a summary
by

axiom5
LAW CHAMBERS

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I. Context

On 5 September 2023, the Competition Commission of India (**CCI**) issued the draft Competition Commission of India (Combinations) Regulations, 2023 (**Draft Combination Regulations**) and an accompanying background note. We discuss the key features of the Draft Combination Regulations below and offer our initial analysis. Comments on the Draft Combination Regulations may be submitted to the CCI by 25 September 2023.

Defined terms in this document refer to definitions in the Draft Combination Regulations. Where necessary, we refer to the relevant provisions of the amended Competition Act, 2002 (**Act**), which provide additional context to the changes proposed to be introduced through the Draft Combination Regulations. These statutory provisions are not yet in force and will likely be notified once the Draft Combination Regulations are finalised.

II. Analysis of the Draft Combination Regulations

I. Continuing ambiguity in aspects of the Deal Value Threshold (DVT)

The 2023 amendments to the Act introduce ***Section 5(d),*** which requires all transactions valued above INR 2000 crores, if the target enterprise has substantial business operations in India (**SBOI**). ***Explanation (c) to Section 5*** defines "*value of the transaction*" to include every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation. The CCI was expected to further clarify the specific parameters of the DVT, including the local nexus requirement through regulations.

The Draft Combination Regulations provide an inclusive list of examples and an explanation for determining "*value of the transaction*". The examples and the explanation raise several issues, including:

(a) *Lack of clarity in the architecture of Reg 4(1)*

Reg 4(1) contains a non-exhaustive, inclusive list of examples of "*valuable consideration*". However, the lack of clarity in Reg 4(1) remains in three ways:

First, there is a lack of specificity. The main clause of ***Reg 4(1)*** incorporates the definition of "value of the transaction" from Section 5(d) of the Act and introduces an inclusive list of examples. Regulations must clarify the broad provisions contained in a statute. By offering only an inclusive list of examples and not any objective, or

definite set of parameters or factors for determining the value of a transaction, ***Reg 4(1)*** fails to offer transacting parties sufficient guidance on the meaning of "*valuable consideration*" and the factors relevant for computing the value of a transaction.

Second, there are vague and overbroad provisions. ***Reg 4(1)(e)*** states: "*for occurrence or non-occurrence of any uncertain future event as per the estimates of the acquirer*" as being one of the various kinds of valuable consideration that is counted towards the DVT. This provision is also vague and overly broad, and does not offer any clarity to parties on how to ascribe a value to such uncertain events, which by definition are not quantifiable in the present. The CCI's long existing practice indicates that if a transaction is contingent on a future uncertain event, then the acquirer must evaluate whether the transaction is notifiable at the time the uncertain event indeed takes place, and not at any time prior. [see *Reliance Industries Limited / Bharti AXA*, 2011]

Third, the presumption of meeting the DVT is onerous. ***Explanation (g) to Reg 4(1)*** appears to indicate that the CCI will presume that a transaction has met the DVT if it is not possible to precisely establish the value of a transaction with reasonable certainty or otherwise. This presumption limits the freedom of parties to structure transactions as they see fit based on their commercial interests, by imposing an onerous filing burden and mandating notification. Although intended to be a catch-all provision, ***Reg 4(1)(e)*** read with ***Explanation (g),*** this would lead to a default notification requirement, which would not only stretch CCI's resources but also impose an unjustifiable burden and compliance cost on transacting parties.

Notably, ***explanation (c) to Reg 4(1)*** clarifies that where transaction value is not recorded in transaction documents, transacting parties should assume the value considered by the board of directors or any other approving authority of the entity on which the filing obligation lies (acquirer / merging parties) to be the relevant figure. This offers specificity and a uniform reference point across transactions and sectors, which can easily be relied on by parties to determine whether a notification is required.

Axiom5 Comment:

Reg 4(1) should be reframed to offer greater specificity and clarity in determining transaction value under the DVT, given it is a more subjective threshold than the more objective asset and turnover thresholds in the Act. Both the CCI and transacting parties would be well served by the CCI offering guidance that is precise and easily understood, to ensure that DVT successfully achieves the CCI's objective of capturing high value transactions between parties which may not exceed the existing asset/turnover thresholds. The components of DVT could be further clarified through concrete examples and guidance notes.

Reg 4(1)(e) should be deleted from the Draft Combination Regulations. If the CCI believes that a catch-all provision is required, ***Reg 4(1)(e)*** can be replaced with a provision that allows the CCI to enumerate further specific situations through additional regulations.

Further, ***Explanation (c) to Reg 4(1)*** should be made the default reference point to determine the value of a transaction. This will facilitate consistency and regulatory certainty for transacting parties.

Finally, ***Explanation (g) to Reg 4(1)*** should be deleted. As it stands, ***Explanation (g)*** places an unreasonable administrative burden on the CCI to review filings in uncertain cases, which may not actually raise any competition concerns. Further, in cases where multiple interpretations are possible, and parties choose in good faith to not notify, they still run the risk of the CCI initiating penalty proceedings under ***Section 43A*** of the Act for failure to notify, should the CCI adopt a different interpretation. Not only does this expose parties to regulatory uncertainty and financial risk (penalties), but would also add to the CCI's administrative burden by adding a requirement to review cases to determine whether a notification was required.

(b) ***Valuation of non-competes and other covenants***

Reg 4(1)(a) includes the value of any covenant or obligation imposed on a seller or any other person, including non-competition obligations as being part of "valuable consideration" in a transaction.

The value of a non-compete clause is usually included in the overall deal consideration. However, it is unclear how the CCI will compute the value of a non-compete (or any other covenant) where the deal consideration may not include its value.

Explanation (g) to Reg 4 reveals that it is also not clear whether the CCI may assume, even absent specific language in the transaction documents, that an undertaking, covenant or non-compete arrangement has not been appropriately valued in either the transaction documents or considered by the board, and require the acquirer to consider that such value (although not expressed) would exceed Rs. 2000 crore. The ambiguity presented by ***Explanation (g) to Reg 4*** in assuming the value of a non-compete or any other covenant, introduces a high degree of uncertainty for notifying parties.

Axiom5 Comment:

To ensure consistency and regulatory certainty, the Draft Combination Regulations should preclude the application of ***Explanation (g) to Reg 4*** from applying to ***Reg 4(1)(a).*** Transacting parties need to ensure that consideration in transaction documents, valuation reports, and other documents should be clearly enumerated and specified.

(c) *Inter-connected transactions and arrangements*

Reg 4(1)(b) and ***Reg 4(1)(c)*** deal with inter-connected transactions and ancillary arrangements that may form part of the transaction.

Reg 4(1)(b) requires that consideration for all "interconnected steps" be aggregated to determine the value of a transaction. ***Explanation (e) to Reg 4*** clarifies that any acquisition by the one of the parties or its group entity in the enterprise being acquired or merged or amalgamated in the transaction, anytime during the period of two years before the relevant date shall also be deemed to be an inter-connected transaction. Aggregating the value of interconnected steps will prevent parties from "structuring around" the notification requirement by splitting up a single transaction into several smaller parts.

The test of "interconnection" is well settled in CCI's decisional practice (see CCI's decision under s. 43A of the Act in *ReNew Power*, the Supreme Court's decision in *CCI v. Thomas Cook*).

This deeming provision will:

(a) create an onerous filing burden on smaller "stand alone" transactions that would otherwise be non-notifiable. For instance, multiple rounds of investments in start-ups could be affected by this deeming provision;
(b) remove the ability of a party to determine notifiability of any one transaction, if the next (unconnected) transaction was to be completed, without any prior planning, within the 2-year period;
(c) create a compliance burden for all staggered investments, e.g. where a private equity investor invests in the same company opportunistically over a 16-24 month period, and each such investment is a stand-alone event and is not predicated on the next, then subsequent rounds of investment, will be deemed inter-connected, even if the acquirer had no intention to "split up the transaction" and
(d) create a "gun-jumping" risk for parties who have not notified previous transactions that are deemed to be interconnected within a 2-year period.

Reg 4(1)(c) indicates that arrangement(s) entered into as a part of the transaction or incidental arrangement(s) entered into anytime during two years from the date on which the transaction would come into effect including but not limited to technology assistance, licensing of intellectual property rights, usage rights to any product, service or facility, supply of raw materials or finished goods, branding and marketing.

This provision allows the CCI to include the value of any "incidental" arrangements within two years, as being part of the overall transaction value. This will ostensibly prevent transacting parties from avoiding notification by breaking up transaction value into smaller arrangements, staggered over a period of time.

However, by including the value of all such "incidental arrangements" within a 2-year period, the CCI is casting a wider net than is required and the risk of false positives in this approach is high. For example, it is entirely possible that at the time of the acquisition, merger or amalgamation, transacting parties may not have anticipated entering into future, stand-alone business arrangements. If subsequent transactions are "interconnected" with the original transaction, then ***Reg 4(1)(b)*** already addresses such situations.

Axiom5 Comment:

The deeming provision in ***Explanation (e)*** creates uncertainty and is an onerous requirement. The existing test for interconnection is adequate to address the possibility of structuring around the notification requirement. Two or more steps or transactions should only be "interconnected" such that their value is accumulated only where the test of inter-connection in Reg 9(4) and (5) is met. ***Explanation (e) to Reg 4*** should be deleted.

Reg 4(1)(c) as currently framed is redundant and too expansive. It would club the value of possibly unconnected transactions simply because they were entered into within two years of the combination. It would make the assessment of notifiability fundamentally unpredictable and expose acquirers to potential gun-jumping penalties. The CCI should continue to use its existing test for whether transactions are inter-connected as in ***Reg 4(1)(b)***, and dispense with ***Reg 4(1)(c)***.

(d) *Acquisition of options and securities*

Reg 4(1)(d) requires that the value of options and securities to be acquired are to be considered, assuming the full value of exercise of such option. Effectively, where parties have been provided with an option to purchase securities at a future date, the value of a transaction must be calculated by assuming that the option will be exercised in its entirety.

While it is not unreasonable to require parties to assume that the option will be exercised fully, it is unclear what price will be attributed to such options. For instance, it is not unusual for transaction documents to link the price of an option to the fair market value or market price of the underlying security on the date of its exercise.

Axiom5 Comment:

Reg 4(1)(d) should be amended to clarify that the value to be ascribed to the option, must be its notional price (however determined) on the date of the transaction. This would remove any uncertainty on the future valuation of such options.

(e) *Valuation of future payments: Explanation (a)*

Explanation (a) to Reg 4(1) states that the value of future payments should not be discounted to present value.

However, the phrasing of ***Explanation (a)*** is unclear. As indicated in respect of ***Reg 4(1)(e),*** it is impossible to determine the value of consideration when linked to uncertain events in the future. The CCI's own decisional practice has indicated that parties may evaluate the need for notification at the time of the event taking place and not prior.

Axiom5 Comment:

There would be greater clarity if this was instead framed as a positive obligation. For instance, the value of future payments should be linked to the valuation report either created at the time of entering into the transaction or at the time of payment in the future.

(f) *"Value of transaction" in Explanation (d)*

Explanation (d) to Reg 4(1) indicates that the value of transaction shall be the consideration attributed by the parties to the enterprises being acquired, taken control of, merged or amalgamated.

However, the use of "parties" in this explanation appears to contradict the primacy of "the estimates of the acquirer" in ***Reg 4(1)(e)***.

(g) ***Further clarity required in the local nexus test***

Reg 4(2) sets out the local nexus requirement, by clarifying the term "substantial business operations in India" or SBOI. The Draft Regulations provide for 3 types of parameters: (i) users, subscribers, customers or visitors (**User Threshold**); (ii) gross merchandise value (**GMV Threshold**); and (iii) turnover from all products and services (**Turnover Threshold**). If the target derives 10% under each threshold in India, the local nexus requirement is met (although a specific reference to "in India" in respect of the User Threshold and GMV Threshold is missing).

The first two thresholds are to be measured over the 12 months preceding the date of execution of transaction documents or board approval for merger (**Relevant Date**). In respect of turnover, the Draft Regulations require parties to consider the turnover for the immediately preceding financial year.

The scope of the User Threshold is overly broad:

First, while the user base of a target enterprise is a useful measure in digital markets, the phrase "user" by itself is vague and could include transitory users such as guest users, inactive users, etc. Similarly, including "visitors" within the User Threshold renders it excessively broad, since visitors may not actually interact with the products or services offered by the target, and therefore, are not likely to add any economic value to the target. This is acknowledged in legislations looking to regulate digital markets, such as the EU's Digital Markets Act (**DMA**), which set out a detailed methodology to capture only "active" and "unique" users as part of the threshold requirements for applicability of the legislation. The terms "subscriber" and "customer" have also not been defined in the Draft Regulations.

Second, unlike the GMV Threshold and the Turnover Threshold, the time frame in which the User Threshold is met (to qualify as SBOI) is "*at any time*" in the preceding 12 months. This is also overly broad, as it would cover instances where the target may have exceeded the 10% threshold potentially on only one day in the previous 12 months, rather than on a sustained basis.

Axiom5 Comment:

The User Threshold should be modified to refer to "monthly active end users" and "monthly active business users" rather than simply "users". Further, the Draft Combination Regulations should include a clear methodology to compute monthly active business users and monthly active end users, as specified in the Annex to the DMA. This will minimize regulatory uncertainty, especially as ***Reg 4(2)*** prescribes a threshold for notification. The User Threshold should also exclude "visitors" as they are unlikely to contribute to the economic value of the target's activities. Further, the terms "subscriber" and "customer" should also be defined for greater clarity.

The User Threshold should also be revised such that the SBOI test is met if 10% of the *average of active users over the previous 12 months* is attributable to India. This provides a more consistent local nexus, rather than instances where the target may have had an increase in user base as a one-off occurrence.

Finally, given ***Reg 4(2)*** prescribes local nexus, the language of the User Threshold and GMV Threshold should specify that 10% of the target's active business / end users or gross merchandise value (as the case may be) should be located in or derived from India.

(h) *The local nexus thresholds should be appropriately modified for asset acquisitions*

Each of the User Threshold, GMV Threshold and Turnover Threshold under ***Reg 4(2)*** are to be measured with respect to the "enterprise referred therein", i.e. under the ***proviso to Section 5(d)*** of the Act. The proviso to Section 5(d) of the Act refers to "*the enterprise which is being acquired, taken control of, merged or amalgamated*", i.e. the target enterprise.

However, the main clause of ***Section 5(d)*** includes asset acquisitions within the scope of the DVT. In such cases, the Draft Regulations do not indicate whether the three thresholds to determine SBOI under ***Reg 4(2)*** would apply to the assets being acquired, rather than the target enterprise as a whole.

In an asset acquisition, considering the target enterprise as a whole, would be excessive, since the subject matter of the transaction are only particular assets or a part of the target's business. This is in line with the Central Government's position with respect to the *de minimis* exemption, as clarified through its notification in 2017 and in the language of the newly introduced ***Section 5(e)*** of the Act. This is further clarified in the newly introduced ***explanation (f) to Section 5*** of the Act.

Axiom5 Comment:

Reg 4(2) should be clarified (potentially with a reference to ***explanation (f) to Section 5)*** to indicate that in the case of asset acquisitions, the relevant reference point for the applicability of each of the User Threshold, GMV Threshold and the Turnover Threshold are the assets being acquired, and not the entire vendor enterprise.

II. Lack of clarity on the exercise of "influence" in the target in on-market share acquisitions

Under the newly introduced ***Section 6A*** of the Act, the suspensory, standstill obligation under the Act is no longer applicable to the implementation of an open offer or acquisitions of shares or convertible securities through a series of transactions on a regulated stock exchange, subject to two conditions: (a) that the transaction is notified to the CCI within the prescribed timeline and in the prescribed form; and (b) the acquirer does not "exercise any ownership or beneficial rights or interest in such shares or convertibles, except as permitted by regulations.

The Draft Regulations indicate that acquisitions under Section 6A must be notified within 30 days of completing the first acquisition of shares, accompanied by a declaration that the acquirer is in compliance with Section 6A and the conditions listed in Reg 6 ***[Reg 5(4)]***.

Reg 6 lists various categories of permitted benefits and activities, including (a) availing of economic benefits such as dividends and other distributions, participation in rights issues, bonus issues, stock splits and buy-backs; (b) disposal of shares or securities acquired; or (c) exercising voting rights in respect of insolvency or liquidation proceedings.

However, the ***proviso to Reg 6*** imposes a restriction on the affiliates or any of its affiliates from directly or indirectly "*...influenc[ing]... in any manner whatsoever*" the target enterprise. The Draft Combination Regulations remain silent on the nature of activities that may fall within the scope of "influencing" the target enterprise, which could lead to ambiguity, particularly given the CCI's increasingly low threshold for activities that constitute the exercise of "material influence" as the test for "control" under the Act.

Axiom5 Comment:

The CCI should consider issuing an FAQ with examples of the kinds of conduct that may be considered to be "influencing" the target enterprise. The CCI should also clarify whether and how this standard is different or related to its "material influence" standard for control.

III. Revised framework to negotiate remedies

(a) *Procedure and timelines*

Under the existing merger rules, the CCI could issue a show cause notice (**SCN**) if, based on its preliminary analysis, it believed that the notified transaction was likely to cause an AAEC in India. If the CCI was not satisfied with the parties' response to the SCN, it could initiate the Phase II investigation process, which included (a) inviting public comments on the transaction; (b) seeking further information from parties; and (c) if the CCI was still unsatisfied, it could propose modifications or remedies. The parties could either accept these modifications or propose a counter, which the CCI could then either accept or reject. Notably, the statute did not technically permit parties to offer remedies to the CCI in the first instance, in Phase II. Parties were however, free to offer voluntary modifications in Phase I.

The amended Act and the Draft Combination Regulations have now streamlined this process significantly. Parties are now allowed to formulate and offer remedies at three stages:

(a) prior to the CCI's forming its *prima facie* opinion under Section 29(1), i.e. in Phase I;
(b) as part of their response to the CCI's SCN under Section 29(1); and
(c) As part of the additional procedure following the inquiry process described in the paragraph above, which is initiated by the CCI issuing a Statement of Objections (**SO**) ***[Section 29A].*** Parties have an opportunity to present a revised remedy package to the CCI, if the original remedies were not considered sufficient by the CCI.

Notably, the amended Act now formally allows the CCI to offer remedies at the Phase I stage as well as in cases where it is not satisfied with the parties' modification proposal.

The CCI has 15 days to consider the remedies proposed by parties, at any stage, while the parties are only allowed 12 days to consider remedies proposed by the CCI.

Axiom5 Comment:

The time frame for parties and the CCI to consider remedies proposals should be aligned to 15 days in either instance (rather than only 12 days for the parties). While the importance of a time-bound remedies negotiation process is clear, a successful remedies package requires sufficient time for both the CCI and parties to give due consideration to the proposals at hand.

(b) ***Format for offering modifications***

The Draft Regulations prescribe a format in which the parties must present modifications, which requires parties to set out the details of likely AAEC, their remedies proposal, how such remedies address the CCI's AAEC concerns and monitoring arrangements. ***[Reg. 25(3)]*** Notably, Form IV sets out specific information requirements pertaining to divestitures, which is perhaps an indication of the CCI's preference for structural remedies over behavioural remedies. Where parties do not offer structural remedies, Form IV permits parties to offer other remedies, while requiring that parties provide "*reasons for not considering divestiture*".

Axiom5 Comment:

While the streamlined process for offering modifications is a welcome move, the emphasis on divestitures in Form IV may be unduly restrictive, especially as the CCI expands its scrutiny into the M&A in the digital sector (one of the key motivations for the introduction of the DVT). Behavioural remedies are potentially better suited to addressing competition concerns in the fast-paced growth and dynamic nature of the digital sector.

(c) ***Monitoring compliance with modifications***

The Draft Combination Regulations now mandate that the parties' compliance report be accompanied by an affidavit confirming compliance with the modifications agreed / directed by the CCI. In cases where periodic compliance is required, parties must submit a report "*upon completion of each of the actions*" required to carry out the modification. ***[Reg 26(1) and (2)]***

IV. Removal of Schedule I Exemptions

The Draft Combination Regulations have deleted the earlier form of Reg 4 and the accompanying exemptions listed in the erstwhile Schedule I (**Schedule I Exemptions**), which exempted certain categories of combinations from being notified to the CCI as they do not "ordinarily" cause an appreciable adverse effect on competition. The Schedule I Exemptions largely covered transactions which are ordinary course and/or do not result in a change in control.

It is possible that the Central Government will issue exemptions through rules framed under ***Section 6(7) read with Section 63(1)(af)*** of the Act. However, it is unclear whether these will include equivalents of the Schedule I Exemptions. It is also unclear if any rules issued by the Central Government will be subject to public consultation.

Axiom5 Comment:

The CCI and Central Government should work together to ensure that this gap is plugged, to avoid the notification of transactions that are not likely to raise any competition concerns. Failure to do so will only increase the CCI's administrative burden and stretch its limited resources, while also increasing regulatory compliance burdens on transacting parties, ultimately discouraging M&A in India (if parties do not want to bear this burden).

V. Other procedural amendments

(a) *Market share threshold for Form II filings*

The Draft Combination Regulations now specifically indicates that the 15% horizontal overlap threshold and 25% vertical overlap threshold are with reference to *any* relevant market. ***[Reg 5(2)]***

In filings involving multiple relevant markets or business segments, if these thresholds are breached in any one market, a Form II filing will be required for all markets. This formalizes the CCI's existing practice. However, this is still an onerous burden on parties where overlaps are significant in only a few out of several markets.

Axiom5 Comment:

The Draft Combination Regulations should be modified to require that parties provide details in Form II only for markets where overlaps exceed the 15% horizontal overlap threshold or the 25% vertical overlap threshold.

(b) *Increase in filing fee*

The Draft Combination Regulations have increased the filing fees for both Forms ***[Reg 11]***.

(a) For Form I (short form filings) - the filing fee has increased from INR 20 lakh (approx. USD 24,052) to INR 30 lakh (approx. USD 36,078)

(b) For Form II (long form filings) - the filing fee has increased from INR 65 lakh (approx. USD 78,169) to INR 90 lakh (approx. USD 108,234)

Axiom5 Comment:

The increase in filing fee adds to the compliance burden of notifying parties. The introduction of DVT (and vagueness in the regulatory architecture of the DVT) and the removal of the Schedule I Exemptions also increases the likelihood of the

notification requirement being triggered in cases that may not have previously required a notification. This is particularly so for cases without significant overlaps, and Green Channel filings.

(c) *Limited time frame to invalidate filings*

Usually, the review timelines begin to run upon receipt of the filing by the CCI and the Secretary of the CCI issues an acknowledgement to the filing parties. However, the Draft Combination Regulations now introduce a 10-day time period within which the CCI may point out to the parties if there are any "defects" in the Form. In this case, the review timelines begin only once the parties have addressed these defects. ***[Reg 14(4)]***

As before, the CCI continues to have the power to invalidate filings if parties fail to address defects or provide the required information in response to its requests. However, before it can do so, the CCI must grant parties the opportunity to be heard. The CCI must also issue a reasoned order invalidating a notice, which is to be communicated to the filing parties within 7 days of the CCI's decision. ***[Reg 14(6)]***

The introduction of a 10-day window within which the CCI must scrutinize and communicate any "defects" in the filing to parties is a welcome move. This ensures predictability and certainty to filing parties, by setting an outer time limit of 10 days within which a filing may be invalidated. Previously, the CCI could "invalidate" notices at any time in Phase I.

Separately, the CCI may also invalidate a filing if the filing parties inform it of any change to the transaction that significantly impacts its AAEC assessment. In this case, the Draft Combination Regulations have dispensed with the requirement to grant parties a hearing before invaliding the filing, although, as above, the CCI must issue a reasoned order communicating its decision to invalidate the filing. ***[Reg 15]***

Axiom5 Comment:

As with the Old Combination Regulations, the CCI should afford parties a hearing in all circumstances, including when considering material changes to the transaction, before it passes an order to invalidate a filing, including when there are changes in transactions.

(d) *Dispensation on confidentiality affidavit in merger filings*

The Draft Combination Regulations now dispense with the additional requirement to submit an affidavit confirming the confidential nature of information submitted in the

filing, if any. It simply refers to the process prescribed under the Competition Commission of India (General) Regulations, 2009, which were modified and streamlined in 2022.

(e) *Pre-filing consultation*

The pre-filing consultation facility is now formalised in the Draft Combination Regulations. However, the CCI's views provided in the pre-filing consultation process continue to remain non-binding. ***[Reg 7]***

(f) *Green channel filings*

The Green Channel procedure is now formalised in the amended Act. ***[Sections 6(4), 6(5) and 6(6) read with Reg 5(5)]*** From a practical perspective, there is no change.

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