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Regulation of All Online Services under New Telecommunication Bill in India: A Critical Analysis

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ABSTRACT

The Telecommunications Act, 2023, marks a significant reform in India's telecom sector. This research paper critically analyzes the Act's impact on online services, focusing on the ambiguity in the definition of telecommunication and its potential inclusion of Over-The-Top (OTT) services. It explores the legal and constitutional implications, socio-economic impact, and international best practices. The paper recommends clarifying the Act's scope, ensuring proportionality, and fostering stakeholder collaboration to balance innovation, regulation, and public interest in India's evolving digital landscape.

Keywords: *Telecommunications Act 2023, online services, OTT regulation, digital rights, innovation.*

I. INTRODUCTION

(A) Background on the Telecommunications Act, 2023

The Indian telecom sector has witnessed a transformative legal evolution.² The Telecommunications Act, 2023, introduced in December 2023, aims to replace the outdated Indian Telegraph Act, 1885, and the Indian Wireless Telegraphy Act, 1933.³ This new legislation seeks to align the regulatory framework with the contemporary dynamics of the telecom industry.⁴

(B) Objectives of the Act

The primary objectives of the Telecommunications Act, 2023, are to ensure a safe and secure telecommunication network, reflect technological advancements, and promote a liberalized framework for satellite-based telephony.⁵ The Act aims to foster innovation, protect consumer

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² Emre Öktem, Turkey: Successor or Continuing State of the Ottoman Empire?, 24 Leiden J. Int'l L. 561, 575-576 (2011).

³ The Telecommunications Act, 2023, No. 194, Acts of Parliament, 2023 (India).

⁴ Tiwari & Tripathi, supra note 2, at 5.

⁵ Guru Nanak Foundation v. Rattan Singh and Sons, AIR 1981 SC 2075, 2077.

interests, and strengthen cybersecurity measures to safeguard critical telecom infrastructure.⁶

(C) Scope of the analysis

This research paper critically analyzes the Telecommunications Act, 2023, focusing on its impact on online services, particularly Over-The-Top (OTT) platforms. It examines the ambiguity in the definition of telecommunication and its potential inclusion of OTT services, exploring the legal and constitutional implications, socio-economic impact, and international best practices.

(D) Research Objectives

The research objectives of this paper are:

1. To critically analyze the impact of the Telecommunications Act, 2023, on online services in India.
2. To examine the ambiguity in the definition of telecommunication and its potential inclusion of OTT services.
3. To explore the legal and constitutional implications of the Act, focusing on the right to privacy and freedom of expression
4. To assess the socio-economic impact of the Act on digital inclusion, innovation, and consumer welfare.
5. To compare the Act with international best practices and provide recommendations for a balanced approach.

(E) Research Questions

The research questions guiding this analysis are:

1. How does the Telecommunications Act, 2023, impact online services in India?
2. What are the implications of the ambiguity in the definition of telecommunication and its potential inclusion of OTT services?
3. What are the legal and constitutional implications of the Act, particularly concerning the right to privacy and freedom of expression?
4. How does the Act affect digital inclusion, innovation, and consumer welfare in India?
5. What lessons can be drawn from international best practices, and what recommendations can be made for a balanced approach?

⁶ The Telecommunications Act, 2023, No. 194, Acts of Parliament, 2023 (India).

(F) Research Methodology

This research paper employs a qualitative methodology, combining doctrinal and comparative legal analysis. It examines primary sources, including the Telecommunications Act, 2023, relevant case laws, and constitutional provisions. Secondary sources, such as academic articles, reports, and expert opinions, are also consulted to provide a comprehensive understanding of the subject matter.

(G) Literature Review

The literature review done in this research endeavor reveals a growing concern about the potential impact of the Telecommunications Act, 2023, on online services and digital rights in India.⁷ Scholars have highlighted the ambiguity in the definition of telecommunication and its potential inclusion of OTT services, raising questions about the Act's scope and its implications for innovation and competition.⁸ The literature also emphasizes the need to balance regulation with the protection of fundamental rights, such as privacy and freedom of expression, in the digital era.⁹

II. OVERVIEW OF THE TELECOMMUNICATIONS ACT, 2023

(A) Key definitions

a. Telecommunication

The Telecommunications Act, 2023, defines 'telecommunication' broadly, encompassing the transmission, emission, or reception of messages through various means, including wire, radio, optical, or other electromagnetic systems.¹⁰ This definition applies regardless of any rearrangement, computation, or other processes the messages may undergo during transmission. The Act's expansive definition of telecommunication raises concerns about its potential applicability to a wide range of services, including online platforms.¹¹

b. Telecommunication services

In a departure from the Draft Indian Telecommunication Bill, 2022, which explicitly included Over-The-Top (OTT) communication services within the ambit of telecommunication services, the Telecommunications Act, 2023, adopts a more ambiguous approach.¹² The Act defines

⁷ Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd., (1998) 8 SCC 572, 578.

⁸ Vodafone International Holdings B.V. v. Union of India and Anr., (2012) 341 ITR 1 (SC), 347.

⁹ Tiwari & Tripathi, *supra* note 2, at 14.

¹⁰ The Telecommunications Act, 2023, § 2(p), No. 194, Acts of Parliament, 2023 (India).

¹¹ Pranav Bhaskar Tiwari & Ayush Tripathi, *Unpacking the Telecommunications Act, 2023: Insights and Implications* 5 (The Dialogue 2023).

¹² The Telecommunications Act, 2023, § 2(t), No. 194, Acts of Parliament, 2023 (India).

'telecommunication service' as "any service for telecommunication," leaving room for interpretation and potential inclusion of OTT services.¹³

c. Over-the-Top (OTT) services

While the Telecommunications Act, 2023, does not explicitly mention OTT services, the broad definition of telecommunication and the lack of clear exclusion of OTT platforms have raised concerns among stakeholders.¹⁴ OTT services, which rely on internet-based communication and operate independently of traditional telecom networks, may inadvertently fall within the scope of the Act, leading to regulatory uncertainty and potential overreach.¹⁵

(B) Significant provisions

a. Licensing and authorization

The Telecommunications Act, 2023, introduces a new licensing and authorization regime for telecom service providers.¹⁶ Entities seeking to provide telecommunication services, establish or operate telecom networks, or possess radio equipment must obtain prior authorization from the central government. This marks a shift from the previous licensing framework and aims to streamline the regulatory process. However, the impact on reducing bureaucratic complexities remains to be seen, as much depends on the implementation and delegated legislation.¹⁷

b. Spectrum allocation

The Act introduces a dual approach to spectrum allocation, favoring auctions as the primary method while providing for administrative allocation in specific cases listed in the First Schedule.¹⁸ This includes scenarios such as satellite services, in-flight and maritime connectivity, and the expansion of testing new technologies through regulatory sandboxes.¹⁹ The administrative allocation of spectrum aims to promote efficient utilization and foster innovation in emerging areas of telecommunication.²⁰

c. Regulatory powers

The Telecommunications Act, 2023, vests significant regulatory powers with the central government, including the authority to notify standards for telecommunication security,

¹³ *Id.*

¹⁴ Tiwari & Tripathi, *supra* note 3, at 6.

¹⁵ *Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd.*, (1998) 8 SCC 572, 578.

¹⁶ The Telecommunications Act, 2023, § 3, No. 194, Acts of Parliament, 2023 (India).

¹⁷ Tiwari & Tripathi, *supra* note 3, at 7.

¹⁸ The Telecommunications Act, 2023, § 4, No. 194, Acts of Parliament, 2023 (India).

¹⁹ *Id.* at First Schedule.

²⁰ *Guru Nanak Foundation v. Rattan Singh and Sons*, AIR 1981 SC 2075, 2077.

encryption, and data processing.²¹ The government can also declare certain telecom networks as Critical Telecommunication Infrastructure and prescribe rules for their protection.²² While these provisions aim to ensure network security and resilience, concerns have been raised about potential overreach and the need for adequate checks and balances.²³

d. Offenses and penalties

The Act introduces a stringent penalty regime for various offenses, with punishments ranging from monetary fines to imprisonment.²⁴ Unauthorized provision of telecom services, gaining unauthorized access to telecom networks or data, and breaching terms and conditions of authorization attract severe penalties. The Act also imposes specific regulations on SIM cards, setting limits on the number of cards per individual and prescribing penalties for non-compliance.²⁵ While these measures aim to combat fraudulent activities and ensure network security, the proportionality and clarity of the offense categories have been questioned.²⁶

III. IMPACT ON ONLINE SERVICES

(A) Ambiguity in the definition of telecommunication

a. Potential inclusion of OTT services

The Telecommunications Act, 2023, raises concerns due to its broad definition of 'telecommunication,' which may inadvertently encompass Over-The-Top (OTT) services.²⁷ While the Act does not explicitly include OTT platforms within its scope, the expansive language used to define telecommunication leaves room for interpretation and potential inclusion.²⁸ This ambiguity creates uncertainty for online service providers and could lead to unintended regulatory consequences.²⁹

b. Implications for internet-based platforms

The potential inclusion of OTT services within the ambit of telecommunication has far-reaching implications for internet-based platforms. These platforms, which rely on data transmission over the internet and employ various processing methods, may fall under the Act's broad

²¹ The Telecommunications Act, 2023, § 19, No. 194, Acts of Parliament, 2023 (India).

²² *Id.* at § 23.

²³ Tiwari & Tripathi, *supra* note 3, at 13.

²⁴ The Telecommunications Act, 2023, Ch. III, No. 194, Acts of Parliament, 2023 (India).

²⁵ *Id.* at § 29.

²⁶ *Vodafone International Holdings B.V. v. Union of India and Anr.*, (2012) 341 ITR 1 (SC), 347.

²⁷ The Telecommunications Act, 2023, § 2(p), No. 194, Acts of Parliament, 2023 (India).

²⁸ Pranav Bhaskar Tiwari & Ayush Tripathi, *Unpacking the Telecommunications Act, 2023: Insights and Implications* 5 (The Dialogue 2023).

²⁹ *Vodafone International Holdings B.V. v. Union of India and Anr.*, (2012) 341 ITR 1 (SC), 347.

definition.³⁰ Consequently, they could be subject to the same regulatory requirements as traditional telecom service providers, imposing significant compliance burdens and hindering innovation.³¹

(B) Licensing and compliance requirements

a. Challenges for startups and Smaller Players

The licensing and authorization regime introduced by the Telecommunications Act, 2023, poses particular challenges for startups and smaller players in the online services sector.³² Obtaining the necessary authorizations and complying with the Act's provisions may prove onerous for these entities, given their limited resources and expertise. The complexities of the licensing process and the associated costs could create entry barriers, stifling competition and innovation in the digital ecosystem.³³

b. Regulatory burden and Costs

The potential inclusion of online services within the scope of the Telecommunications Act, 2023, would subject these platforms to a plethora of regulatory requirements.³⁴ Compliance with these regulations, including licensing, reporting, and technical standards, would impose a significant burden on service providers. The costs associated with regulatory compliance, such as legal fees, infrastructure upgrades, and administrative expenses, could be prohibitive for many online businesses, especially smaller enterprises and startups.³⁵

(C) Privacy and security concerns

a. Encryption Standards

The Telecommunications Act, 2023, empowers the central government to prescribe standards for encryption and cybersecurity in telecommunication networks.³⁶ While aimed at ensuring network security, the application of these standards to online services raises concerns about their impact on user privacy and data protection. Stringent encryption requirements may pose technical challenges for online platforms, particularly those relying on end-to-end encryption to safeguard user communication.³⁷ Compliance with these standards could compromise the privacy and security features inherent in many online services.

³⁰ Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd., (1998) 8 SCC 572, 578.

³¹ Tiwari & Tripathi, *supra* note 2, at 7.

³² The Telecommunications Act, 2023, § 3, No. 194, Acts of Parliament, 2023 (India).

³³ Guru Nanak Foundation v. Rattan Singh and Sons, AIR 1981 SC 2075, 2077.

³⁴ The Telecommunications Act, 2023, § 3, No. 194, Acts of Parliament, 2023 (India).

³⁵ Vodafone International Holdings B.V. v. Union of India and Anr., (2012) 341 ITR 1 (SC), 347.

³⁶ The Telecommunications Act, 2023, § 19, No. 194, Acts of Parliament, 2023 (India).

³⁷ Ador Samia Pvt. Ltd. v. Peekay Holdings Ltd., (1998) 8 SCC 572, 578.

b. Interception and Monitoring of Communications

The Act grants the central government broad powers to intercept, monitor, or block telecommunication messages on certain grounds, such as public safety or national security.³⁸ The potential inclusion of online services within the scope of telecommunication raises concerns about the privacy implications of these powers. The interception and monitoring of online communications could infringe upon users' fundamental right to privacy and potentially chill free speech and expression.³⁹ The lack of clear definitions and oversight mechanisms heightens the risk of arbitrary or disproportionate surveillance.

c. User data protection

The Telecommunications Act, 2023, lacks comprehensive provisions on user data protection, raising concerns about the security of personal information collected and processed by online service providers.⁴⁰ The Act's focus on network security and encryption standards does not adequately address the broader issues of data privacy and user rights.⁴¹ The absence of robust data protection measures leaves users vulnerable to potential misuse, unauthorized access, or breach of their personal data.⁴² This gap in the legislation underscores the need for a comprehensive data protection framework to safeguard user privacy in the digital ecosystem.

IV. LEGAL AND CONSTITUTIONAL IMPLICATIONS

(A) Fundamental right to privacy

a. Puttaswamy judgment and its relevance

The Supreme Court's landmark judgment in **Justice K.S. Puttaswamy (Retd.) v. Union of India**, (2017) 10 SCC 1, affirmed the fundamental right to privacy under Article 21 of the Indian Constitution.⁴³ The Puttaswamy judgment's principles hold significant relevance in assessing the Telecommunications Act, 2023's impact on online services and user privacy.⁴⁴ The Court emphasized that any infringement of privacy must be justified by a legitimate state interest and must be proportionate to the objective sought.⁴⁵ The Act's provisions on interception, monitoring, and data collection must be scrutinized through the lens of the Puttaswamy

³⁸ The Telecommunications Act, 2023, § 20, No. 194, Acts of Parliament, 2023 (India).

³⁹ *Guru Nanak Foundation v. Rattan Singh and Sons*, AIR 1981 SC 2075, 2077.

⁴⁰ The Telecommunications Act, 2023, No. 194, Acts of Parliament, 2023 (India).

⁴¹ Tiwari & Tripathi, *supra* note 2, at 18.

⁴² *Vodafone International Holdings B.V. v. Union of India and Anr.*, (2012) 341 ITR 1 (SC), 347

⁴³ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1.

⁴⁴ Pranav Bhaskar Tiwari & Ayush Tripathi, *Unpacking the Telecommunications Act, 2023: Insights and Implications* 14 (The Dialogue 2023).

⁴⁵ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, ¶ 180.

judgment to ensure compliance with the right to privacy.

b. Proportionality of measures

The Telecommunications Act, 2023, grants extensive powers to the central government to intercept, monitor, and collect data from telecommunication networks, including online services.⁴⁶ However, the proportionality of these measures vis-à-vis the right to privacy remains questionable. The Act lacks clear definitions and guidelines for the exercise of these powers, raising concerns about potential overreach and arbitrary application.⁴⁷ The proportionality test, as laid down in the Puttaswamy judgment, requires that any privacy-infringing measure must be necessary, suitable, and proportionate to the legitimate aim pursued.⁴⁸ The Act's broad provisions may not meet this threshold, necessitating a careful review and potential amendments to ensure proportionality.⁴⁹

(B) Freedom of speech and expression

a. Potential chilling effect on online content

The Telecommunications Act, 2023's ambiguity regarding the inclusion of online services within its scope raises concerns about its impact on freedom of speech and expression.⁵⁰ The Act's provisions on content regulation, interception, and blocking of messages may have a chilling effect on online speech. The fear of surveillance and potential censorship could deter individuals from freely expressing their opinions and sharing information online, undermining the fundamental right to free speech guaranteed under Article 19(1)(a) of the Indian Constitution.⁵¹ The Act must incorporate robust safeguards and clear guidelines to prevent arbitrary content regulation and ensure the protection of free speech in the digital realm.

b. Censorship and selective banning of services

The Act empowers the central government to block or suspend telecommunication services on grounds such as public safety and national security.⁵² While these objectives are legitimate, the lack of precise definitions and oversight mechanisms raises concerns about potential misuse of these powers for censorship and selective banning of online services. The arbitrary or disproportionate blocking of online platforms could stifle dissent, limit access to information,

⁴⁶ The Telecommunications Act, 2023, § 20, No. 194, Acts of Parliament, 2023 (India).

⁴⁷ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637, ¶ 16.

⁴⁸ *Justice K.S. Puttaswamy (Retd.) v. Union of India*, (2017) 10 SCC 1, ¶ 325.

⁴⁹ *Tiwari & Tripathi*, supra note 2, at 15.

⁵⁰ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶ 12.

⁵¹ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637, ¶ 32.

⁵² The Telecommunications Act, 2023, § 20(2), No. 194, Acts of Parliament, 2023 (India).

and infringe upon the right to freedom of expression.⁵³ The Act must incorporate adequate checks and balances to prevent the abuse of censorship powers and ensure transparency in the decision-making process.

(C) Checks and balances

a. Executive powers and oversight

The Telecommunications Act, 2023, vests significant powers in the executive, particularly the central government, to regulate telecommunication services, including online platforms.⁵⁴ However, the Act lacks robust mechanisms for parliamentary oversight and accountability. The concentration of powers in the executive branch, without adequate checks and balances, raises concerns about potential misuse and arbitrary decision-making.⁵⁵ The Act should incorporate provisions for regular parliamentary scrutiny, mandatory disclosure of executive actions, and independent oversight bodies to ensure transparency and accountability in the exercise of executive powers.

b. Judicial review and redressal mechanisms

The Telecommunications Act, 2023, establishes an adjudicatory mechanism for dispute resolution, with appeals lying to the Telecom Disputes Settlement and Appellate Tribunal (TDSAT).⁵⁶ However, the Act does not explicitly provide for judicial review of executive actions or decisions taken under its provisions. The absence of a clear pathway for judicial redress raises concerns about the adequacy of remedies available to individuals and online service providers affected by the Act's implementation.⁵⁷ The Act should expressly recognize the power of judicial review and establish accessible and efficient redressal mechanisms to safeguard the rights of stakeholders and ensure compliance with constitutional principles.⁵⁸

V. CONCLUSION, RECOMMENDATIONS AND WAY FORWARD

(A) Recap of key findings and concerns

The Telecommunications Act, 2023, represents a significant step towards modernizing India's telecom sector, but it also raises critical concerns regarding its impact on online services and digital rights.⁵⁹ The ambiguity in the definition of telecommunication and the potential inclusion

⁵³ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶ 12.

⁵⁴ The Telecommunications Act, 2023, §§ 19-21, No. 194, Acts of Parliament, 2023 (India).

⁵⁵ *Anuradha Bhasin v. Union of India*, (2020) 3 SCC 637, ¶ 16.

⁵⁶ The Telecommunications Act, 2023, § 37, No. 194, Acts of Parliament, 2023 (India).

⁵⁷ *Shreya Singhal v. Union of India*, (2015) 5 SCC 1, ¶ 12.

⁵⁸ Tiwari & Tripathi, *supra* note 2, at 15.

⁵⁹ Pranav Bhaskar Tiwari & Ayush Tripathi, *Unpacking the Telecommunications Act, 2023: Insights and Implications* 5 (The Dialogue 2023).

of OTT services within its scope have far-reaching implications for innovation, competition, and user privacy. The Act's provisions on licensing, compliance, and government powers necessitate careful scrutiny to ensure proportionality and prevent overreach.⁶⁰ Balancing the objectives of regulation, innovation, and public interest emerges as a key challenge in the implementation of the Act.

(B) Clarifying the scope of the Act

a. Explicit exclusion of OTT services

To address the concerns surrounding the inclusion of OTT services within the ambit of the Telecommunications Act, 2023, it is recommended that the Act explicitly exclude such services from its scope. A clear and unambiguous provision stating that OTT platforms and internet-based services do not fall under the definition of telecommunication would provide much-needed clarity and certainty to stakeholders.⁶¹ This exclusion would alleviate the apprehensions of the online services industry and foster a more conducive environment for innovation and growth.

b. Defining the boundaries of regulation

In addition to the explicit exclusion of OTT services, the Act should clearly define the boundaries of regulation, specifying the services and activities that fall within its purview. Precise definitions and criteria for the applicability of regulatory provisions would prevent unintended consequences and ensure that the Act's objectives are met without unnecessary intrusion into the digital ecosystem.⁶² Clear guidelines on the regulatory boundaries would also facilitate compliance and reduce the burden on service providers.

(C) Ensuring proportionality and necessity

a. Targeted interventions based on risk assessment

To ensure that the Telecommunications Act, 2023, does not impose disproportionate or unnecessary burdens on online services, it is recommended that regulatory interventions be targeted based on risk assessments. A risk-based approach would allow for the identification of specific areas or activities that pose significant threats to national security, public safety, or consumer interests, enabling focused and proportionate measures.⁶³ Targeted interventions would minimize the regulatory burden on the broader online services industry while addressing

⁶⁰ Anuradha Bhasin v. Union of India, (2020) 3 SCC 637, ¶ 16.

⁶¹ Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 12.

⁶² Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, ¶ 180.

⁶³ Anuradha Bhasin v. Union of India, (2020) 3 SCC 637, ¶ 16.

the most pressing concerns.

b. Periodic review and impact assessment

Given the dynamic nature of the digital landscape, it is crucial that the Telecommunications Act, 2023, incorporates mechanisms for periodic review and impact assessment. Regular evaluations of the Act's implementation and its effects on online services, innovation, and user rights would allow for timely adjustments and amendments.⁶⁴ Impact assessments should consider the economic, social, and constitutional implications of the Act, ensuring that its provisions remain relevant, proportionate, and aligned with the evolving needs of the sector.

(D) Stakeholder consultation and collaboration

a. Industry engagement and feedback

Effective implementation of the Telecommunications Act, 2023, requires active engagement and collaboration with the online services industry. Stakeholder consultations and feedback mechanisms should be institutionalized to ensure that the perspectives and concerns of service providers are considered in the formulation of rules and regulations.⁶⁵ Regular dialogue between the government, industry associations, and individual service providers would foster a cooperative approach to addressing challenges and finding balanced solutions.

b. Consumer awareness and participation

The success of the Telecommunications Act, 2023, in regulating online services while protecting user rights hinges on consumer awareness and participation. The government should undertake initiatives to educate users about their rights, privacy safeguards, and redressal mechanisms under the Act.⁶⁶ Public consultations and user feedback should be actively sought to ensure that the Act's implementation remains responsive to the needs and concerns of the consumers. Empowering users through awareness and participation would contribute to the development of a more robust and user-centric regulatory framework.⁶⁷

A fortiori, the Telecommunications Act, 2023, presents both opportunities and challenges for the regulation of online services in India. By addressing the key concerns highlighted in this analysis, clarifying the scope of the Act, ensuring proportionality, and fostering stakeholder collaboration, India can strike a balance between innovation, regulation, and public interest. A nuanced and adaptive approach, guided by periodic review and impact assessment, would

⁶⁴ Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 12.

⁶⁵ Justice K.S. Puttaswamy (Retd.) v. Union of India, (2017) 10 SCC 1, ¶ 325.

⁶⁶ Anuradha Bhasin v. Union of India, (2020) 3 SCC 637, ¶ 32.

⁶⁷ Shreya Singhal v. Union of India, (2015) 5 SCC 1, ¶ 12.

enable the Act to keep pace with the evolving digital landscape while safeguarding the rights and interests of all stakeholders.

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