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Dossier "Europe facing the digital challenge: obstacles and solutions"

Intermediary Liability in the EU Digital Common Market – from the E-Commerce Directive to the Digital Services Act

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Abstract

The European Union is committed to its transition towards climate neutrality and digital leadership, and synergies to be created in the EU Digital Common Market provide ample opportunities to achieve these goals: While from an economic perspective, the maximisation of market opportunities and the creation of a globally competitive digital economy are desirable, the transition must be technologically and ecologically sustainable and additionally compatible with established EU consumer protection standards. The latter is especially relevant in terms of the liability of online intermediaries for digital services, taking into account the rapid transformation of the digital architecture and the emergence of new major digital platforms for sales and services. This chapter, which is based on the Bachelor thesis handed in by Sander Sagar and supervised by Thomas Hoffmann for graduation at TalTech Law School, Tallinn University of Technology, intends to elucidate how the transition towards a common digital market is legally established in practice using as an example the adoption of the intermediaries' liability regime to a digitalized environment from the E-Commerce Directive to the Digital Services Act.

Keywords

digital common market; intermediaries' liability; e-commerce directive, digital services act

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Responsabilidad del intermediario en el mercado común digital de la UE: desde la Directiva de comercio electrónico hasta la Ley de Servicios Digitales

Resumen

La Unión Europea está comprometida con su transición hacia la neutralidad climática y el liderazgo digital, y las sinergias que se crearán en el mercado común digital de la UE brindan amplias oportunidades para lograr estos objetivos: Si bien desde una perspectiva económica, la maximización de las oportunidades de mercado y la creación de una economía digital globalmente competitiva son deseables, la transición debe ser tecnológica y ecológicamente sostenible y, además, compatible con las normas de protección del consumidor establecidas por la UE. Esto último es especialmente relevante en términos de la responsabilidad de los intermediarios en línea por los servicios digitales, teniendo en cuenta la rápida transformación de la arquitectura digital y la aparición de nuevas plataformas digitales importantes para ventas y servicios. Este capítulo pretende dilucidar cómo la transición hacia un mercado digital común se establece legalmente en la práctica en el ejemplo de la adopción del régimen de responsabilidad de los intermediarios en un entorno digitalizado, desde la Directiva de Comercio Electrónico hasta la Ley de Servicios Digitales.

Palabras clave

Mercado común digital, responsabilidad de los intermediarios, directiva de Comercio Electrónico, Ley de Servicios Digitales

Introduction

The E-Commerce Directive (hereinafter ECD) adopted by the EU on 8 June 2000,[1] established core principles for online services in the EU and forms as such an essential part of the EU Digital Single Market. Nonetheless, among other shortcomings, the liability regime for online intermediaries established by the ECD has not adequately addressed the rapid development of the digital services market, and ever since, the issue of intermediary liability has been the object of continuous debate, which has ultimately led to the drafting of a preliminary legislative proposal referred to as the Digital Services Act (hereinafter DSA).[2]

Although the EU has attempted to implement further regulatory measures alongside the ECD as e.g. the Audiovisual Media Services Directive (AVMSD)[3] and the Digital Single Market Directive (DSM),[4] these additional frameworks have raised legal challenges in terms of their compatibility with the ECD. Additionally, EU Member States have adopted their own national legislation to regulate the digital services market, which has further increased the legal fragmentation and uncertainty of providing cross-border digital services in the EU. In response to these developments in the digital services economy, the European Commission has announced the adoption of the DSA which would attempt to harmonize and revise the current EU legislative framework surrounding the liability of digital service providers. This chapter, which is based on the Bachelor thesis handed in by Sander Sagar and supervised by Thomas Hoffmann for graduation at TalTech Law School, Tallinn University of Technology, will first examine the ECD and the reasons why it had been unable to adequately respond to contemporary challenges of transforming digital platform economies. Furthermore, the key proposals of the DSA regarding the liability regime of online intermediaries shall be discussed, and thereafter, proposals for future reforms of the DSA shall be made.

1. The E-Commerce Directive

Implemented on 8 June 2000 by the European Union, the ECD is one of the fundamental legislative frameworks for digital services. It facilitated the establishment and the development of the EU's electronic Single Market for digital service providers. The primary objective of the E-Commerce Directive was to minimize legal obstacles to electronic commerce and the functioning of the digital market, through facilitating the free movement of goods and services and enabling freedom of establishment for digital platforms across the EU. Via the adoption of the E-Commerce Directive, the European Union intended to achieve a high level of Community harmonization, promote the digital economy for small- and medium-sized enterprises and ensure higher consumer confidence and legal certainty within the digital market.[5] The ECD's liability regime extends not only to the traditional internet service provider sector, but also encompasses online intermediaries involved with the provision of goods and services on online platforms (Edwards, 2005, pp. 93-100). The ECD covers a wide spectrum of activities online, including the selling of goods online on e-commerce platforms such as Amazon and AliExpress, the provision of online commercial information for revenue purposes, the offering of online search engine tools (Google, Bing), the transmission of information or the hosting of information through internet intermediaries, and many other services that involve electronic communications through a provider to a recipient in an online environment (Pearce & Platten, 2000, pp. 363-378), establishing thus a comprehensive legal framework which accounts for the majority of digital service platforms

1. Directive (EU) No 2000/31 of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1–16.
2. Commission Proposal COM/2020/825 for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and Amending Directive 2000/31/EC.
3. Directive (EU) No 2010/13 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), OJ L 95, 15.4.2010, p. 1–24.
4. Directive (EU) No 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125.
5. Directive (EU) No 2000/31 of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1.

and online intermediaries in the European digital market. They include the selling of goods and the provision of online information or commercial communications, the supplying of tools allowing for search, access and retrieval of data, the transmission of information via a communication network, providing access to a communication network or hosting information provided by a service recipient, and services which are transmitted point-to-point, such as video on demand or the provision of commercial communications by electronic mail.

1.1. The Directive's Liability Exemption Regime and its transposition

The liability exemption regime of the ECD grants internet intermediaries legal certainty to provide digital services without exposing themselves to excessive liability from damages. The commonly known "Safe Harbour" mechanisms in Articles 12-15 of the ECD attempt to outline and define the conditions under which internet intermediaries would be exempt from liability (Montagnani, 2019, pp. 3-11).

In practice, this approach revealed multiple limitations and shortcomings relating to the divergences of national implementation of the Directive, numerous differences resulting from European and national case law adopted by the courts, a non-harmonized notice and takedown system, and the uncertainty of the extent and definition of the liability exemption regime. These issues caused significant legal uncertainty and difficulties for online intermediaries and digital service providers to reliably determine whether the ECD's liability exemption framework applied to them (Madiega, 2020).

Arguably, the inconsistencies resulting from national divergences to implement the ECD had been caused by the diversity of interests at stake, involving both the legitimate interests of businesses and the fundamental rights and freedoms of the consumers, urging regulators to often make difficult compromises for the adoption of the Directive (Bourdillon, 2012, pp. 154-175). More importantly, the ECJ did not successfully provide precise interpretations of the Directive's liability system to harmonize the application of the ECD (Bourdillon, 2017, pp. 275-293). For instance, the CJEU ruled in L'Oreal v eBay (addressing illegal content posted by users on eBay), that eBay cannot rely on the exemption from liability provided for in that provision if "it was aware of facts or circumstances on the basis of which a diligent economic operator should have realized that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31",[6] and thus operators of online marketplaces have had to either increase their costs to prevent the circulation of illegal content and IP infringements, or – on the contrary –, become "sufficiently inactive" to avoid liability and stay within the scope of the exemption provided by Article 14 of the ECD (Clark & Schubert, 2011, pp. 880-888). Additionally, the ruling also refers to a new term, "diligent economic operator", which strongly implies that active online economic operators would have to employ additional due diligence measures in order to safeguard their business platforms over the content which is submitted by the users of their platform. Even though Article 15 of the ECD explicitly exempts internet intermediaries from "general monitoring obligations", L'Oreal v eBay highlights the direction of active online operators for more active involvement and monitoring of user content on their platforms. Controversially, online platforms proactively monitoring and implementing additional controls over the content submitted by the users in order to not expose themselves to extensive liability would mean that platforms would have to employ even broader obligations to filter and control the content of their platforms, which would likely lead to excessive intervention and the creation of disproportionate restrictions that would adversely affect freedom of expression on online platforms (Sloot, 2015, pp. 211-228). Additionally, some national courts – as .e.g. in France – have pointed out that internet service providers should implement a more active and preventative approach to online content moderation against copyright infringements, resulting in further legal uncertainty and fragmentation for cross-border internet service providers, which would have to additionally consider whether these obligations also apply in the jurisdictions of other Member States (Mlynar, 2014, pp. 1-28).

6. European Court of Justice, L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi, Case C-324/09, 12 July 2011, para. 124.

As a result of the divergences in both European and national case law, internet service providers would rather actively protect their own rights through private agreements, out-of-court settlements and self-censorship by removing the flagged content on request, rather than protecting the right to freedom of expression and the circulation of online content submitted by the recipients of their services as it is a significantly more costly alternative to maintain (Marušić, 2016, pp. 4-17). As a result, the balanced approach considering the legitimate rights and interests for both businesses and consumers as intended by the ECD had been jeopardized (Eecke & Ooms, 2007, pp. 3-9).

1.2. Non-Harmonized Notice- and Takedown System

Additionally, the ECD did not impose a harmonized notice-and-takedown system, but merely suggested that Member States should take proper measures and initiatives to adopt the notice-and-takedown systems within their own national legislative frameworks. The Directive's approach however, lead to the further legal fragmentation of the ECD, as the Directive did not explicitly outline specific guidelines for the implementation of notice-and-takedown systems. Therefore, Member States eventually developed differing practices, which involved varying statutory forms and notice systems for users and platforms alike (Eecke, 2011, pp. 1455-1502). Moreover, some Member States implemented special regulatory bodies dealing with notice-and-takedown forms and the filtering of such notices, resulting in further variety in the procedure and therefore adversely affecting the digital harmonization goal of the Directive (Barceló & Koelman, 2000, pp. 231-239). More importantly, the absence of a harmonized notice-and-takedown system significantly undermined the freedom of expression and legal certainty of users on online platforms who send out notice-and-takedown requests to internet service providers. Service providers are thus more inclined to take down their online services in order to avoid injunctions or liability, which has the potential effect to hinder public discussion and criticism (Baistrocchi, 2003, pp. 111-130). Furthermore, the lack of a harmonized notice-and takedown system also has the potential to promote the activity of unfair commercial practices, wherein competitors could effortlessly send out unfounded claims towards their competitors without facing significant penalties by supervisory authorities (Baistrocchi, 2003, pp. 111-130). Although there had been no harmonized notice-and takedown system implemented by the Directive, online intermediaries often do not possess the knowledge and personnel to evaluate whether certain information is illegal and, even if they receive a notice-and-takedown request, they should not be in the position to have the obligation to objectively assess and evaluate whether potentially illegal or defamatory material should be available or not on the online platforms to safeguard the freedom of expression and the fundamental interests of the users of the platform (Barceló & Koelman, 2000, p. 130).

1.3. Online Intermediaries and the Use of Automated Filtering Measures

Large online platforms and service providers have started to employ automated filtering measures to remove illegal or infringing content from their platforms for efficiency, risk management and commercial purposes. Considering the massive influx of information and data transmitted and stored on online platforms, traditional governance mechanisms have proven unable to govern and enforce the illegal or harmful practices shared by users on online platforms, thus shifting the burden of law enforcement to the hands of online intermediaries, particularly large-scale online intermediaries such as Google and Amazon (Koren & Perel, 2018).

While algorithmic content enforcement measures are the emerging trend for "mega-platforms" with millions of users, they entail certain risks for rights holders and end consumers that concern the transparency and accountability of such mechanisms and the proper standards of due process. These would significantly affect legitimate interests of online users' rights to privacy and freedom of expression and the protection of fair commercial practices, if the automated filtering measures are not properly implemented by the online intermediaries (Frosio, 2017, pp. 18-46). Frosio and Mendis convincingly argue that the proactive monitoring duty placed on online service providers results in an increased use of automated filtering and algorithmic enforcement measures to monitor the content of users on online platforms, which could significantly limit and undermine the users' freedom of expression, rights to procedural justice, and the usage of public domain content (Frosio & Mendis, 2019, pp. 544-565). According to Riis, the shift towards algorithmic content moderation is a significant departure from the traditional

liability regime under the ECD since algorithmic content moderation is highly controlled and developed by private industry stakeholders and employed by major online intermediaries without supervision and legislative intervention through secondary law or regulatory harmonization on a Community level (Riis, 2018, pp. 1-21). Algorithmic content moderation measures employed by internet intermediaries spark particular concerns regarding the problem of over-enforcement, as online service providers and major internet intermediaries – being profit-oriented businesses that seek to mitigate costs – would be more inclined to employ algorithms which would, through the excessive removal of content submitted by the users, prevent dispute and litigation risks and as a result undermine the legitimate rights and interests of the involved end-users of online platforms (Riis & Petersen, 2016, pp. 228-251). Another potential concern revolves around the accountability and transparency of algorithmic filtering tools due to their complexity and scalability, as they are likely to function as "black boxes"[7] which automatically regulate the behaviour and content of users on online platforms without the opportunity of procedural oversight (Koren & Perel, 2016, pp. 473-532). Numerous studies have shown that automated filtering tools and technologies are currently mostly capable of identifying the contents within particular files, and often lack the capacity to make complex and subjective judgement decisions on whether a particular case constitutes infringing or unlawful material, which would likely still require the traditional intervention by courts and legal practitioners (Spoerri, 2019, pp. 173-186). While algorithms are certainly capable of making information-based decisions on filtering and removal of certain online content, they are still argued to be imperfect tools which cannot maintain a one hundred per cent accuracy rate, meaning that some inconsistencies and false positives would eventually undermine the platform users' fundamental rights to information and freedom of expression in the online environment.[8]

2. The Digital Services Act

In response to the rapid development of the changing landscape of the modern digital world and the emergence of new digital platform economies, the European Commission has drafted a preliminary legislative proposal for review in the European Parliament, which is referred to as the Digital Services Act, which would amend the ECD. Built on the fundamental principles outlined in the ECD, the DSA seeks to create a durable and harmonized legal framework that enables the provision of innovative digital services within the Community, while safeguarding the fundamental rights of users on online platforms through establishing additional measures for fairness, transparency and accountability for the moderation of content on online digital platforms. The proposal outlines clear responsibilities and accountability mechanisms for the providers of intermediary services, particularly for large social media platforms and online marketplaces, through establishing clear due-diligence obligations and notice-and-takedown procedures for the removal of illegal and harmful content online in order to improve the users' safety on online platforms. Considering the impact of very large online platforms within the European economy and society, the proposal sets even higher standards of accountability and transparency for the use of risk management tools. The DSA creates increased obligations for the risk assessment of automated filtering tools and imposes the creation of appropriate risk management and auditing systems to protect the integrity and transparency of the services of very large online platforms against the use of manipulative techniques which would undermine the functioning of the digital economy. The proposal outlines that the scope of additional obligations and measures which would apply to very large online intermediaries in the Union, would be applicable if the platform has approximately more than 45 million monthly average recipients of the service. The specific changes and the impact of the provisions outlined in the DSA will be examined in the following sub-chapters.

2.1. New obligations introduced by the DSA

In general, the proposal seeks to maintain the main principles and definitions established in the ECD without major significant changes. Nonetheless, uniform definitions have been added, as e.g. for "recommender systems" under article 2 (o), "advertisement" under article 2 (n) and – importantly – for "content moderation" in article 2 (p) DSA.

7. On further interferences of such decision-making algorithms see Hoffmann, Thomas. "The Impact of Digital Autonomous Tools on Private Autonomy". *Baltic Yearbook of International Law Online*, vol. 18, pp. 18-31.
8. Riis (2018), *supra nota* 27, 1.

Chapter II DSA outlines in articles 3-9 the general liability exemption regime for internet intermediaries, which does not significantly differ from the fundamental principles. Nonetheless, art 6 DSA goes clearly beyond the ECD in terms of "voluntary own-initiative investigations and legal compliance", providing an important safety mechanism for online internet intermediaries to remain within the liability exemption regime as previously under the ECD; voluntary actions taken by intermediaries would place them outside the scope and protection of the liability exemption regime and thus expose them to civil liability and potential damage claims (Savin, 2021, pp. 15-25). Additional procedural measures are also introduced in Articles 8 and 9 DSA on intermediaries' obligations to inform national judicial or administrative authorities about the specific action taken upon receipt of allegedly unlawful content.

The most important changes proposed by the DSA are constituted in chapter III, which outline new due diligence and transparency obligations applicable for internet intermediaries. For instance, article 17 DSA outlines an internal electronic complaint handling mechanism which enables users to lodge complaints against the decisions taken by online intermediaries, thus effectively creating further accountability and transparency measures as online intermediaries are unable to completely base their decisions for the abovementioned removal of information or data solely on automated filtering tools, which would safeguard the users' right to an additional appeal process; however, this could significantly increase the costs of operation for intermediaries (Savin, 2021, pp. 15-25). Another tool newly introduced by the DSA is the concept of "trusted flaggers" in art. 19 DSA, which provides to entities specializing in tackling illegal and unlawful content a priority status to handle complaints submitted by ISP's, as well as the option to suspend the provision of services to recipients who frequently provide manifestly illegal content in art. 20 DSA (provided that appropriately justified). Further consumer protection mechanisms are outlined in article 22 DSA, which obliges online intermediaries to ensure that traders using the intermediary's platform provide accurate information, and otherwise to suspend the provision of their services to the trader.

Taking into consideration the impact and role of very large online platforms (defined in art 25 DSA) on the European economy and society, the DSA sets increasingly higher standards of transparency and accountability for the monitoring of the content of such platforms in Articles 25-37 DSA. For instance, article 26 DSA requires such platforms to address issues related to any systemic risks stemming from the functioning of their services within the Union and additionally to introduce "reasonable, proportionate and effective" mitigation measures for these risks in art. 27 DSA.

2.2. The DSA on intermediaries' liability – an interim solution?

In general, the DSA succeeds to address the gaps and challenges which have emerged since the adoption of the ECD through implementing harmonized notice-and-take-down mechanisms, creating additional measures for online intermediaries to provide detailed reports to ensure that transparency and accountability measures are followed with respect to online content moderation, ensuring compliance through steep fines and injunctions in case of non-compliance and sets even higher standards for very large online platforms to manage systemic risks resulting from the crucial role these major platforms play in the modern digital age of the EU's economy and society.

Regarding the abovementioned considerations outlined in the proposed DSA, the EU faces two primary challenges for the creation of a uniform and harmonized digital services market in Europe. The first issue concerns the necessity for high levels of harmonization on the EU level, as the limitations from the fragmented legal framework created by the ECD should certainly be avoided. Nonetheless, the EU ought to navigate carefully, as the DSA could have major implications for the engagement of large platform economies, which could isolate the EU common market from global digital platform economies. Raising barriers to entry could deter digital businesses from innovating their services and entering the market, if the enforcement of rules and measures outlined in the DSA are burdensome or too excessive for online intermediaries to comply with (Rodríguez, 2021, pp. 75-86). Despite the considerable changes proposed in the DSA itself, the success of the DSA will nonetheless considerably depend on the subsequent legislation adopted by European and national legislative and regulatory bodies as well as substantive decisions taken by judicial authorities, which will determine in detail what constitutes illegal online content and the extent as to how to balance the competing fundamental rights in order to create a stable and functioning digital economy

within the Union for both online intermediaries and users alike.[9] Furthermore, some concerns could arise with the overall complexity of due diligence and transparency reporting requirements prescribed for online intermediaries within the DSA which, as a result, could to a certain extent disincentivize the recipients of intermediary services to acquaint themselves with the reports on the activities of online intermediaries. Although there are significant uncertainties regarding the use of automated filtering measures, the DSA must ensure that it is adequately balanced and implements the highest possible standards to safeguard the recipients of online services and, on the other hand, make sure that the provisions are not too excessive and do not prevent technological progress and innovation within the sphere of digital services.

Nonetheless, the DSA has also certain shortcomings, but they could be alleviated by minor reforms. Firstly, in order to maintain high levels of consumer protection within the digital services economy, an extension of Article 22 which concerns the traceability of traders to include micro and small enterprises is advisable.[10] Currently, the DSA excludes additional provisions applicable to online platforms if the online platform qualifies as a micro or small enterprise within the meaning of the Annex to Recommendation 2003/361/EC (see art 16 DSA),[11] with the criteria to be qualified as a micro or small enterprise according to the number of workers or annual turnover serving as a potential loophole. Moreover, online businesses providing goods and services on digital marketplaces are a very convenient business model for micro or small enterprises. Additionally, there is a high chance for the circulation of illegal or counterfeit goods and unlawful content in the online environment through micro and small enterprises; the criteria to include micro and small enterprises in the provisions of section 3 DSA should be based rather on a risk-assessment approach of their services instead of their size and annual turnover.

Conclusion

Digital platform economies have fundamentally transformed the digital architecture and the provision of goods and services within the contemporary European digital economy, and the establishment of a properly functioning and harmonized European digital market has thus become a priority. Since the adoption of the ECD in 2000, significant shortcomings concerning the digital legal framework and intermediary liability regime have arisen regarding their capacity to effectively safeguard the objectives and the protection of fundamental freedoms outlined in the ECD.

In response to these challenges, the European Commission has put forward a preliminary legislative proposal for a Digital Services Act reforming the legal framework of the provision of digital services and the liability regime of online intermediaries. Although the original intermediary liability protection mechanisms have been relatively unchanged, a harmonized notice-and-takedown system has been implemented, including the creation of new internal complaint handling systems and alternative dispute resolution systems to safeguard the principles of due process and transparency for the users of online platforms which would guarantee the users' rights to exercise their rights to freedom of expression and information. Additionally, a more specialized set of rules has been carved out for very large online platforms which would be subject to increased procedural and regulatory oversight, with the introduction of extra layers of transparency, accountability, and reporting requirements for the moderation of content on such platforms, wherein additional enforcement measures which include steep fines for violations of the proposed measures would ensure the compliance with the DSA. Nonetheless, the EU ought to seek a careful balance between the impact of increased regulations and organizational measures on online intermediaries to prevent the EU common market from becoming isolated in the global digital platform economy. Excessively increasing entry barriers for new online intermediaries can have considerable negative effects on the development of the digital

9. Savin (2021), *supra nota* 33, 16.
10. Opinion of the European Economic and Social Committee of 29 April 2021 on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC.
11. Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, OJ L 124, 20.5.2003, p. 36–41.

economy, innovation and the ability to conduct business within the EU. The DSA could further take into account the diversification of criteria on the inclusion of micro and small enterprises within the legal framework in section 3 DSA, applying a rather risk-assessment approach of their services instead of taking into account merely their size and annual turnover.

In conclusion, although the current proposal of the DSA could still be considered imperfect, it represents an ambitious development to reform the EU digital services economy and can be considered an important legislative proposal designed to protect fundamental rights and interests of both online intermediaries as well as recipients of intermediary services.

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