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THE COMPONENTS OF EFFECTIVE DEFENSE IN PRACTICE IN LIGHT OF THE EU'S LATEST DIRECTIVES

1. Introduction

One of the most relevant pillar of the guarantee-system of criminal procedure law is to provide the opportunity of effective defense, which is mainly dealt with as a state duty. Everybody seems to know the content of this criterion, but virtually it is almost impossible to define its exact notion. At first sight it always seems to be easy to draft an idealistic picture about a criminal lawyer and his work: he should be prepared about the facts of the case, reacts to the authorities' writs without any hesitation, arrives on time before the procedural acts, has access to every pieces of information related to the client and the actual conduct, does not let the authorities exclude him or the client from the relevant and potentially exculpatory pieces of evidence, carefully informs his client about all circumstances of the case and has an open mind for the clients occurring questions, does not let the authorities obstruct any procedural right of the client, searches with all available instruments for exculpatory evidences, but his work and attitude entirely comply with all professional and ethical norms.

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Furthermore, as the basis of all these feature, the idealistic criminal lawyer should have an up-to-date knowledge not only in the sphere of the effective national regulations and judicial practice, but also in the field of the international regulations including the European Court of Human Rights (hereinafter: 'ECHR') relevant decisions. From a personal aspect, a defense attorney should be empathic, understanding and communicative both with the client and his relatives, yet has to develop and be in control of the defense strategy, often against of the client's own destructive ideas during the implementation of it.

It is clear from the above, not the least complete list, that to define the criteria and notion of effective defense is extremely complex. Therefore, in the present study I may not try to develop an exact definition for this – nonetheless besides the scientific 'game' it would make little sense –, but would like to draw attention as a practicing criminal lawyer to some aspects and problems of this theme, in particular in view of the criteria raised by the European Union's latest criminal substantive and procedural norms.

According to my belief, effective defense is a complex, multi-layer notion and a state's relation to criminal defense and the national regulation is only one side of this issue, another relevant level of the question is the related international provisions and recommendations. Moreover, the bars' professional standards and ethical norms and the individual preparedness and competences of the attorney are not the least negligible components of this issue. With the citation of this, I would only like to illustrate that effective criminal defense in practice could not be assured only by the state guarantees, but it should also appear in the everyday practice of the communication between the participating legal professionals, and in the own, individual self-development of the practicing attorneys.

Contrary to the above, the vast majority of the studies dealing with this theme focus only on one field of the issue, and draw a negative picture about the

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procedural guarantees of the examined state. This seems to be similar to the 'tower' of the EU's Parliament in Strasbourg which is a large, multi-floor building, but intentionally does not show the pretense of completeness, because the European parliamentary democracy could always be and should be developed, even after 60 years. The issue of the development of the defendant's and defense attorney's rights is currently one of the most actual questions of the Hungarian legislation as a new criminal procedural act is to enter into force (hereinafter: 'Bill')[2]. It is necessary to note also that recently the claim to confine the danger of terrorism stands in the center of the European and Western world's public interest[3]. This is a real challenge for any legislator – which virtually consists of parliamentary representatives as politicians –, because it is difficult to explain to the public why torturous interrogation could not be applied for the prevention of a terrorist conduct, if human lives could possibly be saved in this manner. Torturous interrogation is not supported by anyone, also the European Convention on Human Rights[4] and the Charter of Fundamental Rights of The European Union[5] do not allow exemptions from the prohibition of torture, but the real question is that the public interest could be sacrificed for the defendant's personal defense rights? Moreover, the alleged reduction of the

[2] No. T/13972. Proposal on the Act of Criminal Proceedings, Budapest, 2017.
[3] See e.g.:
Gábor KAJTÁR: Szükséghelyzet vagy önvédelem? Vitatott jogalapok a terrorizmus elleni „háborúban". (Emergency or self-defense? The disputed grounds of the 'war' against terrorism) Jog, állam, politika, 2016., Vol. 2., 57 – 74.
Kinga SZÁLKAI: Transznacionális terrorizmus a nemzetközi kapcsolatok elméletében: külpolitikai válaszok és válaszlehetőségek az al-Káida és az "Iszlám Állam" tevékenységére, (Transnational terrorism in the theory of international relations: foreign affairs answer opportunities against the activity of Al-Kaida and the ISIS), Nemzet és biztonság: biztonságpolitikai szemle, 2016., Vol. 1., 19 – 39.
Péter STAUBER: A terrorizmus elleni nemzetközi fellépés legújabb fejleményei (The developments of the international counterstrike against terrorism), Belügyi szemle, 2015., Vol. 7-8., 166 – 175.
László KORINEK: A terrorizmus (The terrorism), Belügyi szemle, 2015.m Vol. 7-8., 7– 38.
József VÉGH: A változó terrorizmus és a változó terrorista (The changing terrorism and changing terrorist), Belügyi Szemle, 2005., Vol. 11., 67-76.
[4] European Convention on Human Rights as amended by Protocols Nos. 11 and 14 supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13, Chapter 1.
[5] Charter of Fundamental Rights of The European Union, First Title, Article 4 on the prohibition of torture and inhuman or degrading treatment or punishment, HL C 326/391, 2012.10.26.

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defendant's personal defense level would only affect him detrimentally or may impact the whole society, is the guarantee-system the individual 'treasure' of the defendant or it is the society's own value? Naturally, these questions are rather rhetorical and serve a proactive attitude, but apparently show that extremely reverse and partly grounded interests conflict even during the discussion of minor details.

In correspondence with the above, the present study primarily aims to highlight the criteria raised by the EU – as the supra-national actor possibly bearing the most influence on the recent European legislation – to the member states and indirectly to the other European states concerning the conditions expected from the member states, bars and attorneys as the defendant's professional helpers related to the formally guaranteed fundamental principles (as in Hungary a new procedural act will enter into force, creating an interesting legal situation, the relevant provisions of the Bill will also be briefly mentioned, examining the implementation of the EU's directives).

2. About the normative standards in general

The EU felt among its responsibilities to define in normative standards the guarantees which are indispensable for the virtual emergence of the defendant's rights and the effective defense. In 2010 a 3-years-long research[6] focusing on the issues of the effectivity of criminal defense in certain member states – including Hungary[7] – was published. One of the research's main aims was to define the frame of effective defense and fair trial taking into account the ECHR's judicial practice, the EU's – yet – directive-proposals, furthermore the national regulations and legal practice as well. As a result of the research 7 guarantee circles were detected, which shall be implemented into the national regulations

[6] Ed CAPE, Zaza NAMORADZE, Roger SMITH, Taru SPRONKEN: *Effective Criminal Defence in Europe.* Antwerp – Oxford – Portland, Intersentia, 2010., 321 – 372.
[7] Ibid. 17 – 19.

as normative standards[8]: 1) the general criterion of fair trial 2) the right to information 3) the right for legal assistance 4) the right to (effective) appearance and defense 5) right to interpretation and translation 6) the right to properly reasoned decision 7) the right of appeal.

The set of right to defense includes i) the defendant's right to self-determination, which apparently means the defendant's own, individual defense work ii) the right to legal assistance and representation iii) the state legal assistance for those lacking sufficient means to pay for legal services iv) the right to communication between the lawyer and the client without any limits v) the criminal lawyers' procedural position as independent representative and the profession's self-regulation.

Naturally, it bears utmost relevance how deeply and detailly accepts and ensures a state the single components as minimum standards, this is the basis of the differences between the national regulations. Exactly this is why the EU decided to define minimum normative standards with the implementation of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, Directive 2012/13/EU on the right to information in criminal proceedings, and Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty. The acceptance and virtual implementation of these directives is also significant in view of the fact, that the ECHR's developing case-law is primarily 'application-driven'[9], meaning that the Court only deals with the questions emerging from the lack of or the non-compliant operation of a legal instrument, whilst the EU with its own legislation could create a more uniform system with

[8] Ibid. 53 – 61.
[9] CAPE – NAMORADZE – SMITH - SPRONKEN: i.m. 54.

provisions applicable on the same level in every member state. In the frame of this study all elements of this could not be discussed, therefore in the followings only several fields of this theme will be highlighted: on one hand those in which the application practice does not seem to be sufficient and compliant, on the other hand those in case the citation of the scientific standpoints may give answer to fundamental questions and doubts emerging from time to time.

2.1. The Right to Remain Silent

The refusal of confession or making a statement is – or at least is should be – a one of the most complicated and difficult decisions for the defendant and the defense attorney. However, the question is often not dealt with its real significance by the criminal lawyers as the everyday practice, the routine lays in the easy and risk-free refusal. This is an absolutely wrong attitude as the refusal is not at all risk-free[10], several outstanding authors note that 'to remain silent has its own cost' as well[11]. All criminal procedural act evaluates the defendant's incriminating confession and statements as one of the most relevant evidence which may be the reference point of the whole procedure[12]. On the contrary, remaining silent shall not mean automatically the acceptance and confirmation of the accusation and/or the lack of innocence. In the free evidencing system, the followings will be subject to judicial evaluation: i) the defendant denied making statements during an interrogation concerning certain questions (vertical

[10] The defendant refusing to make a statement and/or a confession risks that despite of an alleged subsequent confession of him (until the prosecutor's accusation is not submitted to the court), the prosecutor's office would deny giving consent to a mediation procedure due to the putative or real lack of remedial purpose as defined in Section 221/A. of the Criminal Procedure Code, on the grounds that the subsequent statement may only be driven by 'business interest' and the defendant does not truly regret his conduct.

[11] BÁRD Károly: *Emberi jogok és büntető igazságszolgáltatás Európában (*Human Rights and Criminal Justice in Europe*)*. Budapest, Magyar Hivatalos Közlönykiadó, 2007., 285.

[12] It is not the task and purpose of the criminal proceedings to rely the assessment of evidence on the defendant's confession, neither it is necessary to coerce a confession at any cost. Pursuant to the criminal procedural act, the defendant's confession does not bear outstanding proving power. On the contrary, in the legal practice the investigative authority and the Prosecutors' Office tend to lay special emphasis on that – beyond the other pieces of evidence – the defendant's confession should be coerced to confirm the accusation. A confession may have outstanding proving value when it confirms the content of the pieces evidence procured from other sources, e.g.: when such details of the commission are disclosed by the defendant during an onsite interrogation (reconstruction of crime) which could not be exposed in any other way.

silence), or ii) the defendant decided to make a statement once and afterwards chooses to the deny answering the authorities' questions (horizontal silence)[13]. In case of vertical silence the evaluation of being silent could be accepted in a narrow circle. Concerning horizontal silence, the issue is more complicated: the evaluation may lead to the danger that once the defendant made a statement, afterwards he could not remain silent without consequences as it would be 'apparent' that he does not confess regarding the certain issues due to his individual guilt, and his alleged prior refusal may also 'confirm' this. It is beyond dispute however, that the defendant shall not be forced to a situation that once he made a statement during the procedure, he could not change his prior standpoint. This would mean the pricelessly high cost of making a statement as the defendant would choose to remain silent during the whole procedure to protect the sole opportunity of the refusal, even in cases when giving answers for the authorities would be vital for the himself as well (e.g.: the defendant is accused with several conducts, and the statement would provide exculpatory clarification for certain conducts).

There could be situations of course as well when the defendant is almost forced to give the right to remain silent, for example, when the accusation is so precise and the evidences are numbered in such a strong correlation that it only could be challenged by the defendant's statement on its merits, particularly forcing the defendant to prove evidence. In such cases, therefore the defendant's silence is not the sole and independent evidence for establishing the defendant's culpability, it may only be an additional instrument for the court.

2.2. The Right to Information

The starting and reference point of this theme is the provisions of Directive 2012/13/EU on the right to information in criminal proceedings. According to Section 3 of the Directive Member States shall ensure that suspects or accused

[13] BÁRD i. m. 285.

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persons are provided promptly with detailed information concerning at least the following procedural rights: a) the right of access to a lawyer; b) any entitlement to free legal advice and the conditions for obtaining such advice; c) the right to be informed of the accusation, d) the right to interpretation and translation; e) the right to remain silent.

In regard of the right to be informed of the accusation at least in Hungary – but the situation may be similar in the other European countries as well – several serious problems could be experienced as it is also demonstrated by the research of the Hungarian Helsinki Committee[14]. The accusation often formally cites the statutory definition of the actual crime, and it does not include in reality the facts of the case, which would be the essential pre-condition of the submission of a grounded defense. The brief, sematic and negligent accusations may comply formally with the with the provisions of the procedural act, but for sure do not satisfy the criteria of the Directive. The breach of the right to information in this regard not only means the simple lack of a formality, but it is a real obstacle of effective defense[15]. It is not the least indifferent that the actual conduct was committed by the accused in the position of perpetrator or accomplice/abettor; includes any form of organized crime; the exact criminal law evaluation of the conduct (including the questions of alleged cumulation of crimes which could be a challenge even for experienced legal professionals), or the defense strategy should be developed for crime including a special purpose or not[16].

On the other hand, positive results of the Directive's implementation could also be detected. Pursuant to Section 7 of the Directive when a person is arrested and detained at any stage of the criminal proceedings, member states shall ensure that documents related to the specific case in the possession of the

[14]Hungarian Helsinki Committee (edited: Júlia IVÁN, András Kristóf KÁDÁR, Zsófia MOLDOVA, Nóra NOVOSZÁDEK, Balázs TÓTH): *A gyanú árnyékában* (In The Shadow of Suspicion), Budapest, 2009.
[15] Edwards v. the United Kingdom, No. 13071/87, ECHR, Decision of 09.01.1991, § 35 – 38.
[16] Ádám BÉKÉS: *Nemzetek feletti büntetőjog az Európai Unióban.* (Supra-National Criminal Law in the European Union), Budapest, HVG-ORAC, 2015. 389 – 390.

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competent authorities which are essential to challenging effectively the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers. It was a memorable success in Hungary, when the defendant and his lawyer surprisingly first received not only the prosecutor's motion for the detention of the defendant but also the whole documentation of the investigation as a result of the cited provision. This was an outstanding development in the Hungarian legal practice as finally the opportunity of effective defense against the prosecutor's motion seemed to be granted. However, of course the authority realized the generosity of this practice and recently reduced the extent of the documents revealed to the defendant. It could also be established that provisions of the Directive were not and will be not completely implemented into the yet effective Procedural Act in view of the new Bill. It is worth examining briefly whether the new Bill fully complies with the expectations of the Directive. The new act shows a controversial picture in this regard. Although the Hungarian legislation aimed to implement the EU's provisions in a broader sphere (e.g.: with the facilitation of the consensual elements and procedures, with granting easier access to the investigation's documentation and ensuring the real possibility to conciliate with the members of the authority about the merits of the case), some provisions of the new act mean apparent reversal concerning the effective application of the right to information (e.g.: the stringent accessibility to the prosecutor's motion for the defendant's pre-trial detention and the related documentation).

2.3. The Defense Lawyer's Right of Presence

From the aspect of effective criminal defense one of the most important issue is whether the defense layer should and/or could be present at the first interrogation of his client. Pursuant to Section 3 of Directive 2013/48/EU Member States shall ensure that suspects and accused persons have the right of access to a lawyer in such time and in such a manner so as to allow the persons

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concerned to exercise their rights of defense practically and effectively. The Directive states that the opportunity of legal assistance shall be granted for the defendants before they are questioned by the police or by another law enforcement or judicial authority. In light of this, it seems that the Directive also orders the presence of the criminal lawyer at the defendant's first interrogation. However advisable this would be, in reality the Directive does not include this. The European Parliament and the Council clarified in the reasoning of the Directive, that member states are entitled to temporarily derogate from the right to access legal aid under specific circumstances. For example, Member States are allowed to derogate temporarily from the right of access to a lawyer in the pre-trial phase where immediate action by the investigative authorities is imperative to prevent substantial jeopardy to criminal proceedings, in particular to prevent destruction or alteration of essential evidence, or to prevent interference with witnesses. However, in such case it shall also be granted that the defendant has been informed of his right to remain silent and virtually can exercise that right, and provided that such questioning does not prejudice the rights of the defense, including the privilege against self-incrimination. The reasoning of the Directive especially refers to the ECHR's decision held in the Salduz v. Turkey case[17] (also known as Salduz-principle/doctrine) as it irretrievably affects the defendant's defense rights if he is interrogated in police custody without the opportunity to have any legal assistance, and the confession made during such interrogation is used as the basis of the judgement establishing the defendant's culpability. However, the ECHR partly revised this standpoint in its decisions met in the case of Ibrahim and others v. the UK[18]. The Court established in this case that this provision could not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in

[17] Salduz v. Turkey, No. 36391/02, ECHR, Decision of 27.11.2008.
[18] Ibrahim and others v. the United Kingdom, Nos. 50541/08, 50571/08, 50573/08 and 40351/09., Decision of 13.09.2016.

taking effective measures to counter serious crimes which may significantly endanger public interest. In such cases the authority is entitled to interrogate the defendant without the presence of a legal representative and this may not result in the non-compliance of the whole procedure with the fair trial's criteria. It is clear, that the Court tries to create a sensitive balance between the authority's activity against terrorism and the defendant's rights.

On the contrary, the Hungarian regulation currently does not grant, and neither will the Bill that the criminal lawyer shall be present at the first interrogation, but only states that the accessibility to legal assistance should be ensured and the lawyer should be informed in proper time about the procedural acts (according to a well-known decision of the Hungarian Constitutional Court the defense counsel shall always be informed in sufficient time about the location and time of the procedural act, in lack of such notion the defendant's statement is prohibited to be evaluated as evidence. The Bill will raise this legal practice to the level of regulation, and orders to inform the defense lawyer in such manner, that he would have at least two hours to arrive to the actual procedural step. It emerges as a practical question if this provision could properly be applied concerning e.g.: a night interrogation). The right to consult with the defense counsel will not be mentioned in a separate chapter of the present study, but it has to be noted that pursuant to the Directive it shall be granted for the defendant in any situation. In correspondence with this, the Bill guarantees this right for the defendant prior to the interrogation, but according to other provisions of the act the conciliation could not last more than 1 hour. In comparison to the prior Hungarian regulation and legal practice, this could be evaluated as a real development in the field of the defendant's rights and effective defense.

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2.5. The problem of free legal assistance and the lawyer's right to retrace evidence

Pursuant to Section 6 subparagraph 3 point c) of the European Convention on Human Rights the defendant shall have the right to defend himself through legal assistance, even if he has not sufficient means to pay for legal assistance and it has to be given free when the interests of justice so require. In correspondence with the cited provisions of the Convention, the above mentioned Directive 48/2013/EU also order for the member states to grant the accessibility of free legal assistance. According to my belief, this is an extremely sensitive and widely disputed issue of all the member states both in the level of the formal regulation, and the actual legal practice. This is an especially true statement concerning the Hungarian legal environment as the so-called 'state' legal assistance system is literally the Achilles heel of our legal system. I would not like to analyze the theme in details, but it is worth mentioning that from my standpoint it would be the foundation stone of the free legal assistance provided by the authorities, that the selection of the criminal lawyers should be realized independently and separately from the authorities – e.g.: with the help of the professional bars –, moreover the involved attorneys' professional remuneration should be reasonably established, based on the actual market conditions. In lack of these criteria, from my point of view the legal assistance provided by the state could only be guaranteed formally and the effectiveness of it could not be ensured.

Pursuant to Section 50 subparagraph 2 of the effective Hungarian criminal procedural act, the defense lawyer has the right to seek for exculpatory evidence and to procure and collect relating data, although only in the strict frame of the opportunities and conditions defined by other lower legal instruments. It is however well-known by the practicing criminal lawyers that this remains a norm without real content until the reform of the regulation of the private detective

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agencies' activities is not implemented and substantive rights are not granted for the private detectives. It should be mentioned, that the Directive on the right of access to legal assistance in criminal proceedings does not guarantee this right.

2.6. The defendant's right to use his mother tongue

Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings was approved by the European Parliament and of the Council on the 20th October 2010. Pursuant to Section 3 of the Directive, Member States shall ensure that the defendant who does not understand the language of the on-going criminal proceedings shall be provided within a reasonable time with a written translation of all documents which are essential to ensure that he is able to exercise his right of defense and to safeguard the fairness of the proceedings. The resolutions concerning deprivation of liberty, the accusation and any decision/judgement should be considered as essential documents.

It is the competence of the authority to decide whether any further document of the case could be qualified as essential. The defendants and their representatives may also submit sufficiently reasoned requests. However, there is not any mandatory provision for translating those parts of the documentation, which is not relevant for the defendants to get to know the subject of the in-going criminal proceedings. The Member States shall grant also in correspondence with the national regulations for the defendants the right to appeal the resolution refusing the translation of the documentation or the requested part of it on the ground that it is not essential in the case, and shall also ensure that the defendant has the opportunity to lodge a complaint about the insufficient quality of the provided translation endangering the fairness of the procedure.

The Directive also guarantees that if interpretation is necessary for the defendant because he could not understand the langue of the procedure, then the

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interpreter should not only provide his services during the formal communication with the professional legal bodies (police, prosecutors' office, court). The right to defense and the right to access professional legal aid during the criminal procedure are also components of the criterion of fair procedure as defined in Section 6 of the Convention. Therefore, the Directive also grants for the defendants the right to interpretation during the communication with their defense counsel related to any interrogation, appeal or the submission of any other claim concerning the criminal case. The costs of such interpretation necessary for the limitless communication between the defendant and his defense counsel shall not be incurred by the defendant, but the state.

3. Summary of the consequences

It is apparent from the above mentioned that the European Union has recently made several efforts to oblige the Member States and indirectly the professional bodies (e.g.: bars) as well by several mandatory provisions defined in the latest directives to virtually guarantee effective defense. However, every provision remains useless and insufficient if the defense counsel as the legal expert actually practicing the guaranteed rights is not sufficiently prepared for providing his services. In view of this, the most urgent and significant problem seems to be that the training of the practicing lawyers is not under control in the majority of the member states – including Hungary –, the continuous self-development of legal professionals is rather uncertain.

Furthermore, what could be a realistic expectation against a criminal lawyer aiming to provide effective defense? According to my standpoint, the primary duty of any lawyer practicing in any European state, specialized in any field of law should be to ensure that his own, individual knowledge is absolutely up-to-date by continuous self-development. This especially seems to bear utmost significance at the dawn of a so-called European legal system harmonized and

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united by the mentioned normative standards, resulting that the knowledge of the always changing national substantive and procedural acts become insufficient as several directives of the EU tangibly influence the everyday practice of our work, not to mention that the deep knowledge and utilization of the ECHR's case law has also become practically indispensable. However, the duty and responsibility of the further training and professional development could not be devolved exclusively to the individuals, it should be ensured by professional forums, especially in the organization of the local professional bodies and bars. According to my standpoint, the proper regulation and organization of this issue would be the 'sine qua non' of ensuring effective criminal defense all across Europe.

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The Components of Effective Defense in Practice in Light of The EU's Latest Directives

The provisions of the EU's latest directives on the criteria of effective criminal defense were summarized in the present study. At first the normative standards in general, afterwards the certain components of this legal system are described. In order to draft a whole picture of the theme the related ECHR's case law and the Hungarian legal practice briefly are reviewed as well. Finally, the author's individual consequences and legal standpoint is exposed.

Key words: international criminal law, European law.

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