break fees, asset lock-ups, no-talk agreements and no-shop agreements. Such arrangements generally fetter the actions of the target, but may also fetter the actions of a bidder or substantial shareholder. It explains the two guiding criteria, concerning competition and coercion that the Panel will apply when considering whether such arrangements give rise to unacceptable circumstances.

The term "lock-up device" refers to different types of restrictive arrangements entered into between bidders and targets (or other parties) to encourage or facilitate a takeover bid, and is not limited to the types of devices referred to above. The Panel does not consider lock-up devices to be prima facie unacceptable. However, the Panel is concerned to ensure that lock-up devices do not prevent control transactions from taking place in an efficient, competitive and informed market.

In relation to break fees, the Guidance Note explains the Panel's application of its "1% guideline" as a starting point for assessing whether a break fee is likely to be anti-competitive or coercive.

The Guidance Note should be read as applying to lock-up arrangements in other control transactions as well as takeover bids, such as schemes of arrangement and shareholder approved transactions, to the extent applicable.

Introduction

7.1 This Guidance Note[2] considers lock-up arrangements including break fees, asset lock-ups, no-talk agreements and no-shop agreements. As the principles discussed in it are of general application, they will be applied to any arrangement which has the effect of fettering the actions of a target, a bidder or a substantial shareholder.

7.2 In this Guidance Note, the Takeovers Panel (**Panel**):

(a) states that it does not regard lock-up arrangements to be unacceptable as such; and

(b) sets out the criteria that it applies in assessing whether any particular lock-up arrangements are unacceptable in relation to a takeover bid or other control transaction.

[1] In the balance of the Guidance Note, a reference to an arrangement refers to the effect of a device, or series of devices.

[2] The Panel's Guidance Note will guide the Panel's administrative decision-making when implementing the legislation and legislative policy.

7.3 Whether circumstances are unacceptable depends on the effect or likely effect of the lock-up arrangements on current and potential bidders, on shareholders and on the market, in light of the policy of sections 602 and 657A of the Corporations Act 2001 (the **Act**).[3] In particular, the Panel considers that a lock-up arrangement is likely to give rise to unacceptable circumstances if it prevents the acquisition of control of a target taking place in an efficient, competitive and informed market.[4]

7.4 The Panel will examine on a case-by-case basis whether particular lock-up arrangements give rise to unacceptable circumstances, guided by the criteria set out in this Guidance Note. In particular, the Panel will focus on the competitive element: the arrangements must not have a significant anti-competitive effect on existing or potential rival bidders, and on the efficient element: the arrangements must not have a significant coercive effect on target shareholders making them unlikely to consider other alternatives (including taking no action) on their merits.

7.5 To avoid putting pressure on shareholders to accept a bid or locking out a potential competitor, the Panel considers that a break fee should not in general exceed 1% of the equity value of the target company. Size alone is not determinative, and other terms may render an agreement coercive or anti-competitive. A break fee which is more than 1% will be examined closely by the Panel to ensure that it is not anti-competitive or coercive. If the fee is 1% or less, the fee will generally not be considered unacceptable unless it is shown that the fee is coercive or anti-competitive.

7.6 Since the first issue of this Guidance Note in 2001, lock-up devices have been considered by the Panel in several matters that have come before it.[5] Those matters indicate that lock-up arrangements have continued to evolve in Australia. The Panel expects that it will need to continue to monitor the evolution of, and its own experiences with, lock-up arrangements, and to update this Guidance Note from time to time to keep it relevant.

7.7 This Guidance Note is not a statement of the law. The fact that a Panel does not declare an agreement to be unacceptable does not affect its legality or enforceability under other laws.

General Approach

7.8 The Panel is primarily concerned with whether the overall effect of the lockup arrangements are contrary to the policy in paragraph 602(a) that control transactions take place in an efficient, competitive and informed market. If it secures an opportunity or proposal for sellers or shareholders to consider, a

[3] All statutory references are to the Act, unless otherwise indicated.
[4] s.602(a) of the Act.
[5] *Normandy Mining Limited (No. 3)* [2001] ATP 30, 20 ACLC 471; *Ballarat Goldfields NL* [2002] ATP 7, 41 ACSR 691; *Ausdoc Group Limited* [2002] ATP 9, 42 ACSR 629; *Sirtex Medical Limited* [2003] ATP 22; *National Can Industries Limited* [2003] ATP 35, 48 ACSR 409; *National Can Industries Limited 01R* [2003] ATP 40, 48 ACSR 427; *Axiom Properties Limited 01* [2006] ATP 1; *Wattyl Limited* [2006] ATP 11; *Magna Pacific (Holdings) Limited 02* [2007] ATP 03; and *Queensland Cotton Holdings Limited* [2007] ATP 05.

properly structured lock-up arrangement may enhance the competitive environment.[6]

Criteria

7.9 Two criteria that the Panel will apply when determining whether lock-up arrangements are contrary to the policy in paragraph 602(a) are that the arrangements must not be either:

(a) **anti-competitive -** they must not have a significant deterrent impact on the competition for control or on current or potential counter-proposals; and

(b) **coercive -** they must not have a substantial coercive effect on target shareholders when they are assessing the proposal or any current or potential counter-proposals .

7.10 These two criteria look at the effect of the arrangements on two different classes of people. The 'anti-competitive' criteria focuses on the effect or likely effect of the lock up arrangements on current or potential buyers or bidders, while the 'coercive' criteria focuses on the effect or likely effect of the lock up arrangements on the sellers or shareholders. This dual focus is appropriate because competition in a market depends upon the existence of willing buyers and willing sellers of the relevant assets.

7.11 Arrangements which have the effect or likely effect of impeding the willingness of current or potential buyers or bidders to advance their proposal or the ability of sellers or shareholders to consider and accept or respond to current or potential alternative proposals have the effect of undermining the competitiveness and efficiency of the market for control of the relevant company and generally. This is true, even if the arrangements affect only one of those classes of people.

First movers and subsequent movers

7.12 The principles in this Guidance Note apply equally to lock-up arrangements agreed with a first bidder and to those agreed with subsequent bidders. In relation to break fees, a fee paid to a first bidder may induce it to make a takeover bid or initiate another proposal that it would not otherwise have made, potentially starting an auction. A fee to a subsequent bidder is akin to an inducement for a person to enter an auction. In either case, a fee which is excessive in amount or badly structured may impede or even terminate the auction process in which case it may be considered unacceptable.

Lock-up arrangements in the context of other control transactions

7.13 The principles set out in this Guidance Note apply equally to lock up arrangements in other transactions under which a person seeks to gain or increase control over a target company. This includes, for example, schemes of arrangement (aspects of which are within the Panel's jurisdiction, subject to

[6] While a bidder may also agree to pay a break fee, for example in return for a period of exclusive negotiations or a due diligence opportunity, the fee is unlikely to be of concern to the Panel.

the Court's supervisory role) and transactions requiring shareholder approval under item 7 of section 611.

7.14 When considering lock-up arrangements in the context of other control transactions, the Panel will refer to the policies set out in this Guidance Note, to the extent that they are applicable, in determining whether or not they are unacceptable.

Break Fees

7.15 A break fee is most commonly an arrangement entered into between a bidder or potential bidder and the target of a proposed takeover bid or merger. Some form of consideration will be payable by the target if certain specified events occur which have the effect of preventing the bid from proceeding or causing it to fail (**triggers**). These events will typically be outside the control of the bidder (but not necessarily of the target or its shareholders).

7.16 The break fee might in many cases be viewed as an option fee paid to secure the opportunity for the target or its shareholders to consider. Therefore the Panel does not believe that payment of a break fee is of itself unacceptable because it becomes payable upon shareholders rejecting the takeover bid or other transaction (however, see the discussion of coercive effect in paragraph 7.24).

The 1% guideline

7.17 It is good practice for anyone who agrees to pay a break fee to negotiate a fixed or capped figure, whether dollar or percentage based. In this regard, the Panel will use a guideline that a fee should not exceed 1% of the equity value of the target. For this purpose, the equity value is the aggregate of the value of all classes of equity securities issued by the target, where relevant having regard to the value of the consideration under the bid, as at the date the bid is announced.

7.18 As indicated in *National Can Industries 01(R)*,[7] the Panel starts from the position that a break fee which does not exceed the 1% guideline is unlikely to be either anti-competitive or coercive.

7.19 Accordingly, in order to satisfy the Panel a break fee which is within the 1% guideline is unacceptable, an applicant will need to demonstrate that the lock-up arrangements are actually anti-competitive or coercive, because of the fee amount, structure, or effect.

7.20 Conversely, if the amount of a break fee is more than the 1% guideline, in order to find that the break fee is not unacceptable the Panel must be satisfied that the arrangement is neither anti-competitive nor coercive. This may be established by showing, for example:

[7] [2003] ATP 40 at [33].

(a) the fee is demonstrably not anti-competitive because, for example, another current bidder has increased its bid, or a new bid has been proposed, since the break fee was announced;

(b) although the fee exceeds the 1% guideline, it was agreed only after a public and transparent process or auction conducted by the target or a controlling shareholder to elicit transaction proposals; i.e. the control proposal can be seen as the culmination of a suitable competitive process rather than as preventing it; or

(c) the bidder has incurred disproportionate cost, effort or risk in mounting its bid.

In addition, that party must demonstrate to the Panel that there are no other circumstances arising from the arrangement which might be coercive.

7.21 In some limited cases, the Panel accepts that it may be appropriate for the 1% guideline to apply to a company's enterprise value rather than equity value, because for instance, the target is highly geared. In such a case, as with every fee in excess of 1% of equity value, a party seeking to justify the fee must be prepared to show that the fee does not have an anti-competitive or coercive effect.

Examples

1. *Normandy Mining Limited (No. 3)* [2001] ATP 30 – a break fee of approximately 1% of equity value, which might have been regarded as excessive because of the large size of the bid, was not unacceptable because a counter-bidder had over-bid the bid supported by the break fee.

2. *Ausdoc Group Ltd* [2002] ATP 9 - a break fee of 1.87% of equity value was not regarded as being unacceptable because of the previous public tender process, the high cost of preparing and carrying out the bid because of the complexity of the target's businesses and because the premium being offered to shareholders was many times the amount of the break fee.

Parties' costs

7.22 The costs (including both funded costs and opportunity costs) incurred by the parties to a proposal, though a relevant factor (see, for example paragraph 7.20(c) above), are secondary to their anti-competitive or coercive effect.

Multiple Fees

7.23 Where there are multiple fee arrangements with the same party and its associates (in respect of the same, or related, transactions) the Panel may aggregate them for the purposes of the 1% guideline.[8]

Coercive effect and triggers

7.24 Whether a lock-up device is coercive depends on its tendency to affect adversely the value or nature of shareholders' investment (via their shares) in

[8] As was done with the first and second fees in *National Can Industries 01 and 01R* [2003] ATP 35 and 40. Contrast *Ausdoc Group Limited* [2002] ATP 9 at [38] where certain other fees were not aggregated with a break fee, because they were not in the nature of break fees.

the target company if they do not accept the relevant bid, or if they accept a competing proposal. A coercive lock-up device can in fact be very similar to frustrating action,[9] in nature and adverse effect. In both cases, the directors of a company enter into agreements that block or restrict the ability of target shareholders to determine the outcome of proposed control transactions.

Examples

1. *Ausdoc Group Limited* [2002] ATP 9 at [44] – a fee which was likely to absorb a very large proportion of the anticipated profits of a target, which was principally traded on the basis of its earnings and not on the value (or future value) of its assets, was considered coercive.

2. *Ballarat Goldfields NL* [2001] ATP 7 at [14]-[16] – a fee which was to be "paid" by the issue of shares representing a 10% interest in the target was considered coercive.

7.25 When payment of the fee is triggered because of a more attractive counter-bid, there is unlikely to be any coercive effect on sellers/shareholders as the success of the competing proposal has commercially supplanted the proposal which had been supported by the break fee agreement.

Carve-outs in break fee agreements

7.26 In general, the Panel does not accept that target board directors should require a break fee to be subject to the possibility of target directors changing their minds as to the desirability of the transaction to which the break fee relates as circumstances unfold. Such an agreement would be so uncertain for the bidder as to be hardly worth having. Target directors cannot foresee all future circumstances. They must make decisions on the basis of the information before them, reasonable enquiry, and a belief that the decision they make is, as far as they can tell, in the best interests of the company. [10]

7.27 However, each trigger needs to be appropriate to the stage that the negotiation or transaction has reached at the time that the board agrees to the break fee and its terms. If a step which is beyond the control of target directors but which critically affects the ability of those target directors to enter into a proposal is outstanding, those directors should consider whether it is appropriate to delay entry into the break fee arrangement until that step has been taken or to make the payment of the break fee contingent upon completion of that step.

Example

1. *National Can Industries Limited 01(R)* [2003] ATP 40 – one of the triggers in a break fee arrangement was for any director to withdraw their recommendation of the proposal. However, the directors had not yet obtained a required report from an independent expert, the support of which was important to the directors' decision whether to maintain their recommendation. Either the agreement should not have been executed until the report was obtained or there should have been a fiduciary exception where a director was obliged by their duties to reconsider their recommendation as a result of the receipt of the expert's report.

[9] See Guidance Note 12: *Frustrating Action*, particularly at [12.18].
[10] *Normandy Mining Limited 03* [2001] ATP 30 at [40].

No-Talk Agreements

7.28 A no-talk agreement is an arrangement entered into between a bidder, or potential bidder, and the target, by which a target agrees not to negotiate with any bidder or potential bidder, even if that bidder's approach to the target is unsolicited.

7.29 What is an acceptable no-talk agreement if the target has already conducted an effective auction process may not be acceptable if the target has not conducted an effective auction process before agreeing to the arrangement.

Safeguards

7.30 No-talk agreements are inherently more anti-competitive than, for example, no-shop agreements. Therefore, the safeguards required are more stringent, and the benefits that the agreement brings to target shareholders need to be greater and/or more certain. Target directors need to be convinced of the commercial and competitive benefits to their shareholders before agreeing to this form of agreement. The period of restraint must be limited and reasonable: in order not to be unacceptable, a no-talk obligation should usually cease once a public announcement of the relevant bid or proposal has been made.[11] Generally, when it is subject to appropriate fiduciary exceptions, a no-talk obligation will have little practical effect in the period following announcement of the relevant bid or proposal.

Fiduciary exception in no-talk agreements

7.31 The Panel regards it as essential that a no-talk agreement contain an appropriate 'fiduciary exception', allowing directors to respond positively to any better proposal if they form the view that to do so would be in the best interests of target shareholders.

7.32 The Panel would be likely to find a no-talk agreement to be anti-competitive if the form of any fiduciary exception meant that it was unlikely to be available to target directors in practical terms.

Example

1. *Magna Pacific Holdings Limited 02* [2007] ATP 03 – it was unclear from the wording of a fiduciary exception as to whether, in order to avail itself of the carve-out, the target board required legal advice that "failing to respond **would** breach their fiduciary duties" (emphasis added). The Panel had concerns that this wording may have effectively rendered the fiduciary exception meaningless, and would have been more comfortable to leave the decision to the directors having a reasonable basis (for example, legal advice) to believe that failing to respond **would be likely** to breach their fiduciary duties.

2. *Queensland Cotton Holdings Limited 02* [2007] ATP 05 – the target board was interpreting and applying the terms of an implementation agreement so strictly that it considered itself unable to advise a potential alternative bidder as to what further information the board required for the indicative proposal to be considered a "competing proposal" capable of consideration within the terms of the fiduciary exception. The Panel considered that such a restrictive interpretation could give rise to a declaration of unacceptable circumstances.

[11] Compare the restraint on disposing of shares in *PowerTel Limited 01* [2003] ATP 25.

Agreements affecting dealings with rival bidders

No due diligence agreements

7.33 A no due diligence agreement is an arrangement entered into between a bidder, or potential bidder, and a target whereby a target agrees not to allow a rival bidder, or potential bidder, to conduct due diligence on the target's corporate information without the initial bidder's consent. It is similar in nature to a no-talk agreement.

Agreements to pass on information

7.34 An agreement might oblige the target to provide details of any approaches regarding alternative proposals to the original bidder or restrict the target in communicating relevant information to a potential rival bidder.

7.35 The Panel considers that the discussion about no-talk agreements above, including appropriate safeguards and fiduciary exceptions in no-talk agreements, apply similarly to agreements affecting dealings with rival bidders.

No-Shop Agreements

7.36 A no-shop agreement is an arrangement entered into between a bidder, or potential bidder, and the target by which a target agrees not to solicit a takeover bid or other control transaction from a third party, usually during some defined period of exclusivity.

7.37 The Panel generally does not require that a no-shop agreement be constrained by a fiduciary exception, because it considers that a no-shop agreement is materially less anti-competitive than a no-talk agreement: a no-talk agreement may diminish competition in the market for target shares by preventing an interested party from bidding, whereas a no-shop agreement only prevents the target from soliciting additional bidders or alternative transactions.

7.38 As with a no-talk agreement, the period of restraint under a no-shop agreement must be limited and reasonable. However, a no-shop obligation may extend into the bid period where this is justifiable having regard to the advantages that the agreement offers to target shareholders.

7.39 As with a no-talk agreement, ancillary provisions of a no-shop agreement may also be taken into account in determining whether it is anti-competitive; if, for example, they oblige the target to provide details of any alternative proposals to the original bidder or restrict the target in communicating relevant information to a potential rival for control.

7.40 The Panel will look to the form and effect of no-shop agreements as well as the specific wording. If the specific wording of a no-shop agreement did not clearly permit the target board to respond to an alternative proposal or enquiry, the Panel would be likely to treat the agreement in the same way as a no-talk agreement. Accordingly, it would need to be subject to similar protections and exceptions as a no-talk agreement.

Example

1. *Queensland Cotton Holdings Limited 02* [2007] ATP 05 – see discussion at paragraph 7.32 above.

Asset lock-ups

7.41 An asset lock-up is an arrangement which may be entered into between a potential acquirer, and the target,[12] for example, agreements:

(a) by the target to sell a particular asset or assets in exchange for an agreement by the acquirer to make a bid or enter into another control transaction; or

(b) by the acquirer to buy a particular asset or assets in exchange for a defined period of exclusivity or the opportunity to undertake due diligence for a control transaction.

7.42 There has been little experience of asset lock-ups in Australia. If an asset lock-up involves an agreement to sell an important asset of the target (often the target's "crown jewels"), it can have the effect of making the target a less attractive acquisition candidate, and a less attractive investment for its shareholders. Accordingly, an asset lock-up may be both anti-competitive and coercive.

7.43 If an asset lock-up were entered into with a potential rival bidder (or as part of some other transaction) after the target company had received notice of a takeover bid or proposed takeover bid, the asset lock-up may also constitute "frustrating action" requiring scrutiny under the principles set out in Guidance Note 12: Frustrating Action.

7.44 Even if a proposed asset lock-up would not directly eliminate meaningful competitive bidding for the target, the lock-up may nevertheless still be unacceptable if certain safeguards are not observed. In particular, the agreement should be negotiated on an arms length basis, should be at a fair price and should not adversely affect the amount or distribution of benefits accruing to shareholders in the target in connection with the takeover.

7.45 In the absence of an appropriate commercial reason for giving such an asset lock-up, the agreement may give rise to unacceptable circumstances. In general, asset lock-up devices are likely to be exposed to more scrutiny, and run more risk of being unacceptable, as the size or strategic value of the asset increases.

7.46 The Panel considers that it is good practice for a target board to seek expert advice on the appropriateness of any fixed price, or price formula, asset lock-up agreement.

[12] The Panel recognises that companies may enter bona fide asset lock-up agreements well prior to, and outside the context of, a takeover bid. This Note applies only to asset lock-ups entered into in the context of an existing or anticipated takeover bid.

Lock-up devices with major shareholders

7.47 In addition (or as an alternative) to the target company, a bidder may seek to enter into the various types of lock-up devices mentioned in this Note with a major shareholder of the target. When considering such an agreement, the Panel will refer to the policies set out in this Note, to the extent that they are applicable, in determining whether or not that agreement is unacceptable.[13]

7.48 A lock-up device agreed with a major shareholder of a target as part of an arrangement for that shareholder to sell all or part of its holding to the bidder, by accepting the bid or otherwise, will affect competition for control of the target.

7.49 The Panel expects that the principal concern regarding such an arrangement will be whether it defeats the purpose of section 606 by allowing the bidder effectively to control the disposal of shares above the 20% threshold in circumstances other than those contemplated by the exceptions listed in section 611.

7.50 In general, the coercion criterion does not apply to lock-up arrangements agreed with a major shareholder. However, the Panel will assess whether any such lock-up device has an anti-competitive effect, such as in circumstances where the shares which are the subject of the lock-up arrangements, when combined with any shares in the target then held by the bidder, exceed the 20% threshold – irrespective of whether or not the arrangement in question technically gives rise to a relevant interest.

Example

1. *Alpha Healthcare Limited* [2001] ATP 13 at [23]-[24] – a mere commercial commitment to sell a 19.9% holding under a pre-bid agreement by a shareholder with economic incentives was not regarded as leading to a contravention of section 606 where it was clear that the shareholder was free to accept a competing bid in respect of the balance of its shareholding.

Disclosure

7.51 The existence and nature of any lock-up device should normally be announced together with the relevant proposal, when the proposal is required to be announced under the continuous disclosure provisions which apply to each of the parties.[14] This announcement should:

(a) be made in a way that will bring the information to the attention of shareholders generally – so if the bidder or the target is listed, to the relevant home exchange (and if both are listed, to both of them); and

[13] The 1% cap will be calculated on the value of the shares held by the shareholder rather than the target's market capitalisation. However, a higher percentage fee in this context may not be unacceptable if it is not actually anti-competitive.

[14] Such as Listing Rule 3.1 or section 675 of the Act. Confidentiality provisions in a lockup agreement can satisfy LR 3.1A.1 or regulation 6CA.1.01(b), but can only be observed while the other requirements of LR 3.1A or regulation 6CA.1.01 are satisfied.

(b) include all the relevant terms of the arrangements – even if they are embodied in separate documents.[15]

7.52 There may be circumstances where the nature and existence of the lock-up device itself are sufficiently material to require its disclosure under the ASX Listing Rules forthwith, without waiting until the related proposal itself has reached the point of requiring disclosure.[16]

7.53 The bidder's statement and target's statement (or any other relevant document, such as an explanatory statement for a scheme of arrangement) should fully disclose the terms of the lock-up device again.

Process

7.54 Where a break fee or other lock-up device comes before the Panel, directors are expected to be able to explain their process in considering the relevant issues relating to lock-up devices (including any advice taken) and the appropriateness of entering the arrangements.

Remedies

7.55 The Panel has a wide power to make orders (including remedial orders) if it finds that a lock-up device gives rise to unacceptable circumstances. For example, the Panel may cancel or declare voidable an agreement (i.e. the lock-up device or any other agreement) relating to a takeover bid, or a proposed takeover bid, or any other agreement in connection with the acquisition of securities. It can also make orders or accept undertakings that have the effect of removing any anti-competitive or coercive effect.

Examples

1. *Ballarat Goldfields NL* [2002] ATP 7 – the Panel ordered that the shares which were to constitute the break fee not be issued and no other benefit be provided in substitution.

2. *Ausdoc Group Limited* [2002] ATP 9 – the Panel accepted undertakings from the fee-taker to waive its right to receive and not to accept the payment of a particular fee and from the fee-payer not to pay that fee.

3. *National Can Industries Limited 01(R)* [2003] ATP 40 – the Panel accepted undertakings from the fee-taker to increase the consideration to be provided by it to shareholders under the relevant scheme of arrangement by an amount equal to the per share value of the break fee, to repay the break fee in certain circumstances and not enforce or accept payment of a second break fee and from the fee-payer not to pay that second break fee.

Legality

7.56 Regardless of whether or not a particular lock-up arrangement is unacceptable under the approach set out in this Guidance Note, other laws may make that lock-up arrangement void or unenforceable. For example, it may be void or unenforceable because it contravenes the law relating to directors' duties, reductions of capital, or financial assistance.

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[15] *Normandy Mining Limited (No. 3)* [2001] ATP 30 at [39].

[16] In *AMP Shopping Centre Trust 01* [2003] ATP 21, the Panel made a declaration of unacceptable circumstances in relation to contractual pre-emptive rights over the assets of a target, the existence of which rights had not been fully disclosed to the market until a bid was made for the company.

7.57 Directors are responsible for the legality and validity of agreements into which they enter. Therefore, before entering into a lock-up arrangement, directors must consider their fiduciary duties and statutory obligations and consider seeking expert legal advice.

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