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# COMPETITION LAW & POLICY NEWSLETTER

Quarter 4 of 2023

## SECTORS COVERED IN THIS ISSUE



FMCG



Iron and Steel  
Industry



Civil Aviation

## Merger Control

- The CCI approves the Air India-Vistara merger.

## INSIDE

### Key Enforcement Matters

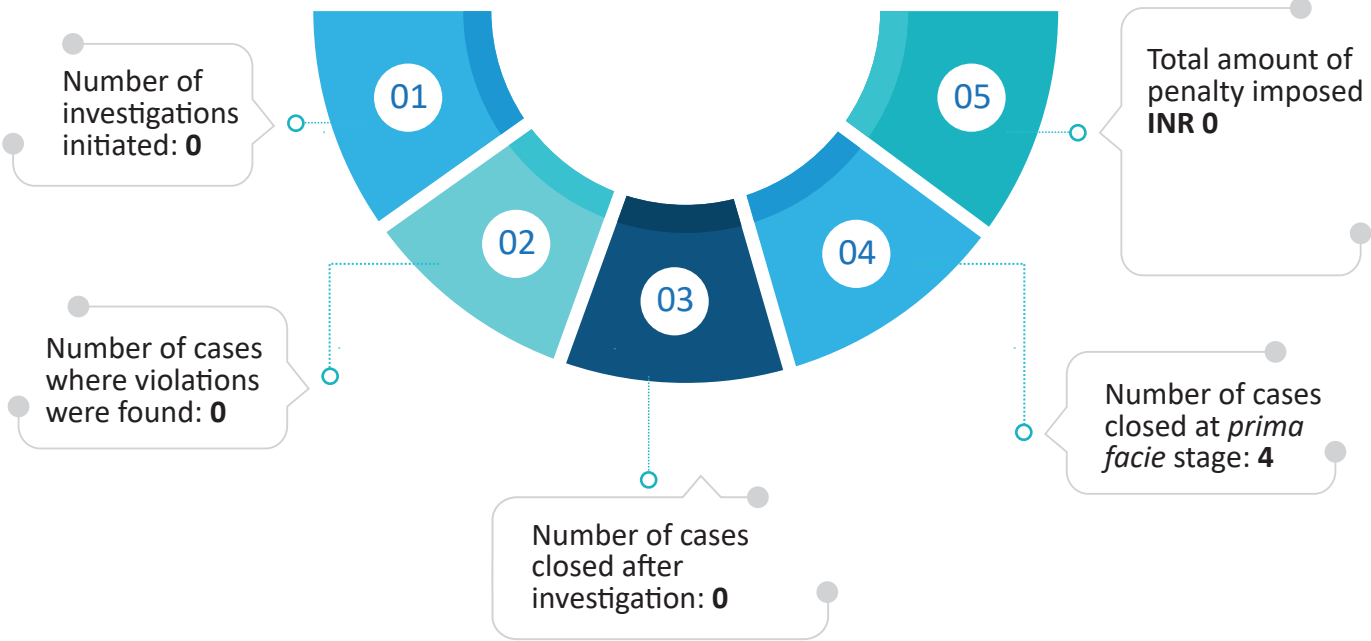
- The NCLAT sets aside the CCI order on cartelization against 18 sugar mills and their two trade associations; remands the matter back to the CCI for fresh hearing.
- The Madras HC dismisses writ petition filed by Agni Steels challenging the CCI's investigation in an alleged steel cartel.

### Other Key Developments

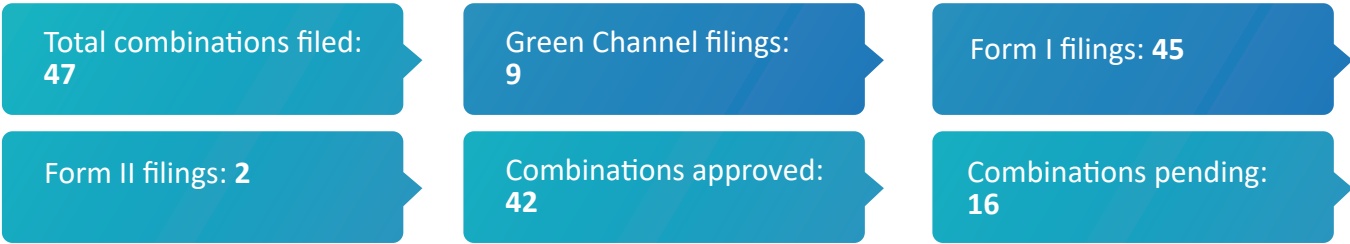
- Mr. Ansuman Pattnaik appointed as Director General for the investigations arm of the CCI.
- The CCI releases draft regulations on Lesser Penalty and Turnover and Income for stakeholder consultation.
- The CCI launches a market study into the cement sector.
- The CCI becomes a member of the Steering Group of the International Competition Network

# A QUICK SNAPSHOT

## Enforcement Matters



## Mergers & Acquisitions



# ENFORCEMENT

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## #1 The NCLAT sets aside the CCI order on cartelization against 18 sugar mills and their two trade associations; remands the matter back to the CCI for fresh hearing.

On October 10, 2023, the National Company Law Appellate Tribunal (“NCLAT”) quashed a September 2018 order (“CCI Order”) passed by the Competition Commission of India (“CCI”) where it had penalized 18 sugar mills and 2 trade associations, namely, Indian Sugar Mills Association and the Ethanol Manufacturers Association of India on the grounds that the CCI had failed to comply with the principles of natural justice. The sugar mills filed an appeal before the NCLAT challenging the CCI Order. Agreeing with the sugar mills upon the allegations raised, the NCLAT set aside the CCI Order and remanded the matter back to the CCI noting the following:



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### **The parties were denied an opportunity of hearing by the CCI:**

The NCLAT held that the sugar mills should have been given an opportunity of hearing after the submission of the supplementary investigation report by the Director General (“DG”) to enable the sugar mills to adequately defend themselves.

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### **There was a lack of quorum at the CCI at the time of adjudication:**

The quorum of the CCI present at the time of arguments did not pass the final order as the final order was only signed by 3 members, even though 5 members heard the matter in its entirety. Noting that such lack of quorum caused prejudice to the case of sugar mills, the NCLAT held that the principle of ‘one who hears must decide’ was violated.

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### **There was an inordinate delay in pronouncing the final order:**

Regulation 32(2) of the CCI (General) Regulations, 2009 (“General Regulations”), provides that every order or decision of the CCI, as far as practicable, is to be made within 21 working days from the date of conclusion of the final arguments. The NCLAT noted that the CCI Order was pronounced 13 months after the conclusion of the final arguments in February 2017. Such inordinate delay was also found inconsistent with the decision of the Supreme Court of India (“SC”) in *Anil Rai vs. State of Bihar*<sup>1</sup>, which prescribed a timeline of 6 months as an outer limit for passing the final order.

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The judgment can be accessed [here](#) with the case details as Comp. (AT) No. 86 of 2018.

<sup>1</sup> (2001) 7 SCC 318

## #2 The Madras HC dismisses writ petition filed by Agni Steels challenging the CCI's investigation in an alleged steel cartel.

On October 19, 2023, a Division Bench of the Madras High Court (“**Madras HC**”) dismissed a writ petition filed by Agni Steels Private Limited (“**Agni Steels**”) against an investigation launched by the CCI into allegations of cartelization in the steel sector.

Subsequent to an investigation initiated by the CCI and a dawn raid conducted by the DG, Agni Steels filed a leniency application with the CCI, seeking a marker position. However, despite the ask and the issuance of summons, the officials of Agni Steels failed to make personal appearances on multiple instances and sought exemption from personal appearance which was denied by the DG. Challenging the investigation, Agni Steels approached the Madras HC primarily arguing that no investigation could have been initiated without the CCI forming a *prima facie* opinion in terms of Section 26(1) of the Competition Act, 2002 (“**the Act**”).

Dismissing the writ petition, the Madras HC made the following key observations:



**The investigation against Agni Steels is not vitiated for want of compliance with due procedure as per Section 26(1) of the Act:** Agni Steels argued that the CCI had not complied with the procedure laid down in the Act because the CCI did not pass an order forming a *prima facie* opinion under Section 26(1) of the Act before directing the DG to investigate the matter. Placing reliance upon Sections 19 and 26(1) of the Act, the Madras HC noted that the CCI, in this case, decided to initiate an investigation *suo moto*. In Madras HC's view, when the CCI in its meeting deliberated and decided to register a '*suo moto*' case, the formation of the *prima facie* opinion was very much pregnant in the said decision and therefore, it was not inconsistent with Section 26(1) of the Act.



**Mere presence of the DG during the ordinary meeting of the CCI does not vitiate the proceedings:** The Madras HC noted that, under the Act, there was no embargo on the presence of the DG and other CCI officials during the ordinary meetings. Mere presence of other officials will not render a meeting invalid since the process under Section 26(1) of the Act is preparatory in nature and not a part of the decision making.



**Procedural grounds taken for challenging the CCI investigation are not completely valid at an early stage of the investigation:** The Madras HC held that it would be premature to intervene on grounds of cherry picking, arbitrariness, malice or discriminatory treatment at that stage of the investigation merely because some companies were not questioned/ investigated yet, leaving it open for the petitioner to agitate at a subsequent stage, if a case is made out.

The judgment can be accessed [here](#).

Subsequently, Agni Steels approached the SC by way of a special leave petition (“**SLP**”) which was dismissed by the SC on November 10, 2023. The SLP can be accessed [here](#) with the details SLP (C) No. 24796/2023.

# MERGER CONTROL

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## #1 The CCI approves the Air India-Vistara merger.

On September 1, 2023, the CCI approved the merger of Tata Sia Airlines Ltd. (“**TSAL/ Vistara**”) into Air India Ltd. (“**Air India**”), (collectively referred to as “**Parties**”) with Air India being the surviving entity. Notably, TSAL, operational under the brand name ‘Vistara’, is a joint venture between Tata Sons Private Ltd. (“**TSPL**”) and Singapore Airlines Ltd. (“**SIA**”), with TSPL and SIA respectively holding 51% and 49% of the total shareholding. Consequently, SIA and TSPL would acquire shares in the merged entity and SIA would acquire additional shares based on a preferential allotment.

The CCI approved the combination (subject to commitments offered by the Parties) while making the following key observations:



**Charter flight services:** The CCI noted that there was sufficient competition in the charter flights segment since the airlines that offer passenger transport also operate charter flights through government tenders. Noting the Parties’ presence in this segment to be miniscule, the CCI held that there was no Appreciable Adverse Effect on Competition (“**AAEC**”).



**Domestic air cargo transportation:** The CCI found that the Parties did not have the dedicated capacity in this segment unlike their other competitors and owing to the national scale of operations it would be easy to find customers who are only concerned with timely delivery and not with the specific transportation routes. Noting the position of the Parties and the nature of services offered in comparison with other players, the CCI found no AAEC in this segment.



**Ground handling and in-flight catering services:** The CCI noted that given the ability of airlines to undertake ground handling services on their own and source catering services from third parties, there was no AAEC in ground handling and in-flight catering services.



**Business class segment:** The CCI initially suspected the possibility of a monopoly formation given that the Parties were the only two airlines present in the business class segment on domestic routes. Upon further assessment, the CCI found that there was minimal air passenger traffic in this segment on domestic routes, facing increasing decline given the consumer preferences being driven by low fare and convenient timings. Noting that the same services offered in business class (e.g. extra leg room, priority boarding, etc.) were also available at an extra cost from a low-cost carrier, the CCI found no AAEC in this segment as well.



**Network Effects:** The CCI noted that the Parties have offered to scale up the presence of the merged entity across domestic and international segments in short as well long-haul sectors which will allow the merged entity to venture into new routes and add more destinations with closer cooperation and better integration.



**Unilateral price increase:** The CCI noted that the Parties had unutilized capacity along certain routes and were also planning to introduce substantial capacity in the Indian markets. Considering that the merger would also result in operational efficiencies and cost savings, the CCI identified the potential for upward price pressure and price competition if available flights or seats on certain routes were reduced. However, the CCI also noted that Parties offered to increase options for international customers from Tier 2 and Tier 3 cities with better scheduling, deployment of unutilized capacity on existing routes and increased capacity on new ones. The Parties further offered to maintain at least minimum capacity on certain identified routes to tackle the issue of artificial scarcity on 7 domestic and 8 international (4 for non-Singapore as well as 4 for Singapore) routes. Accordingly, CCI was of the view that the potential benefits of the merger were likely to outweigh any adverse impact on competition.



**Levels of concentration on domestic and international routes:** In the domestic air passenger transportation segment, the CCI noted that the combined market share of the Parties was 50% or higher across 7 out of the 36 domestic routes and voluntary commitments were offered to address these concerns. Separately, in international air passenger transportation segment, the CCI noted that the combined market share of the Parties was under 40% across 15 routes with overlapping direct flights and presence of strong and established carriers as competitors on other routes.



**Entry barriers in the civil aviation industry:** The CCI highlighted the oligopolistic structure of the civil aviation industry with high fixed and operational costs, regulatory requirements, etc. to stress upon the entry barriers present in the industry. However, the CCI referred to examples of airlines such as Akasa Air which was operating on 13 out of 18 routes within a year of starting operations and upcoming airlines such as TruJet and Fly91 to record the instances of new entrants in the market.



**Elimination of one entity from the market and discontinuation on certain routes:** Noting examples of Air India and Vistara running in losses, the CCI found that the merger would enable the Parties to work with improved efficiencies, network integration, and financial stability. The CCI also noted that discontinuation of services was a commercial decision of the airlines alone and Air India had restructured capacity on certain routes and increased frequency, spreading the options evenly for customers to choose from.

The CCI holistically assessed the structure of the civil aviation industry and considered the market realities, likely competition law concerns in the form of high concentration, price competition, market profitability and certain voluntary commitments offered by the Parties while approving the merger.

The order can be accessed [here](#).

## OTHER UPDATES

### #1 Mr. Ansuman Pattnaik appointed as Director General for the investigations arm of the CCI.

On December 21, 2023, the CCI appointed Mr. Ansuman Pattnaik as the DG of CCI.

Mr. Pattnaik holds a wide range of experience across offices such as Central Board of Direct Taxes, where he handled investigations of tax frauds and implementation of policy on direct taxes, tax deduction, etc.

Mr. Pattnaik is an officer of the Indian Revenue Services of 1994 batch who also previously held an additional charge of DG of the CCI between January 2019 to November 2019 and was also the Additional DG (Investigations) at the CCI between August 2014 and November 2019.

Mr. Pattnaik's appointment as the DG is the first since the enactment of Competition (Amendment) Act, 2023 ("**Amendment Act**") which transferred the power of appointment of the DG from the Central Government (Ministry of Corporate Affairs) to the CCI.

### #2 The CCI releases draft regulations for stakeholders' consultation.

#### I. Draft Competition Commission of India (Lesser Penalty) Regulations



01

The Amendment Act introduced significant amendments to the provisions relating to lesser penalty under the Act.

02

In this regard, the CCI published the draft Competition Commission of India (Lesser Penalty) Regulations, 2023 ("**DLPR**") on October 16, 2023, seeking comments from stakeholders.

03

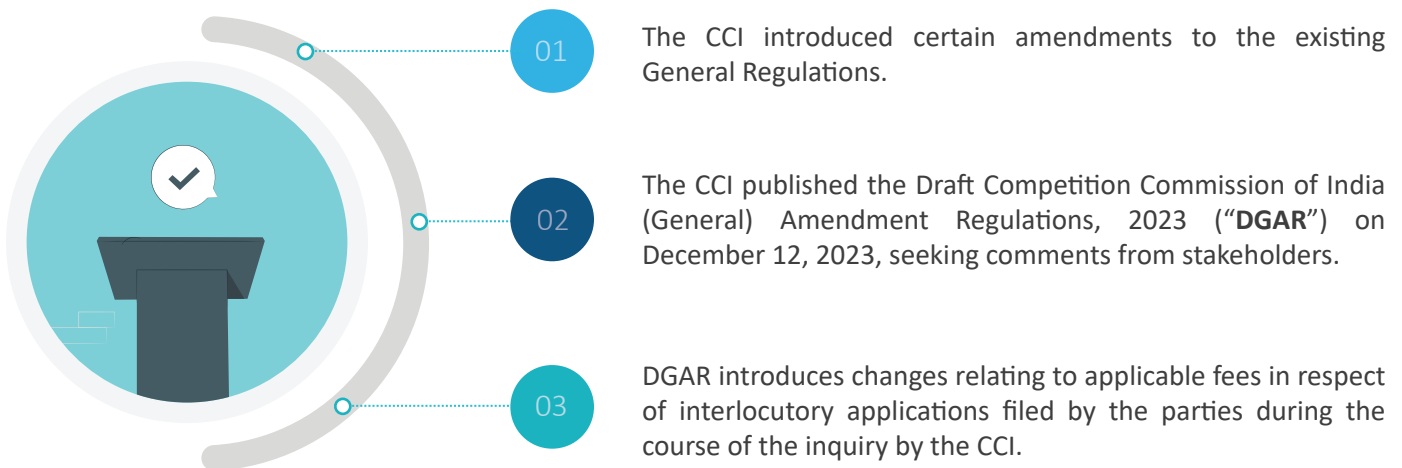
The DLPR operationalizes the amendments made to the provisions with respect to lesser penalty under the Act including: (i) introduction of the lesser penalty plus mechanism<sup>2</sup>; (ii) expansion of the scope of 'applicant' for lesser penalty or lesser penalty plus to include a 'hub' in a 'hub and spoke' cartel<sup>3</sup>; (iii) withdrawal and forfeiture of lesser penalty and lesser penalty plus applications.

The DLPR can be accessed [here](#).

<sup>2</sup> Lesser Penalty Plus or 'Leniency Plus' is an enforcement tool to encourage entities already being investigated for a cartel to report another cartel that they may be a part of and in effect, get additional benefits in their leniency application for the first cartel along with the second cartel.

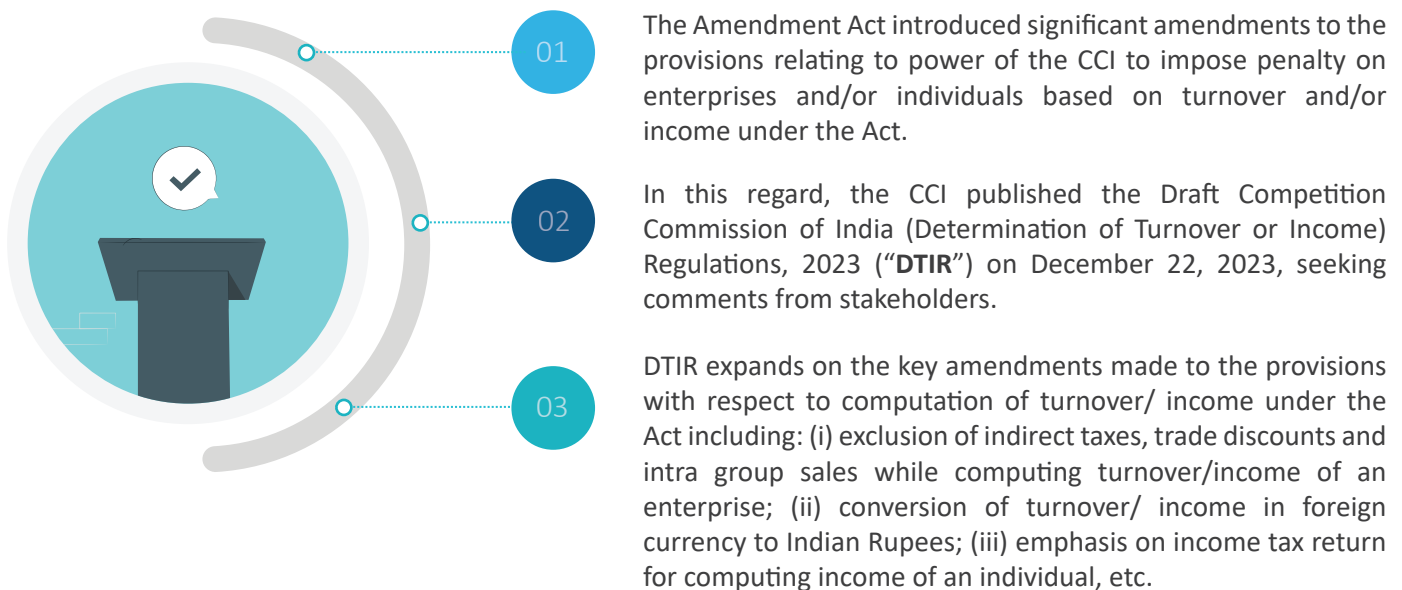
<sup>3</sup> Hub-and-spoke cartels are horizontal restrictions at the supplier or retailer level (the "**spokes**") which are implemented through vertically related players that serve as a common "**hub**" (e.g., a common manufacturer, retailer or service provider)

## II. Draft Competition Commission of India (General) Amendment Regulations



The DGAR can be accessed [here](#). On January 12, 2024, the CCI notified the amendments to the General Regulations with some changes. The gazette notification can be accessed [here](#).

## III. Draft Competition Commission of India (Determination of Turnover or Income) Regulations



The DTIR can be accessed [here](#).

The CCI has sought public comments and once this process is complete, the Amendment Act and the regulations are expected to come into effect by way of an official gazette notification.

## #3 The CCI launches a market study into the cement sector.

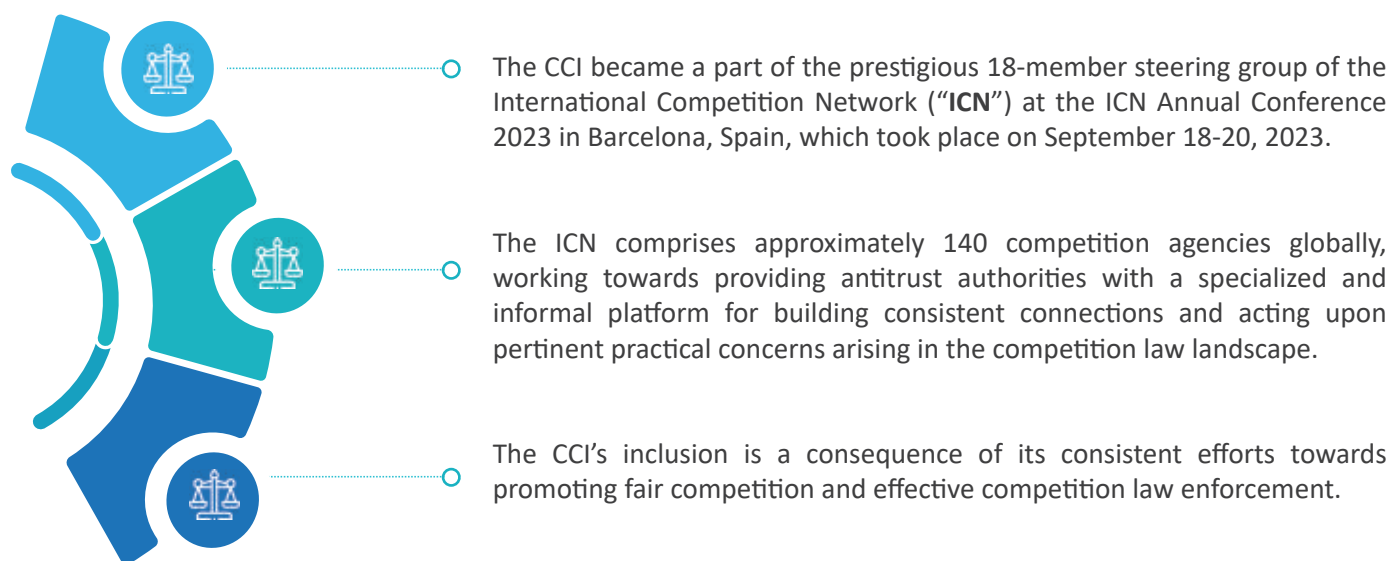
The CCI launched a market study to assess the competitive landscape and the functioning of cement markets across India. The key objectives of the market study are to:





The press release can be accessed [here](#).

## #4 The CCI becomes a member of the Steering Group of the International Competition Network.



The press release by the BRICS Competition Law and Policy Centre can be accessed [here](#).



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