Competition Law Bulletin

Vol. II, No. 3, May-June 2010

VAISH ASSOCIATES ADVOCATES
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From the Editor's Desk...

Dear Reader,

Greetings for the season.

The merger regulations under the Competition Act, 2002("the Act") are awaited. As recently reported in print media, the draft regulations, prepared by the Competition Commission of India ("CCI") have been sent to the Ministry of Law by the Ministry of Corporate Affairs, Government of India. It is only a matter of time that merger regulations will be notified.

The recent interim order by CCI allowing the screening of Mani Ratnam's "Raavan" in Karnataka on a petition filed by Reliance Big Entertainment Ltd., staying the ban imposed by the Karnataka Film Chamber of Commerce, reported in a wide section of print media, is a welcome development and exhibits a pro-active approach against attempts to stifle competition in any manner. Noticeably, in the last two months, news on complaints filed or *suo moto* investigations undertaken by CCI, such as revival of inquiry into the Jet-Kingfisher deal, have remained in limelight and are positive signs in the right direction.

The publication of the orders on closure of 5 cases under the Act and of 3 MRTP cases transferred to CCI (on the website of CCI) is another welcome development and marks the beginning of the development of jurisprudence of competition law in India.

We eagerly await your feedback on the bulletin.

Yours truly,

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Inside...

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INDIAN PERSPECTIVE

CCI passes orders for closure of certain matters

CCI has displayed full text of the orders on closure of 5 cases of Information filed under the Act and 3 cases of pending investigations transferred from the Director General of Investigation & Registration (DGIR) on its website www.cci.gov.in. We publish excerpts for 3 cases as under:

1. **CCI dismisses petition filed against Reliance Infrastructure Ltd (RIL):**

This complaint was filed u/s 19 for alleged abuse of dominant position by the respondent through imposition of allegedly unfair conditions in granting electricity connections. Informant were carrying on the business as a builder/ contractor/ developer and undertook various real estate development projects. The informant alleged that the respondent, RIL was the sole distributor prior to October 15, 2009 and enjoyed dominant position, but also stated that after October 15, 2009, another distribution company namely TATA Power Company has been allowed to operate in the same area by the Maharashtra Electricity Regulatory Commission (MERC) but due to some technical difficulties only few consumers were able to switch over supply from the respondent RIL to TATA Power Co. The respondent, RIL had refused to provide electricity connection to the informant unless the unpaid electricity charges of the slum dwellers, for the period prior to the applicant taking charge of the properties in question, were paid off. The informant opposed the payment of outstanding electricity charges as insisted upon, resulting in losses to its construction activity because of non-supply of electricity by the respondent. Aggrieved by the unjust demands, the informants had also filed an application before the Forum for redressal of Consumer Grievances, which was dismissed and a writ petition before the Hon'ble Bombay High Court is still pending. CCI vide its order dated March 30, 2010 closed the matter, on the grounds that there was neither a competition issue involved nor it being a case of abuse of dominant position and that the arrears of electricity charges pertain to the period before the relevant provisions of the Act came into force, thus holding itself incompetent to determine the liability or relief in regard to alleged infringement. CCI accordingly found no *prima facie* case, closed the same under section 26(2) of the Act.

(Case No. 09/2010: Ackruti City Ltd. v. Reliance Infrastructure Ltd.)

2. **CCI dismisses petition filed against ETC Network Ltd:**

On March 2, 2010, CCI dismissed the allegations made by Cinergy Picture (P) Ltd, Mumbai that ETC Network, promoted by ZEE Network which has a dominant position in the television entertainment channel market and had the capacity to influence the consumer opinion, by rating informant's movie '*Rann*' at 3 out of 10 in its voting meter, which allegedly resulted into limiting or restricting competition in the relevant market in any manner. Since the informant did not advertise the trailer of its movie *"Rann"* with the ETC Channel, the channel with a vengeful attitude rated the movie very poorly, in contrast to another movie '*Ishqiya*' which advertised its trailer and was therefore rated highly. CCI closed the information due to failure of the informant to furnish concrete material in relation to unfair or discriminatory conditions imposed by the network. Also the failure of the informant to establish that the opposite party enjoyed a dominant position in the broadcasting entertainment market led to the dismissal. CCI accordingly found no *prima facie* case, closed the same under section 26(2) of the Act.

(Case No. 2/2010: Cinergy Picture Ltd. v. ETC Network Ltd.)

3. **CCI dismisses petition filed against Electro Steel Casting Ltd. & Ors.:**

Vide its order dated May 18, 2010, the CCI dismissed the information filed u/s 19 of the Act in regard to mandating of ISI marked ductile iron pipes for potable water and sewerage system allegedly on lobbying by Ductile Iron Pipes and Casting Manufacturers Association leading to limitation and restrictions being imposed upon the informant through the use of its dominant position. The said restrictions by introduction of mandatory certification scheme of ISI Mark were allegedly effected by repeated approach and pressure exerted by the respondents, creating discrimination as well as benefitting themselves. The CCI on perusal of the notification held it as neither restricting /limiting the market nor deterring the competition and that they have been issued by the Government in due exercise of its statutory powers, without any influence from the respondents. Further, on examination of the material on record, it found no contravention of Sec 4 of the Competition Act.

(Case No. 16/2009: Tata Metaliks Ltd. v. Electro steel Casting Ltd. & Ors.)

Media updates

CCI stays KFCC's ban on '*Raavan*'

The CCI has issued an interim order dated June 18, 2010 u/s 33 of the Act in response to the petition filed by Reliance Big Entertainment (RBEL), in effect staying the ban on screening of the movie *"Raavan"* in Karnataka imposed by Karnataka Film Chamber of Commerce, which was reportedly taking arbitrary decisions by its restrictive policies for the screening of Non-Kannada Movies. The CCI has further directed the Director General (DG) u/s 26(1) of the Act to investigate if KFCC is abusing its dominant position warranting CCI's Intervention. Based on the reply of KFCC on June 22, the CCI will decide the course of action to be initiated.

(Source: Business-Standard.com, June 19, 2010).

CCI scanner over realty firms

A *suo moto* investigation has been initiated by CCI, which has referred to DG (Investigation) to probe against real estate developers misleading the buyers. Specific complaints of rampant malpractices have been made against the market leader, *DLF Ltd.* The CCI is expected to review the averments pertaining to misleading advertisements, delayed possession or change in terms and conditions of sale agreements, which have made it impossible for customers to opt out.

(Source: LiveMint, The Economic Times, June 7, 2010)

CCI to Re-Probe Jet Kingfisher Deal

JET AIRWAYS

KINGFISHER AIRLINES

CCI has decided to restart its investigation into the strategic alliance between Kingfisher Airlines Ltd. and Jet Airways India Ltd. in 2008. This is in furtherance of a consumer complaint filed in August 2009 wherein the Inquiry was suspended after Kingfisher moved the Bombay High Court. Kingfisher (as reported in Vol. II, No. 2, March - April 2010) had argued before the Bombay High Court that the alliance could not be probed as it was struck before the Competition Act was notified. The said petition was dismissed by Bombay High Court on March 31, 2010 against which dismissal; Kingfisher has filed a Special Leave Petition on May 4, 2010 before the Apex Court. The said matter has also been previously investigated by former Anti Trust Regulator, MRTPC which ruled in its order dated September 4, 2009 that there was no cause for inquiry. The re - start of the CCI inquiry is as a result of dismissal of the writ petition of Kingfisher by Bombay high Court.

(Source: LiveMint, June 9, 2010)

CIL to face CCI Scrutiny over explosives deal

Coal India Ltd.

The DG's investigation into the Anti-Competitive Practices of Coal India Ltd. (CIL), India's largest coal producer for allegedly *tying up the supply* of mining explosives from a particular company without inviting bids (which is prohibited under Sec 3 of The Competition Act, 2002) is near completion. A thorough investigation was initiated following a complaint filed by Explosives Manufacturers Association of India alleging bid rigging. DG's Report over the matter is expected by the end of this month.

(Source: The Financial Express, May 3, 2010)

3G Spectrum Row

A possible investigation by CCI is anticipated in the wake of the last round of 3G Spectrum Auction. The Private Operators through GSM Industry Body, Cellular Operators Association of India (COAI) have written to the Department of Telecommunications (DoT) for a level-playing field by subjecting the state-run BSNL and MTNL to the same terms and conditions, as imposed on the private enterprises. BSNL and MTNL have till now been exempted from the clause in *Notice Inviting Application* requiring the successful spectrum winners to make payment within 10 calendar days of the auction. They claim that BSNL and MTNL must be required to match the winning price achieved in the respective service areas in the 3G auction as payment for the allotted spectrum and not be given any concessions regarding payments for third generation airwaves. It is pertinent to note that, BSNL and MTNL were given 3G broadband wireless frequencies by the Communications Ministry last year. The CCI is expected to evaluate COAI's claims of grant of extension on equal terms to all private sector service providers and that delay in payment on the part of PSU's would result in a non-level playing field with other service providers.

(Source: The Economic Times, the Financial Express, May 6, 2010)

COMPAT decides more pending MRTP matters

Competition Appellate Tribunal ("COMPAT") continues to decide the pending cases under the repealed MRTP Act. As per information received from the record keeping office of COMPAT, it had disposed of *535 cases* up to *May 2010* as under:

RTP cases	96
UTP cases	256
Compensation cases	183
MTP cases	0

INTERNATIONAL PERSPECTIVE

Malaysia - Introduces Competition Law

On 22 April 2010, Malaysia's House of Representatives passed the Competition Bill 2010 and the Competition Commission Bill 2010. The new Competition Act and Competition Commission Act are likely to be implemented during 2011. Whilst the Competition Commission Act provides for the establishment of a Competition Commission to administer and enforce the Competition Act, the Competition Act focuses on the prohibition of anti-competitive and abusive conduct and practices. There are no provisions in the Competition Act that expressly deal with mergers, and therefore, there is no requirement of notification for mergers in Malaysia. Under the Malaysian Competition Act, potential fines for infringements of the Act can amount up to 10% of the worldwide turnover of the enterprise over the period during which the infringement occurred, which can potentially be very large as they are strictly not constrained by the relevant market nor by a time period. Businesses in Malaysia need to start preparations for compliance with the requirements of the Competition Act early as certain traditional ways of doing business will have to change.

(Source: Client Update June 2010, Competition Review, Rajah & Tann, LLP)

USA - The US Federal Trade Commission ('FTC') proposes to revamp Horizontal Merger Guidelines

In April 2010 the FTC and the US Department of Justice (DOJ) released their proposed revisions on the Horizontal Merger Guidelines for public comment. The Guidelines were first issued in 1992 and have been only revised once since then in 1997. The revisions include amending the thresholds of the Herfindahl-Hirschman Index ('HHI')* for determining whether the market is concentrated. The HHI is a tool used by the US antitrust regulators to determine the level of concentration in the industry. For example, the revised guidelines consider a market with an HHI of less than 1500 as 'not concentrated' as opposed to the prior threshold of 1000. The higher the resulting figure, the higher the market concentration in that market. The Merger Guidelines publishes various HHI thresholds that are used as benchmarks to determine whether certain merges and acquisitions should be permitted. The lowering of this thresholds means that certain mergers which would have raised concerns under the old Guidelines will no longer be considered as worthy of investigation. The revised Guidelines have also added a new section on 'Evidence of Adverse Competitive Effects', which demonstrates the type and nature of evidence that is generally considered by the FTC and the DOJ when evaluating the effect of mergers on competition in the market.

(Source: Client Update June 2010, Competition Review, Rajah & Tann, LLP)

* *HHI - Herfindahl-Hirschman Index - is computed as the sum of squares of market shares of firms in the market e.g. in case of monopoly the HHI would be* $100^2 = 10{,}000$.

China - Emergence of a leniency policy

For the first time in Chinese legislation, a leniency programme is expressly recognized as part of the fight against monopoly agreements. The Anti Monopoly Law, 2008 makes only a passing reference to a leniency policy, under which "undertakings which voluntarily report to antitrust enforcement authorities on monopoly agreements and advance key evidence may receive reduced penalties or exemption". China's antitrust authorities have been left to fashion rules to implement the policy. In China, two government agencies share responsibility for combating monopoly agreements: the State Administration of Industry and Commerce (SAIC) and the National Development and Reform Commission (NDRC). The SAIC's enforcement is limited to price-related monopoly agreements, whereas the NDRC enforces other types of monopoly agreement. However, the dividing line can easily be blurred in practice. As per the SAIC's Draft Regulation on Prohibiting Monopoly Agreements, a whistleblower must:

- be the first party to come forward to the SAIC on a voluntary basis;
- report on a monopoly agreement;
- provide key evidence; and
- co- operate actively in the subsequent investigation.

Under the first draft regulation, the second whistleblower's penalty was reduced by 50%, with the third whistleblower benefiting from a 30% reduction. However, the new draft

regulation simply states that other whistleblowers may have their penalties reduced on certain conditions. The draft regulation has no provisions on procedural matters and a number of ambiguous issues remain, such as:

- whether the authorities intend to issue markers to parties coming forward with key evidence?
- what the authorities' timeframe for reviewing leniency applications will be?
- whether key evidence supplied under the leniency procedure must be submitted to court in the event of a civil claim? and
- what percentage reduction will apply to penalties for second and third whistleblowers?

The NDRC is expected to coordinate its position on leniency with the SAIC. Given the intricate jurisdictional links between the two regulators, a unified position is vital in enforcing anti-cartel legislation. Otherwise, undesirable situations may arise where, for example, competitors have reached an agreement that limits prices and divides sales territory - if the availability of leniency depends on which authority exercises jurisdiction, this may give whistleblowers an incentive to engage in forum shopping.

(Source: International Law Office Competition Newsletter -June 24, 2010 available at www.internationallawoffice.com)

South Korea - 19 airlines fined a record of 120 billion won in Korea

On May 28, 2010, the South Korean Fair Trade Commission ('KFTC') fined 19 airlines a combined 120 billion won (S$137.87 million) for unfair trading and issued warnings to two more airlines. The KFTC's investigation began with unannounced inspections in February 2006, prompted by a leniency application from Korean Air. In its investigation, the KFTC found that the 21 airlines had conspired to introduce fuel surcharges and continued to raise surcharge rates for air cargo services between Hong Kong and Korea, Europe and Korea and Japan and Korea between 1999 and 2007. Amongst those penalized were Japan Airlines, Lufthansa, Cathay Pacific, Singapore Airlines, Malaysian Airlines and Air France, while Scandinavian Airlines and Air India were issued warnings.

(Source: Client Update June 2010, Competition Review, Rajah & Tann, LLP)

UK - Resale price maintenance in the UK tobacco sector

On April 16, 2010, the UK Office of Fair Trading ('OFT') imposed a total fine of GBP 225 million on tobacco manufacturers and their retailers for artificially controlling the prices of tobacco products in the market. According to the OFT, the unlawful arrangement involved tobacco manufacturers Imperial Tobacco and Gallaher entering into individual agreements with various retailers such as Asda, Sainsbury's, Safeway, Somerfield etc. Under these agreements, the retail price of one brand was linked to a competing manufacturer's brand. The OFT found that these arrangements were in place at various time between 2001 and 2003 and covered cigarettes, hand rolling tobacco, pipe tobacco, cigars and cigarellos. Sainsbury's approached the OFT for leniency for the arrangements and received full immunity from the fines. Some retailers benefited from a reduced fine for voluntarily providing information to the OFT after the investigation had started.

(Source: Client Update June 2010, Competition Review, Rajah & Tann, LLP)

South Africa - Vehicle tracking companies found guilty of Anti-Competitive behavior

On April 19, 2010, the Competition Tribunal of South Africa found that three vehicle tracking companies – Netstar, Matrix Vehicle Tracking and Tracker Network – and industry association, The Vehicle Security Association of SA (VESA) contravened the Competition Act by setting standards which created barriers to entry into the stolen vehicle recovery market. The complaint was initiated by rival vehicle tracking company Tracetec, which was denied admittance by VESA to its stolen vehicle recovery category based on VESA's standards. Tracetec could not expand in the market without VESA's approval because the South African Insurance Industry Association would approve only the installation of VESA-accredited products by its customers. The Tribunal found that the setting of such standards had an exclusionary effect, as they prevented competitors from entering or expanding into the market. As a result, consumers would not benefit from having lower prices, greater choice and technological development. The Tribunal's declaration that the respondents had acted illegally will

allow rival firms to claim proven civil damages against the respondents.

(Source: International Law Office Competition Newsletter - June 3, 2010 available at www.internationallawoffice.com)

South Africa- Airlines raided for suspicion of collusion to raise prices for the FIFA world cup

The South African Competition Commission (SACC) has initiated investigation against six of the biggest airlines operating in SA for colluding to fix prices during the 2010 FIFA World Cup namely, BA/Comair, South African Airways, 1 Time, SA Airlink, Mango and SA Express. The Commission said the investigation followed a leniency application by South Africa Airways (SAA) in December in which it undertook to fully co-operate with the Commission, in exchange for leniency from prosecution under the Competition Act. The office of the President also requested the Commission to took into concerns that airlines planned to escalate their air fares during the World Cup. If the six companies are found guilty, SACC will refer the case to the Competition Tribunal for a hearing and request for a suitable penalty.

(Source: Manupatra's Competition Law Reports Volume 1 Part 2, April – June 20100).

Pakistan - ACE Group charged with fraudulent use of BMW and Harley trademarks

BMW (Bayerische Motoren Werke Aktiengesellschaft) and The Harley Davidson group, property of H-D Michigan LLC had filed complaints with the Competition Commission of Pakistan (CCP) alleging that the ACE Group of Industries had been using their trademarks for its products as well as advertising them on its website which resulted into CCP issuing show cause notices to ACE group on May 17, 2010. ACE Group admitted the unauthorized use of the complainants' trademarks in its reply to the show cause notice during the course of the investigation. The ACE Group tried to mislead customers into believing that the garments it was advertising on its website belonged to Harley Davidson and BMW which constituted 'deceptive marketing practices'. The Commission forwarded both companies' complaints to ACE group, which denied knowledge of the law and intent to deceive. ACE group also offered to make amends. The investigation report concluded that ACE's claim of ignorance of the law was not a tenable excuse. ACE group was found in violation of the provisions of the Competition Ordinance, 2010. The report recommended that proceedings be initiated against ACE group.

(Source: International Law Office Competition Newsletter -June 24, 2010 available at www.internationallawoffice.com)

USA - FTC approves Google/ AdMob acquisition

On May 21, 2010 the five commissioners of the US Federal Trade Commission (FTC) voted unanimously to approve Google Inc's proposed acquisition of AdMob Inc following a six-month second request investigation. Google announced its acquisition of AdMob on November 9, 2009 in a transaction valued at $750 million. AdMob is a mobile advertising network that facilitates transactions between advertisers and mobile 'publishers'. The argument that this deal would create an unlawful concentration of market power in the hands of a single company didn't impress the government agency, even though the AdMob acquisition turned Google into a big mobile advertising figure, in addition to desktop advertising they already own. The commissioners' primary rationale for clearing the deal was the entry of Apple Inc into the relevant market via its acquisition of Quattro Wireless, a direct competitor of Google and AdMob. FTC, inter-alia concluded that: "*[a]s a result of Apple's entry, AdMob's success to date on the iPhone platform is unlikely to be an accurate predictor of AdMob's competitive significance going forward, whether AdMob is owned by Google or not.*" The FTC also examined competition on non-Apple devices, where Apple presumably will not have the unilateral ability to discipline other advertising networks. The closing statement noted that Google and Apple compete more broadly in the mobile device space, with each company offering mobile device hardware and operating systems. Google developed the open source Android mobile operating system, which runs on a variety of devices, and also sells its own Android mobile device called the Nexus One. The success of a mobile device platform depends in part on the number and quality of apps available on the platform, which in turn depends on app developers' ability to monetize their content effectively on the platform. As a result, the FTC concluded that "Google has a strong incentive to encourage the development of applications on Android to maintain the

competitiveness of Android against the iPhone", and would not have an incentive to exercise market power over advertising on the Android platform.

(Source: International Law Office Competition Newsletter -June 17, 2010 available at www.internationallawoffice.com)

Switzerland - Competition Commission prohibits merger between Orange and Sunrise

On April 22, 2010 the Competition Commission of Switzerland prohibited the proposed concentration between France Telecom SA's and TDC A/S's respective subsidiaries in Switzerland – France Telecom (Orange) SA and Sunrise Communications AG. The Commission held that the merger would have led to a situation in which Swisscom and the merged entity would become dominant in the Swiss mobile telephone market and the network operator which is now most active would have disappeared. Under the planned concentration, Sunrise was to be integrated into France Telecom (Orange). Thus, following the merger, only two operators with their own network would have existed in Switzerland. According to the commission, its in-depth analysis showed that these two operators would have held a collective dominant position which was likely to impede effective competition. Moreover, it was deemed unlikely that potential entrants to the market would have exercised a credible countervailing power. Therefore, the Commission held that it would have been more advantageous for the merged entity and Swisscom to maintain high prices than to compete with each other for market share. No commitments were found to address the Commission's concerns and, therefore, the merger was prohibited. Following the decision, France Telecom and TDC expressed their disappointment and surprise, and declared that they strongly believed that the merger – together with the substantial commitments that they had proposed – would have benefited Swiss consumers. According to the parties, the combined entity would have been in a position to invest significantly in its networks and thus improve its service to customers. The synergies which the parties had identified would have enabled the combined entity to offer lower prices and innovative products and services, as well as enhanced access to a worldwide network.

In its press release the commission responded that the investigation had shown that the synergies put forward by the parties would not have compensated for the negative effects on competition.

The Commission acknowledged that the merger would have permitted the creation of a stronger competitor to Swisscom, but held that the incentives for competition would have been insufficient. Moreover, the market entry of a new operator with its own network was unlikely and therefore only two players would have remained in the market. With three network operators, the Commission believes that certain dynamism will remain in the mobile telephone market, which therefore remains open to innovation. France Telecom (Orange) and TDC have filed an appeal to the Federal Administrative Tribunal.

(Source: International Law Office Competition Newsletter -June 03, 2010 available at www.internationallawoffice.com)

USA - *American Needle:* The Supreme Court evaluates antitrust immunity for joint ventures

On May 24, 2010, the US Supreme Court reversed the decision of the US Court of Appeals of Seventh Circuit made in *American Needle Inc. v. National Football League Case*. American Needle, Inc had been granted a license by NFLP to produce and sell headwear bearing the names and logos of all 32 NFL clubs. In December 2000, however, NFLP decided not to renew its license agreement with American Needle, and instead granted an exclusive license to Reebok International Ltd. American Needle sued the NFL, its teams, NFL Properties and Reebok, contending that the exclusive license violated Section 1 of the Sherman Act. In response, the defendants argued that they were incapable of conspiring because NFL and its teams are a single entity with respect to the challenged conduct. The district court granted summary judgment for the defendants on the grounds that, with respect to the licensing of intellectual property, the NFL and its teams were acting as a single entity rather than a joint venture subject to Section 1. The US Court of Appeals for the Seventh Circuit affirmed the said decision. The Supreme Court, however, reversed these decisions. The Court made it clear that competitors cannot avoid potential liability under section 1 of the Sherman Act merely by acting through a joint venture for the licensing of their intellectual property. The Court held that the 32 members of the National Football League do not function as a single entity when licensing their separately owned intellectual property. Rather, the licensing activity is planned action and therefore not exempt from scrutiny under section 1 for conspiring to restrain trade. The case, impacts not only professional sports leagues, but joint ventures generally.

The highly anticipated *American Needle* decision and its 'single entity' analysis should be of particular interest to companies which participate in, or are considering participation in, joint ventures. The court's decision appears to restrict the ability of joint venture participants to escape scrutiny under Section 1 of the Sherman Act. Moreover, it makes clear that venture conduct might still be viewed as concerted action even after a joint venture is formed. Therefore, as the business activities of a joint venture evolve, new competitive restraints will need to be analyzed for compliance with the Sherman Act.

(Source: International Law Office Competition Newsletter -June 24 2010 available at www.internationallawoffice.com)

EVENTS

Conferences/ Seminars

Vaish Associates, Advocates are planning a half-day seminar in early August, 2010, jointly with CIRC-CUTS on the likely implications of the merger regulations. Details will be circulated soon.

Publications

An article titled *"How Mergers Affect Competition"* authored by MM Sharma was published in the quarterly journal of Manupatra, the 'Competition Law Reports" Volume 1: Part 2, April-June, 2010. The said article was also published earlier in the online edition of the Business Standard on May 13, 2010, and may be viewed at the link http://www.business-standard.com/394776/

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